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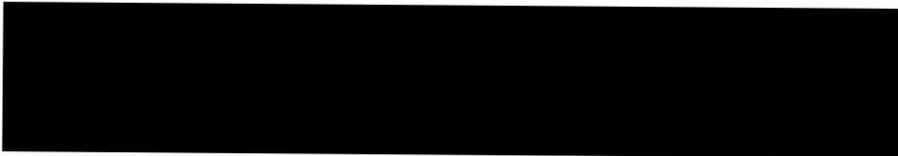
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FILE: LIN 05 246 51978 Office: NEBRASKA SERVICE CENTER Date: NOV 28 2006

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)

ON 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, Chief
Administrative Appeals Office

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

The petitioner claims to be a branch office of [REDACTED] located in South Korea, and it is authorized to conduct business in the state of Michigan. The petitioner states that the United States entity is engaged in the business of automotive component manufacturing, sales and distribution. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner seeks to employ the beneficiary as branch manager for a period of one year to open a new office in the United States.

On October 6, 2005 the director denied the petition, concluding that the record contains insufficient evidence to demonstrate: (1) that sufficient physical premises to house the new office have been secured; (2) that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position; and, (3) that the petitioner will be doing business in the United States as required by the regulations.

On October 24, 2005, the petitioner's counsel timely filed the instant appeal. On appeal, counsel for the petitioner asserts that the petitioner has met the requirements for a "new office" petition. In particular, the petitioner asserts that sufficient physical premises have been secured as the petitioner maintains an office within a separate company's office space. Counsel for the petitioner further asserts that the petitioner is not merely an agent of the foreign company in the United States. Furthermore, counsel for the petitioner asserts that the beneficiary will be employed in a managerial capacity in the United States since the beneficiary will be "managing a 'function.'" Counsel submits a brief and additional documentation in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The first issue in this proceeding is whether the petitioner has secured sufficient physical premises to house the new office in the United States as required under the regulations 8 C.F.R. § 214.2(l)(3)(v).

At the time of filing the original petition, the petitioner submitted a letter dated June 14, 2005, from the president of H.C. Olsen & Associates, Inc. confirming that the petitioner maintains an office at H.C. Olsen & Associates, Inc. The letter stated the following:

[The petitioner] is a sub-supplier and their presence is required to provide U.S.A. customers with adequate technical support for ongoing projects and is not required to pay rent. We will support their office space requirements as long as necessary.

On September 1, 2005, the director requested a copy of the lease agreement establishing that the petitioner secured sufficient physical premises for the new office. In the response, the petitioner resubmitted the above-mentioned letter indicating that the petitioner is utilizing the office space of a client company.

In the denial decision, the director noted that the petitioner did not submit evidence "as to how long the petitioner expects this arrangement to last." In addition, the director noted that it appears the petitioner is not starting a new business but "merely needs an office to serve as a conduit for its foreign office." The director stated that the use of an office for an unspecified period of time does not satisfy the requirement of obtaining premises "sufficient" to house a company.

On appeal, counsel for the petitioner asserts that the petitioner has acquired sufficient physical premises for the new office in the United States. Counsel for the petitioner states that the petitioner has an agreement with H.C. Olsen & Associates to utilize office space from them and the term is "as long as is required." Counsel for the petitioner asserts that the petitioner has opened a branch office since this is the petitioner's "first formal endeavor in the United States," and according to the regulations, a branch qualifies for an intracompany transferee.

Upon review, the petitioner has not established that it secured sufficient physical premises to house the new office. Although requested by the director, the petitioner did not submit the lease agreement for H.C. Olsen & Associates, Inc. to establish that the company has secured office space and to establish the terms and length of the lease agreement. 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)).

Moreover, the petitioner has not described its anticipated space requirements for the new business, and the petitioner did not submit a lease or documentation to specify the amount or type of space secured. Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner had secured sufficient space to house the new office. For this additional reason, the appeal is dismissed.

The second issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the approval of the petition, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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 August 23, 2005. The Form I-129 indicates that the beneficiary will be employed in the position of branch manager. In the letter of support dated August 22, 2005, the petitioner described the duties to be performed by the beneficiary as the following:

[The beneficiary's] position will be General Branch Manager. [The beneficiary] will be reporting directly to the Senior Managing Director, Hee Tae Oh and working with our different departments to make sure that all customers' needs are being meet [sic]. Further, [the beneficiary] will be essentially the executive committee with regards to our U.S. activities.... There are several main objectives of this new U.S. function: 1) to establish and maintain effective communication channels with our current customers; 2) providing much needed technical and engineering support; 3) managing and overseeing that quality standards (QS9000) and procedures are being complied with; and 4) recruiting and training employees to effectively carry-out new function of the U.S. office.

