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U.S. Citizenship
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Services

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File: WAC 04 140 53519 Office: CALIFORNIA SERVICE CENTER Date: **NOV 28 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

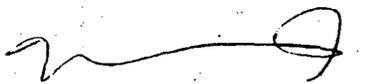
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a Nevada corporation engaged in recruitment, training, and development of amateur and professional soccer players. The petitioner claims that it is the parent company of [REDACTED], Ltd., located in London, United Kingdom. The petitioner seeks to employ the beneficiary as its director of athletic programs for a three-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner objects to the director's implication that the beneficiary is a first-line supervisor, and asserts that he will supervise professional soccer coaches, scouts and recruiters who in turn supervise subordinates. Counsel also emphasizes that the beneficiary "will manage the direction of the company" and have authority to make discretionary decisions and establish goals and policies. Counsel submits a brief in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior

education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The nonimmigrant petition was filed on April 16, 2004. On Form I-129, the petitioner described the beneficiary's proposed duties as: "Will direct coaching and training staff. Will arrange schedules for all

team[s] with competitive league and coaches. Is the hiring and supervisory authority for all coaches and trainer and scout personnel." The petitioner indicated on Form I-129 that it employed three individuals at the time of filing.

In a March 15, 2004 letter submitted with the petition, counsel for the petitioner described the beneficiary's proposed duties as "director of Coaching and Player development":

His duties will include but not be limited to the recruitment, hiring and firing of all coaches for the various level leagues and programs, [c]oordinate and develop player recruitment staff such as scouts, agents, support staff. Direct the implementation of developed players to professional teams, negotiate and review [contracts] offered to players to insure that full value is received and the best deal can be made in behalf of the player. His primary duties of which 60 percent of more time will be spent will be to supervise the different department managers, such as chief scout, in developing their staffs.

The director requested additional evidence on April 22, 2004. In part, the director instructed the petitioner to submit the following documents in order to establish that the beneficiary would be employed in a managerial or executive capacity: (1) a more detailed description of the beneficiary's proposed duties, including the percentage of time spent in each of the listed duties, and a list of employees the beneficiary will supervise, including their job titles and job descriptions; (2) the U.S. company's organizational chart, including brief job descriptions, educational level and annual salaries for all employees under the beneficiary's supervision; (3) copies of state quarterly wage reports for the previous three quarters; (4) copies of IRS Forms 941, Employer's Quarterly Federal Tax Return, for the previous three quarters; (5) payroll summary, Forms W-2 and Forms W-3 evidencing wages paid to employees; and, (6) Federal and State income tax returns for the last tax year.

The petitioner, through counsel, submitted a response to the director's request for evidence on July 12, 2004. In response to the director's request for a detailed job description of the proposed duties in the United States, counsel explained that the beneficiary has been dividing his time between the United States and Europe and would continue to do so under the approved L-1A petition. Counsel further described the beneficiary's duties with the petitioner and foreign entity as follows:

His duties with the company have been many and varied. The past four years have been in the area of Program development, Director of Coaches and player identification and recruitment. He has been responsible for supervision of all coaches, trainers, and identification personnel (both in the US and Overseas). He has extensive travel throughout Europe, Africa and the United States. He has been accomplishing his duties by travelling on a tourist waiver visa. In the past 4 years he has entered and departed over 24 times. He has placed some 20 players in the training program.

In the area of Program Development he has structured programs for players in 4 different age groups. These programs involve skills training, one on one development training and actual game experience.

In the area of Director of Coaches he has identified and co-hired . . . some 10 high level persons for individual one and one programs, internal "intramural" league development programs. These programs have seen over 100 individual players in some stage of development. The individuals range in age of middle school, high school, through professional players.

In the area of Player Identification and Recruitment, he personally has traveled to Africa, throughout Europe, and the United [sic] States observing high school and college level players . . . He has signed numerous players to exclusive "representation contracts" to [the petitioner]. . . .

