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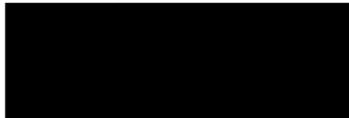
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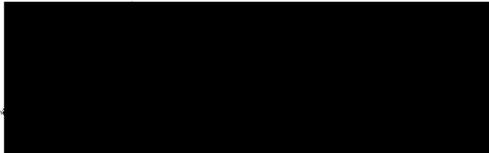
File: EAC 04 082 54019 Office: VERMONT SERVICE CENTER Date: **OCT 03 2006**

IN RE: Petitioner:
Beneficiary:



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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa on February 24, 2004. On March 24, 2004, the petitioner filed a motion to reopen and reconsider the director's decision. On April 27, 2004, the director granted the motion to reopen and reconsider, but affirmed her prior denial of the petition. The director's decision to affirm her prior decision is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to employ the beneficiary as its vice president 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 corporation organized under the laws of the State of New York and is engaged in the business of importing and distributing Christmas tree ornaments. The petitioner claims that it is an affiliate [REDACTED] Sp. z.o.o., a Polish private limited liability company located in Krakow, Poland.

The director affirmed her prior decision in her consideration of the motion to reopen and reconsider concluding that the petitioner did not overcome the grounds of denial set forth in the February 24, 2004 decision. Specifically, the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director further determined that, while the petitioner is not a "new office" as defined by the regulations, the petitioner failed to establish that it meets those criteria set forth in 8 C.F.R. § 214.2(l)(3)(v) for new office petitions.

The petitioner subsequently filed an appeal from the director's decision to affirm her February 24, 2004 decision. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the petitioner is a "new office" petition and that the director erred both in failing to treat the petition as such and in concluding that there was insufficient evidence to establish that the petitioner will, within one year of the approval of the petition, support an executive or managerial position pursuant to 8 C.F.R. § 214.2(l)(3)(v). Although the petitioner does not specifically challenge the director's decision to affirm her decision that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity pursuant to 8 C.F.R. § 214.2(l)(3)(ii), this issue will be considered on appeal. In support of the appeal, counsel to the petitioner submits a brief and additional evidence.¹

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.

¹ It should be noted that, on November 10, 2004, the director again granted the motion to reopen and reconsider and again affirmed her February 24, 2004 decision denying the petition. This decision is materially identical to the director's April 27, 2004 decision. Because the petitioner did not appeal the November 10, 2004 decision, and because the petitioner had already appealed the April 27, 2004 decision, the November 10, 2004 decision will not be considered or further addressed in this proceeding.

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.

While the regulation at 8 C.F.R. § 214.2(l)(3)(v) provides additional criteria to be met should the petition indicate that the beneficiary is coming to the United States to open a new office, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(F) defines a "new office" as:

[A]n organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

Moreover, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines "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 first issue in this matter is whether the petitioner is a "new office" as defined by the regulations.

In the initial I-129 petition filed on January 30, 2004, the petitioner indicated that it was established in 2002, that the petitioner desired to employ the beneficiary for three years, and that the beneficiary was *not* coming to the United States to open a new office. The petitioner also provided a letter dated January 29, 2004, in which the petitioner described the petitioner's business activities as follows:

[The petitioner] was incorporated on August 22, 2002, under the laws of the State of New York, with an office at 225 Fifth Avenue, Suite 726, New York, New York. [citations omitted]. [The petitioner] is engaged in importing, distributing, and wholesales [sic] of Christmas tree ornaments produced by our sister company [the foreign entity] [citations omitted].

Before [the petitioner] was established in the US, [the foreign entity] sold its products through exhibition in the showroom space in the "Gift Building" located at 225 Fifth Avenue, Manhattan, New York. However, U.S. sales remained poor throughout the years 2001 and 2002 mainly because of the lack of a US based Distribution Company and its representative. Potential clients were reluctant about dealing with an overseas company, without a local presence nor the familiar distribution system in place. To respond to this uncertainty, [the petitioner] was established.