The candidate must have working knowledge of both [the foreign company] and our ongoing U.S. accounts to effectively carry out the duties and responsibilities of this position.

The position will require that the candidate be able to exercise decision making with minimal guidance from headquarters. The candidate must have a history of making appropriate decisions, and must be results orientated [sic]. The candidate must also be able to support the ongoing processes from order placement, to delivery, and supporting commercial issues (price, deliver, quality, technology) in accordance with [the petitioner's] long-term objectives. The candidate must be able to deal with emergency situations and oversee technical and testing issues. The success of [the petitioner] relies on effective management and resolution of technical and quality issues. The timely resolution of technical issues and response to customer demand is *crucial* to the success of the company. Any delay in resolution of quality issues regarding our components or systems can affect the manufacturing line. If the manufacturing line is shut down or delayed, our company loses hundreds of millions of dollars.

The position also required that the candidate effectively deal with all related quality control issues, which requires knowledge of all on-going programs and appropriate personnel in Korea. The most important function of the General Branch Manager will be to assure quality and technical support matters are handled effectively and immediately, in order to ensure that our product meets our customers' established time line. Specially, this position and the main function of the U.S. office will be to communicate and coordinate with all departments. In this position and at this time in our U.S. development ("new office"), [the beneficiary] will not be directly managing subordinates at our U.S. branch; however, he will be delegating to his subordinate at [the foreign company]. In the coming year, we plan to hire domestic personnel for our U.S. branch; including, an Accounting Manager, Quality Control personnel, and Logistics Staff...As aforementioned, [the beneficiary] will be spending more than 70% of his time coordinating with [the foreign company] and our customers and customer representatives in meeting his objectives. The main reason for this position is threefold: 1) to provide sales, technical, and engineering support; 2) to maintain quality and technology standards; and 3) to establish a formal presence in the U.S.

The balance of [the beneficiary's] time will be utilized in bringing the U.S. branch to full operational mode; approximately 15% will be attributed to reporting and communication with executive at headquarters; and 15% will be attributed to the other duties as outlined above such as establishing budgets for the operations of the U.S. branch, hiring and managing required personnel, and handling "new office" related matters.

In addition, the petitioner submitted a proposed organizational chart for the U.S. branch. According to the organizational chart, the petitioner will be the "head official" who will then supervise an accounting manager, a quality staff and a logistics staff. The organizational chart states that the petitioner plans to hire the accounting manager in 2005, the quality staff in 2006 and the logistics staff in 2007.

On September 1, 2005, the director requested additional evidence to establish that the intended U.S. operation, within one year of operation, will support an executive or managerial position. In part, the director requested: the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals, including the proposed number of employees, their job titles and duties; the size of the U.S. investment and the financial ability of the foreign entity to remunerate the beneficiary;

and, the organizational structure of the foreign entity including the number of employees, their job titles and duties. Finally, the director noted that the petitioner was authorized to commence business in 2004 and requested that the petitioner explain the delays in the start-up of the new business.

In the response, the petitioner submitted the following details of the beneficiary's position in the United States:

- Establishing procedures and processes, bringing our U.S. office to full operational status: making sure all customer accounts are being handled appropriately, negotiating new supply agreements for new production orders... negotiating new contracts with warehousing and distribution centers, freight forwarders, and carriers.
- Recruiting and hiring appropriate staff for U.S. operations; meeting with and engaging appropriate professional personnel, such as corporation attorney and CPAs, working with legal to make sure that supply contracts are duly awarded and executed;
- Establishing budgets and forecasts for the U.S. office and reporting same to headquarters;
- Recommending long-term targets and objective to executives;
- Making sure that product and processes are compliant with industry, government, and South Korean quality standards and mandates;
- Meeting with customers' management with regards to ongoing programs and requirements;
- Establishing new quoting and response procedures with regards to new business;
- Working with headquarters to ensure that proper procedures and processes are established at [the petitioner]; and
- Reviewing subordinates' (in Korea) reports and making determinations with regard to required action.