He supervises all of the coaches and identification and recruitment personnel through a "regional based" system. He is in daily contact with the Senior Coach, who is responsible for all coaches and trainers.

He is in daily contact with the lead recruiter in Africa and Europe. These lead recruiters have – by independent agreement – have [sic] diverse persons who begin the identification process of potential players. The recruiters who maintain individual files and statistics then follow the young players for potential. The persons will have at least an annual meeting to discuss these players in order to determine which one will be offered development and representation contracts.

His time allocation for the last four years has been 70% on identification and recruitment and 30% on coach development and supervision.

Counsel explained that it has become impracticable for the beneficiary to continue to utilize the visa waiver program to enter the U.S., as he is required to be in the United States for 100 to 120 days during the soccer season, and is not authorized to accept a salary in the United States. Counsel also revealed that the beneficiary had encountered concerns regarding his nonimmigrant intent at the point of entry, and noted that the purpose of the instant petition was to allow the beneficiary to be placed on the U.S. payroll and to remain in the United States for periods of longer than 90 days. Counsel stated that the beneficiary would continue to supervise the U.S. coaches, senior coach, lead recruiter and independent contractor "scouts."

The petitioner's organizational chart identifies the beneficiary as "director of operations" supervising a "player identification" employee (who is also identified as the head coach of the Nevada Wonders soccer team), two senior coaches, a vacant "soccer development programs" position, and an employee identified as "Nevada Soccer Academy." The chart also shows a lead recruiter scout and independent scouts under the "player identification" employee. The petitioner also submitted a chart for the foreign entity that shows that the lead recruiter and recruiter positions for Europe and Africa are vacant until 2005.

Finally, the petitioner indicated that the company does not have a payroll or file quarterly tax returns as all of its employees are paid as owners or contractors. The petitioner submitted its check register for the 2003 year, which reflects intermittent payments to the beneficiary and the petitioner's other owner.

On July 20, 2004, the director issued a second request for evidence, instructing the petitioner to submit additional evidence to establish that the beneficiary will be employed in a managerial or executive capacity. Specifically, the director requested: a list of the specific discretionary decisions exercised by the beneficiary and a list of specific goals and policies he established during the preceding six months; evidence that he receives only general supervision from higher level executives, stockholders or the board of directors; and a specific day-to-day description of the duties the beneficiary has performed over the last six months.

In a response dated September 24, 2004, counsel stated that the beneficiary will serve in an executive capacity and described his proposed duties as follows:

[The beneficiary] directs the management of the entire European division of the company. In such capacity he is the final authority on the signing of professional and or amateur soccer players. He directs the European and Africa Recruitment Supervisors who in turn are responsible for individual country (Europe and Africa) recruiters. He is the final authority on all budget matters, and hiring and firing of employees. He will, upon the issuance of the L-1 visa, maintain this capacity. He will be in Europe [an] average of 7 months a year and in the United States the other five (5) months a year.

Counsel further indicated that the beneficiary's specific discretionary decisions had included the creation of a coaches certification program, increasing the number of development teams in the petitioner's academy, hiring a "senior development coach," and creating a "Nevada Soccer Academy" curriculum for player development. The petitioner indicated that the beneficiary's day-to-day job duties vary depending upon the time of year and the beneficiary's location, and provided the following description:

- a) During soccer season will act as supervisory coach of senior coach and indirectly team coaches (1 professional team and 4-5 development teams). During professional season (US) will scout opposing league team identifying players, hold coach's meetings, defined roles of team coaches depending upon the schedule.
- b) Off-Season (US) on season (Europe) will (in Europe/Africa) recruit players identified by Recruiters (scouts) as referred by [REDACTED] of Europe and Africa. Will travel to observe players, discuss players with Professional league owners and coaches identifying development players and negotiate player contract for professional services of development players to league owners. Will identify players in need of development with future potential to play in European Professional leagues. Will recruit potential player in to development and contracts for future development and placement in European Professional Leagues.