The petitioner also supplied the following: documents confirming the petitioner's corporate establishment in August 2002, evidence that the petitioner acquired an employer identification number in 2002, a copy of a 2002 Form 1120 showing business activity, a business plan showing that sales in the United States were made in 2002 and continued to grow in 2003, invoices establishing that the petitioner conducted an increasing level of business beginning in 2002 and throughout 2003, bank statements showing the establishment of an account in 2002 and continued use of the account into 2003, and evidence that the petitioner has been advertising its products in the United States.

However, the petitioner provided only a vague summary of the beneficiary's proposed duties in the letter dated January 29, 2004, and in the business plan.

On February 11, 2004, the director requested additional evidence. Specifically, the director requested evidence that the beneficiary will be employed in an executive or managerial capacity.

In response, counsel to the petitioner provided a letter dated February 11, 2004 indicating that the petition contained several errors. Primarily, according to counsel, the petition should have indicated that the beneficiary was coming to the United States to open a new office and that the petitioner was seeking to employ the beneficiary for only one year, not three years. In support of this position, the petitioner provided a "corrected" Form I-129 marked "amended." The petitioner also asserted that, because the petitioner had only leased a physical location in the United States in September 2003, and because the beneficiary has been pursuing business opportunities in the United States in B-1 visa status, the petitioner has not been "doing business" in the United States. Importantly, the petitioner failed to provide any further evidence regarding the beneficiary's proposed duties in the United States, despite the request by the director, having presumably adopted the position that it need not prove that the beneficiary will be employed in an executive or managerial capacity during the petitioner's first year in operation since the "new office" regulation at 8 C.F.R. § 214.2(l)(3)(v) should now apply to the petition.

On February 24, 2004, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director further determined that the petitioner is not a "new office" as defined by the regulations and, even if it was, the petitioner failed to establish that it met those criteria set forth in 8 C.F.R. § 214.2(l)(3)(v) for new office petitions.

On March 24, 2004, the petitioner filed a motion to reopen and reconsider the director's decision. On April 27, 2004, the director granted the motion to reopen and reconsider, but affirmed her prior denial of the petition on the same grounds.

On May 25, 2004, the petitioner appealed the director's decision. On appeal, counsel to the petitioner asserts that the petitioner is a "new office" and that the evidence submitted establishes that, within one year of petition approval, the petitioner will support an executive or managerial position. In addition, counsel to the petitioner asserts in his conclusion that the beneficiary will be a "function manager." The petitioner also supplied an organizational chart for the foreign entity.

Upon review, the petitioner's assertions are not persuasive.

As a threshold issue, the petitioner's attempt to "amend" the petition in its response to the request for evidence must be addressed. The regulation at 8 C.F.R. § 103.2(b)(8) defines the permissible scope of a response to a request for evidence. If a director requests additional evidence, as the director did in this case, the petitioner may either submit all the requested evidence, submit some or none of the evidence and ask for a decision on the record, or withdraw the petition. *See* 8 C.F.R. § 103.2(b)(8)(i)-(iii). In this case, the petitioner sought to materially change the Form I-129 in lieu of responding to the request for evidence. Such an attempted "amendment" is improper and is not permitted by the regulations. If the petitioner had concluded that its petition was defective, it should have withdrawn the petition and filed a new petition. *See* 8 C.F.R. § 214.2(l)(7)(i)(C). In view of the above, the director properly denied the petition for failure to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