In addition, the petitioner indicated that the U.S. entity plans to "hire two to three additional employees by the year 2007 according to current awarded business." Furthermore, the petitioner indicated that the initial investment made to the U.S. branch office is \$30,000 and the petitioner "has allocated \$150,000 of its budget for 2006 for the U.S. branch," which included the salary for a proposed quality control specialist. The petitioner also submitted a revised proposed organizational chart which indicates that the company intends to hire "quality staff" in 2006, and an accounting manager and logistics staff in 2007.

The director denied the petition on October 6, 2005 stating that the submitted evidence is not persuasive in establishing that the beneficiary's proposed position is in a capacity that is managerial or executive in nature. The director noted that the U.S. office does not appear to be a branch but "but merely an agent." The director noted that the beneficiary "will be merely taking order in the rent-free office space, and ensure their shipment to the U.S. customers." The director concluded that the petitioner has not demonstrated that the duties to be performed by the beneficiary will be primarily those of an executive or managerial nature.

On appeal, counsel for the petitioner asserts that the beneficiary's proposed position involves "providing sales, technical, and engineering support; and maintaining quality and technology standards per our

customers' demands." Counsel for the petitioner further asserts that the beneficiary will be employed in a managerial capacity, as he will be managing a function.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. 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 prove 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 144470 (9th Cir. July 30, 1991).

In the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will spend on various duties. While the petitioner has provided a breakdown of the percentage of time the beneficiary will spend on various duties, the petitioner has not articulated whether each duty is managerial or executive. Thus, the AAO must attempt to glean the nature of the beneficiary's proposed duties from the vague descriptions submitted.

The petitioner indicated in a support letter dated August 22, 2005, and counsel for the petitioner further reiterated the same on appeal, that the beneficiary will spend 70 percent of his time "coordinating with [the foreign company] and our customers and customer representatives in meeting his objectives. The main reason for this position is threefold: 1) to provide sales, technical, and engineering support; 2) to maintain quality and technology standards; and 3) to establish a formal presence in the U.S." According to the proposed U.S. organizational chart, it does not appear that the U.S. company plans to hire a sales manager to develop and manage the sales and marketing operation, or an engineering staff to handle the technical support. Thus, it appears that the beneficiary will be developing and implementing the sales functions and providing the technical and engineering support to customers, rather than supervising the work prepared by subordinate employees. The lack of employees for the beneficiary to direct and coordinate raises questions as to whether the beneficiary will be managing these activities or actually performing the petitioner's sales, marketing and technical support duties. Thus, it appears the beneficiary will spend a majority of his time performing non-managerial duties associated with sales and technical support.

The petitioner further states that the beneficiary will spend 15 percent of his time "bringing the U.S. branch to full operational mode." As noted above, the proposed U.S. organizational chart indicates that the petitioner plans to hire an accounting manager in 2005, a quality staff in 2006 and a logistics staff in 2007. Since the U.S. company plans to only hire an accounting manager within the first year of operation, it can be reasonably assumed that the beneficiary will perform several non-qualifying duties such as purchasing inventory, negotiating contracts, contacting new clients, researching the potential market, and preparing the budget. In addition, without additional clarification from the petitioner regarding the managerial or executive duties involved, the AAO cannot distinguish this vague

responsibility from routine administrative tasks. These duties have not been shown to be managerial or executive in nature. 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)).

Furthermore, the petitioner states that the beneficiary will spend 15 percent of his time "to the other duties as outlined above such as establishing budgets for the operation of the U.S. branch, hiring and managing required personnel, and handling "new office" related matters." As noted above, since the U.S. company only plans to hire an accounting manager within the first year of operation, it appears that the beneficiary will be performing the public relations and human resources operations and the day-to-day tasks in running a business and directly be providing the services of the business rather than directing such activities through subordinate employees.

The beneficiary's position description is too general and broad to establish that the preponderance of his duties will be managerial or executive in nature. The beneficiary's job description also includes vague duties such as the beneficiary will be responsible for "establishing procedures and processes, bringing our U.S. office to full operational status," "establishing budgets and forecasts for the U.S. office and reporting same to headquarters," and "recommending long-term targets and objective to executives." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *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). The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

In addition, in the petitioner's response to the director's request for further evidence dated September 27, 2005, the petitioner expanded the beneficiary's duties, adding items such as: the beneficiary will be responsible for "recruiting and hiring appropriate staff for the U.S. operations," "making sure all customer accounts are being handled appropriately, negotiating new supply agreements for new production order... negotiate new contracts with warehousing and distribution centers, freight forwarders, and carriers," "meeting with and engaging appropriate professional personnel, such as corporation attorney and CPAs, working with legal to make sure that supply contracts are duly awarded and executed," "making sure that product and processes are compliant with industry, government, and South Korean quality standards and mandates," "meeting with customers' management with regards to ongoing programs and requirements," and "establishing new quoting and response procedures with regards to new business." In sum, the initial description appeared to have the beneficiary doing more of the actual work, while the second iteration of the job has the beneficiary managing more of the actual work done in the petitioner's operation.