- c) Day to [d]ay in US is mostly travel to watch developing players and recruit players to development program. Observe programs coaching staff to insure professional conduct and coach ability. And, [d]ay to [d]ay [o]bservation of activities of [p]rofessional staff of [a]cademy [s]taff and Nevada Wonders [p]rofessional [t]eam.
- d) Day to [d]ay (UK) is mostly travel and personal contact with professional league owners and coaches and players. Direct supervisions [sic] of the regional recruiters and recruitment of players to the US academy and development league(s) and programs.

On October 7, 2004, the director denied the petition concluding that the beneficiary would not be employed in a managerial or executive capacity in the United States. The director determined that a preponderance of the beneficiary's duties have been and would be directly providing the services of the organization and supervising two non-professional employees. The director further observed that the petitioner had not established that the beneficiary would primarily manage the organization or a department or component of the organization, function at a senior level within an organizational hierarchy, supervise a subordinate staff of managerial, professional or supervisory personnel who would relieve him from performing non-qualifying duties, or manage an essential function of the organization.

On appeal, counsel reiterates portions of previously provided job descriptions and objects to the director's implication that the beneficiary does not manage an essential function of the organization. Counsel emphasizes that the purpose of the company is to develop soccer players to be able to compete professionally and states: "The beneficiary is the person directly responsible for the recruitment, training and development of the athletes." Counsel also asserts that as one of two owners of the U.S. company, the beneficiary has authority to direct the management of the company, establish goals and policies, and make discretionary decisions; and that he receives only minimal supervision from the other shareholder. Finally, counsel asserts that the director erroneously suggested that the beneficiary is only a first-line supervisor of non-professional employees. Counsel contends that the beneficiary "hires, fires and supervises professional soccer coaches, professional scouts, and recruiters, as well as being directly responsible for the professional development of the athletes.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity in the United States. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

In addition, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL [REDACTED] (9th Cir. July 30, 1991). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties relate to operational or policy management, rather

than to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

Although counsel claims on appeal that the beneficiary will be employed in an executive capacity, the petitioner has submitted no evidence to establish that he will primarily perform executive-level duties related to directing the management of the organization or establishing its goals and policies. Rather, as concluded by the director, the record shows that the beneficiary will primarily be performing non-qualifying duties including providing instruction to coaches and players, and personally observing, identifying and recruiting soccer players.

Initially, the petitioner, through counsel, stated that the beneficiary would devote 60 percent of his time to supervising department managers, who in turn would develop their own subordinate staff. The petitioner claimed to have three employees but did not submit evidence that it employed "department managers." In response to the director's first request for evidence to clarify the stated duties, counsel indicated that the beneficiary devotes 70 percent of his time to "player identification and recruitment." It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities.

In his July 12, 2004 response to the director's request, counsel indicated that the beneficiary's responsibility for player identification and recruitment required the beneficiary to travel to Africa, Europe and the United States to observe high school and college-level players, sign players to representation contracts, and maintain daily contact with the "lead recruiters" in Africa and Europe. Counsel's response to the second request for evidence listed similar duties among the beneficiary's "day-to-day" tasks. Although counsel attempted to establish that the beneficiary supervises an established hierarchy of recruiters in Europe and Africa, the petitioner's organizational chart for the foreign entity indicates that the "lead recruiter" positions are "vacant until 2005." The petitioner also indicated on its organizational chart that it employed an individual, [REDACTED] who is responsible for "player identification" as well as being the head coach of the petitioner's franchise team. Although requested by the director, the petitioner did not submit evidence of wages paid to this employee or provide a job description for him. His employment and role within the company have not been substantiated, and the AAO cannot assume that he relieves the beneficiary from performing non-qualifying duties associated with the petitioner's player recruitment function. Based on the evidence submitted, it is reasonable to assume that the beneficiary was directly responsible for recruiting activities, rather than managing these activities, at the time the petition was filed. Counsel did not explain how observing, recruiting and signing high school and college soccer players meets the definition of either managerial or executive capacity. See section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44). These duties, which require 70 percent of the beneficiary's time, are duties necessary to provide a service and cannot be considered qualifying in nature. An employee who primarily performs the tasks necessary to produce a