As correctly pointed out by the director in her February 24, 2004 decision, "[i]t is not a choice of the petitioner to specify whether or not a new office petition is being sought." Whether a petitioner will be, or will not be, treated as a "new office" for purposes of 8 C.F.R. § 214.2(l)(3)(v) depends on whether the petitioner meets, or does not meet, the definition of a "new office" contained in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(F). In this case, the petitioner was incorporated in August 2002. Since that time, the petitioner has continuously engaged in business in the United States and demonstrated a modest, yet increasing, sales volume. The petitioner has also filed a tax return, opened a bank account, engaged in advertising, participated in trade shows, and leased gallery space since its establishment seventeen months before the current petition was filed. As explained by counsel to the petitioner, the beneficiary was spending so much time in the United States on behalf of the petitioner, that Customs and Border Protection airport inspectors apparently opined that his continued use of his B-1/B-2 visa for prolonged business visits could eventually become problematic. Therefore, as there is ample evidence in the record establishing that the petitioner has been doing business in the United States for over one year before the filing of the current petition, the petitioner is not a "new office" for purposes of 8 C.F.R. § 214.2(l)(3)(v).

Although counsel argues that the petitioner was not "doing business" in the United States before September 2003 because it was only during that month that the petitioner leased physical space in the United States, this argument is not persuasive. Not only is there ample evidence establishing that the petitioner was doing business prior to the date of the lease, but the petitioner's support letter dated January 29, 2004 never mentions that the acquisition of office or gallery space was material to the petitioner's business plan. To the contrary, the letter is quite clear that the petitioner's incorporation in response to customer concerns signaled its commencement of doing business in the United States. The leasing of gallery space is only additional evidence that the petitioner was doing business in the United States during the seventeen months before the filing of the current petition, and there is no evidence on the record establishing the lease commencement date

as the date the petitioner commenced doing business in the United States.²

Moreover, the beneficiary's repeated admission to the United States on his B-1/B-2 visa for the purposes of providing services to the petitioner is immaterial to whether the petitioner was "doing business" in the United States. The petitioner is a United States entity, and a determination as to whether the petitioner has been doing business in the United States is independent of a determination as to whether the beneficiary was appropriately, or inappropriately, providing services to the petitioner. In this case, there is ample evidence establishing that the petitioner has been doing business in the United States since 2002, and the fact that this business was carried out through the beneficiary while in B-1 status is irrelevant to the analysis.

Accordingly, as the petitioner has not established that the petitioner should be classified as a "new office," the director properly considered the second issue in this appeal, i.e., 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.

²While it is true that the petitioner likely would not have been able to acquire a "new office" classification for its business without having secured sufficient physical premises, this is a separate analysis from whether or not the petitioner had been doing business in the United States for more than one year. Therefore, it is possible for a petitioner to have been "doing business" in the United States as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H) for more than one year even though it would not have been able to qualify for a "new office" classification under 8 C.F.R. § 214.2(l)(3)(v) during its first year of doing business. Just because a petitioner is a "new office" actively engaged in "doing business" for less than one year does not mean it would automatically qualify under 8 C.F.R. § 214.2(l)(3)(v).

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 petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act, but implies in its appeal and motion to reopen and reconsider that the beneficiary will be acting as a "function manager." Regardless, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In the letter dated January 29, 2004 appended to the initial I-129 petition, the petitioner described the beneficiary's job duties as follows:

- Formulating and following sales strategies of the company,
- Contracting sales representatives,
- Marketing activities, such as participating in the industry's main trade fairs as the company's representative through out the year and execute all marketing and trading initiatives[, citation omitted]
- Human resource[s] issues,
- Accounting and all administrative aspects of everyday business[.],
- Creating the Sales Department in the course of next three years and expects to hire 2-5 Direct Sales staff. [citation omitted]

Further, the business plan describes the beneficiary's duties as "[r]esponsible for guiding the company in a profitable direction" and "[e]xecute all aspects of the business, from sales and marketing to human resources and accounting."

Finally, the petitioner clarified in its response to the director's request for evidence that the petitioner currently has no employees, although the beneficiary intends on hiring between two and five sales staff once he becomes the petitioner's first employee.

As explained above, while the director specifically requested additional evidence regarding the beneficiary's

proposed duties in the United States, the petitioner chose not to supply additional evidence in response to this request, and, on February 24, 2004, the director denied the petition determining that the petitioner had not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, and in its motion to reopen and reconsider, the petitioner asserts that the beneficiary will manage an essential function of the organization, specifically marketing.