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. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249

(Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

On appeal, counsel for the petitioner indicates that the beneficiary is a functional manager. However, the petitioner has not established that the beneficiary will be managing an essential function of the U.S. company. 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 furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 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.

As discussed above, the beneficiary's job description included primarily non-qualifying duties associated with the petitioner's day-to-day functions, and the petitioner has not identified any other employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business within one year. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of a "function manager" as contemplated by the governing statute and regulations.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. See 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

Furthermore, as contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

Id.

The petitioner submitted a one page "Business Master Plan" that includes a vague time-line of the new business development of the U.S. entity. The petitioner did not submit a business plan that outlines how the U.S. entity will reach the listed goals and plans and if it is financially feasible to do so as requested by the director. 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. at 165.

Finally, on review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner has not submitted an adequate business plan or otherwise demonstrated that the U.S. company will hire additional employees after one year of operation who would relieve the beneficiary from performing primarily non-qualifying duties associated with operating a business. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. at 604. The regulations at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. In the instant matter, the petitioner has not established that it will employ the beneficiary in a predominantly managerial or executive position after one year of operation. Accordingly, the appeal will be dismissed.

The third issue to be addressed in this proceeding is whether the petitioner will be doing business for the first year of operation as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in 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; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

Doing business means the 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 regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the 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." 8 C.F.R. § 214.2(l)(1)(ii)(H).

The director in the decision stated the following:

With regard to the petitioner actually "doing business," the Service does not consider the United States entity to be a qualifying organization because it does not appear the petitioner will actually be "doing business," as defined by Part 214.2(l)(1)(ii)(H). The petitioner has stated it will be acting as an agent or administrative conduit for arranging material transfers between its parent organization, and US businesses. The petitioner will not be providing a regular, systematic **and** continuous provision of goods and/or services, as is required by regulations, and therefore does not meet this criterion.

On appeal, counsel for the petitioner states that since this is a "new office" petition rather than an extension petition, the petitioner must only establish that the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary in order to commence doing business

in the United States. Counsel for the petitioner further asserts that the branch office in the United States has been established and thus falls under the regulations as an acceptable qualifying relationship with the foreign company. Counsel asserts that the petitioner was established to support and provide direct services to the company's customers, including technical services. Counsel emphasizes that the U.S. office "will be directly providing products and services."

In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(l)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). CIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. *See Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982)(stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick, supra* at 649-50.

Upon review of the documents submitted on appeal, the petitioner has established that the United States entity is a qualifying branch office of the foreign company which will be doing business in the United States. The petitioner submitted a letter from the Michigan Department of Consumer and Industry Services indicating that the state endorsed the foreign company's application for certificate of authority, and a letter from the state of Michigan confirming that the petitioner is authorized to transact business in Michigan.

The director erred in basing her decision on the fact that the majority of the revenue derives from the parent company. The regulations do not limit a corporation from doing business with its parent company. Therefore, the fact that a petitioner is engaged in business transactions with a related foreign entity should not be the determinative factor in deciding whether the company is doing business. A representative office is not specifically excluded by the definition of "doing business," provided that it shows that it is engaged in the provision of goods and services, albeit on behalf of a related foreign entity. Therefore, the petitioner has established that it is doing business as defined by 8 C.F.R. § 214.2(l)(1)(ii)(H). The director's decision with respect to this issue is withdrawn.

In addition, on appeal, counsel requests oral argument before the AAO and suggests that the director's adjudication of the petition was unfair. The petitioner has not demonstrated any error by the director in conducting its review of the petition. Nor has the petitioner demonstrated any resultant prejudice such as would constitute a due process violation. *See Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975).

Furthermore, the regulations provide that the requesting party must explain in writing why oral argument is necessary. Pursuant to 8 C.F.R. § 103.3(b), Citizenship and Immigration Services has the sole

authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

The petition will be denied and the appeal dismissed 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.