product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In response to the first request for evidence, counsel indicated that the beneficiary devoted the remaining 30 percent of his time to "coach development and supervision." Although counsel stated that the beneficiary and the petitioner's other owner, [REDACTED], hired "some 10 high level persons" the petitioner's organizational chart identifies only two coaches - [REDACTED] and [REDACTED]. In response to the second request for evidence, counsel indicated that the beneficiary would supervise the coach of the professional team and four to five development team coaches. The petitioner has not submitted evidence to establish that it employed anyone other than the beneficiary and [REDACTED] at the time the petition was filed. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Further, the petitioner's supporting documents, including newspaper articles, brochures, and the franchise agreement for the petitioner's soccer team, indicate that the beneficiary serves as an instructor for coaching clinics offered by the petitioner, as a coach for participants in the petitioner's youth soccer camps, and as head coach for the Nevada Wonders franchise professional soccer team. The Nevada Wonders 2003 brochure identifies the beneficiary as a "Defender/Coach" which suggests that he actually plays soccer for the team as needed, in addition to serving as the coach. The petitioner has not substantiated its claim that the beneficiary performs a managerial or supervisory coaching role. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the beneficiary will be coaching soccer, the AAO again notes that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, *supra*.

On appeal, counsel attempts to establish that the beneficiary will be employed in a qualifying position by paraphrasing the statutory definition of "executive capacity." See section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(C). Specifically, counsel states that the beneficiary will "manage the direction of the company," "direct the management of the company," "establish goals," "make discretionary decisions" and "receive only minimal supervision." Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The record contains no additional independent evidence or explanation establishing that the beneficiary will work as an executive or manager in the United States, other than in position title. Merely claiming that the beneficiary is a manager or an executive is insufficient to establish eligibility. Counsel's statements on appeal are likewise unsupported by independent evidence, and are inconsistent with the evidence establishing that the beneficiary is primarily a recruiter and coach. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On appeal, counsel asserts the director erroneously implied that the beneficiary does not manage an essential function. Counsel suggests that the beneficiary manages a function because "he is directly responsible for the recruitment, training and development of the athletes," and "is directly responsible for the hiring and firing of Scouts, recruiters, trainers and coaches." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must provide a detailed job description that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of establishing that his duties are "primarily" managerial. As discussed above, the petitioner has not met this burden.

Finally, counsel contends on appeal that the beneficiary is not merely a first-line supervisor of non-professional employees as concluded by the director, but rather is and will be responsible for hiring and supervising professional coaches, scouts and recruiters. Upon review of the record, the AAO cannot conclude that the beneficiary would supervise any employees at the time the petition was filed. The petitioner claimed to employ three individuals as of April 2004 when the petition was filed. As discussed above, only four individuals were identified by name on the petitioner's organizational chart, including the beneficiary and the petitioner's other owner, [REDACTED]. Although requested by the director, the petitioner did not provide evidence of any payments made to the other employees identified, nor did it provide job descriptions for these individuals. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Based on the petitioner's and foreign entity's organizational charts, all other positions within the U.S. and foreign entities appeared to be vacant at the time of filing. Accordingly, the AAO will not consider whether the proposed subordinate staff would be employed in professional, supervisory or managerial positions. Although the beneficiary may be responsible for hiring and supervising coaching and recruiting staff in the future, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