Upon review, the petitioner's assertions are not persuasive.

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.*

The petitioner has failed to prove that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include establishing formulating strategies and marketing activities. The petitioner did not, however, define the beneficiary's strategies being formulated, or clarify who actually will perform the marketing work that is being managed. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the absence of subordinate employees, the beneficiary would appear to be the provider of actual services. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In this case, the petitioner has specifically argued that the beneficiary manages an essential function of the organization, i.e., marketing. 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. 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 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. at 604). In this matter, the petitioner has not established that the beneficiary manages an essential function primarily because the petitioner will not have any other employees available to relieve the beneficiary of the need to perform the duties related to the function.

Moreover, even if qualifying subordinate employees were hired, the petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary will spend on them. This failure of documentation is important because most of the beneficiary's daily tasks, such as marketing, identifying customers, and attending trade shows do not fall directly under traditional managerial duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190.

Similarly, the petitioner has failed to prove that the beneficiary has been or will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* The petitioner has failed to prove that the beneficiary, who will manage no employees and who will be engaged in performing the duties related to a function, will be acting primarily in an executive capacity.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(l)(3)(ii).³

³In the alternative, the director determined that the petitioner, assuming that it could be classified as a "new office," nevertheless failed to establish that it would support an executive or managerial position within one year of petition approval as required by 8 C.F.R. § 214.2(l)(3)(v). Upon review, the AAO concurs with the director's decision and affirms the denial of the petition on these alternate grounds. The scope of the entity as described in the record, and the petitioner's plan to employ between two and five people as sales staff during the first year after petition approval would not be sufficient to support a managerial or executive position. The petitioner failed to provide any description of these prospective subordinate employees which could lead one to conclude that they would be managerial, supervisory, or professional employees. Therefore, the management of them would not be greater than that of a first-line supervisor of sales staff. A managerial or

Beyond the decision of the director, the record contains insufficient evidence to establish that the overseas company employed the beneficiary in a primarily managerial, executive, or specialized knowledge capacity as required by 8 C.F.R. § 214.2(l)(3)(iv). In the initial petition, the petitioner describes the beneficiary's overseas employment as "marketing and sales manager." His duties were described in the letter dated January 29, 2004 appended to the initial petition:

As marketing and sales manager, [the beneficiary] has established marketing strategies and coordinated sales distribution of products by establishing sales territories, quotas, and goals. He also has represented [the foreign employer] at trade fairs to promote product and attract potential buyers.

While the petitioner provided a copy of the foreign entity's organizational chart on appeal, this chart indicates that the beneficiary has no supervisory responsibilities.

As explained above, 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 performed by the beneficiary and indicate whether such duties were either in an executive or managerial capacity. *Id.*

In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary did on a day-to-day basis for the overseas employer. This failure of documentation is important because some of the beneficiary's duties, such as attending trade fairs, do not fall directly under traditional managerial or executive duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary is primarily performing the duties of a manager or an executive. See *IKEA US, Inc.*, 48 F. Supp. 2d at 24. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. Again, specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd.*, 724 F. Supp. 1103, *aff'd*, 905 F.2d 41. Given the vagueness of the job description and the lack of any supervisory function, the petitioner has failed to prove that the beneficiary was employed in a primarily managerial or executive capacity overseas as required by 8 C.F.R. § 214.2(l)(3)(iv), and for this additional reason the petition may not be approved.⁴

executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, the record is equally devoid of any evidence establishing that the petitioner will support a "function" manager within one year after approval of the petition. Therefore, the petitioner has not established eligibility as a new office under 8 C.F.R. § 214.2(l)(3)(v).

⁴ While the petitioner has not alleged that the beneficiary was employed in a specialized knowledge capacity overseas, the record is also devoid of any evidence that the beneficiary served in such a capacity.

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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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.