In sum, the record indicates that the beneficiary would primarily serve as a coach, instructor, and recruiter, with any managerial duties being incidental to these non-qualifying duties. While the AAO does not doubt counsel's claim that the beneficiary's services are valuable to the organization, the petitioner still has the

burden of establishing that the beneficiary's duties will be primarily managerial or executive in nature. The petitioner has not met this burden. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 214.2(l)(1)(ii)(G), as the petitioner has failed to establish that the foreign entity is a qualifying organization engaged in the regular, systematic, and continuous provision of goods and/or services pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H). The regulation at 8 C.F.R. § 214.2(l)(ii)(G)(2) reflects that, in order for an entity to be considered a qualifying organization, the petitioner must show that it:

Is or will be doing business (engaging in international trade is not required) as an employer in the United States and at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee

The regulation at 8 C.F.R. § 214.2(l)(ii)(H) defines the term "doing business" as:

[T]he regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner submitted evidence to establish that the foreign entity was incorporated under the laws of England and Wales on July 3, 2003. In order to establish that the foreign entity is doing business, the director instructed the petitioner to submit photographs of the foreign company, bank statements, a telephone directory listing, business licenses, tax documents, and payroll records. Counsel indicated that photographs were not available, but conceded that the company operates out of the beneficiary's home. Counsel indicated that the foreign entity does not require any business licenses, does not have a bank account, does not have a telephone listing, and does not pay taxes, as it "does not acquire any income or expenses." Counsel explained that the foreign company was created in England "with expectations of doing business in Europe through the US Company. The US Company working in Europe employs the beneficiary." Counsel noted that the petitioner had sent several players "to Europe" to advance their careers and had brought several European players to the United States for development. Finally, counsel noted that the petitioner pays the beneficiary's salary and all obligations of the foreign entity.

Based on the petitioner's inability to provide any of the requested evidence, the AAO cannot conclude that the foreign entity was engaged in "the regular, systematic, and continuous provision of goods and/or services" during any time since its establishment. The petitioner has failed to show that it is doing business as an employer in the United States and at least one other country directly or through a parent, branch, affiliate, or subsidiary. For this additional reason, the appeal will be dismissed.

Another issue not raised by the director is whether the petitioner has established that the beneficiary was employed in a full-time capacity with a qualifying organization abroad for one continuous year during the three years preceding the filing of the instant petition as required by 8 C.F.R. § 214.2(l)(3)(iii). Although counsel claims that the "idea" of the petitioning company was formed in 1998 or 1999, the petitioner was

incorporated and became a "legal entity" for immigration purposes in December 2002, while the foreign entity was incorporated in July 2003. See 8 C.F.R. § 214.2(l)(ii)(G) (defining "qualifying organization" as a firm, corporation, or other legal entity). Any duties the beneficiary performed for the petitioning organization while it operated under an informal verbal agreement will not be considered "employment" for purposes of establishing eligibility for this visa classification. The petitioner states that the beneficiary has been spending 40 to 60 percent of his time in the United States. The time the beneficiary spent in the United States as a visitor under the visa waiver program also will not be counted towards the fulfillment of his one year of continuous employment abroad. See 8 C.F.R. § 214.2(l)(ii)(A). Thus, it is evident that the beneficiary has not been employed with a qualifying entity abroad for a continuous year in the three years preceding the filing of this petition. For this additional reason, the petition must be denied and the appeal dismissed.

A third issue not raised by the director is whether the petitioner has established that the beneficiary was employed abroad in a primarily managerial or executive capacity as required by the regulation at 8 C.F.R. § 214.2(l)(3)(iv). As discussed above, the beneficiary's duties when he is outside the U.S. include traveling in Europe and Africa to observe players, negotiate player contracts, and meet with league owners, coaches and players. Although the petitioner indicates that the beneficiary will eventually hire and supervise recruiters and lead recruiters responsible for identifying and recruiting players in these regions, the record indicates that at the time of filing, the beneficiary had been and would continue to be solely responsible for all non-qualifying recruitment and agency activities claimed to be under the control of the foreign entity. Again, an employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604. For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.