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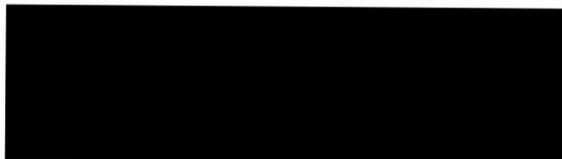
File: SRC 05 113 52392 Office: TEXAS SERVICE CENTER Date: **SEP 05 2006**

IN RE: Petitioner:
Beneficiary:



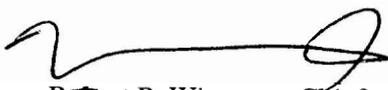
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF THE 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, Texas 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, a foreign corporation, filed this nonimmigrant petition seeking to extend the employment of its U.S. affiliate's 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 U.S. entity is a Delaware limited liability company that is authorized to transact business in the State of Florida. It is engaged in the wholesale and retail sale of motorcycles and accessories. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; and (2) that the U.S. company was doing business for the previous year.

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 disputes the director's decision and asserts that the beneficiary will be employed primarily in an executive and managerial capacity. Counsel suggests that the director misunderstood the nature of the petitioner's business, and asserts that the U.S. entity has been doing business since the beneficiary's arrival to the United States in June 2004. Counsel submits a brief and additional evidence 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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first 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 visa petition was filed on March 14, 2005. On the Form I-129 petition, the petitioner indicated that the beneficiary "must maintain the first affiliate in the US and continue to create new clientele [sic] bases. He will manage the daily affairs of the motorcycle sales business, including hiring and supervising employees, coordinating the sales of the company, and maintaining a viable business in the market." In a March 11, 2005 letter submitted in support of the petition, counsel for the petitioner noted that the beneficiary currently serves as president of the U.S. entity and stated:

In this capacity, [the beneficiary] has significant executive responsibilities. He worked with attorneys to register the new affiliate in the United States as a Delaware corporation. While previously planning to establish the business in Memphis, Tennessee, [the beneficiary] determined that Florida was better suited to spur the growth of his booming business. As such, he instead leased space in Miami and incorporated the company within that state. During the past year, [the beneficiary] opened the company's first retail store in the United States, created a new client base, managed the daily operations of the company, hired and supervised employees, coordinated the sales of the company, and ensured that [the U.S. entity] remained a viable, competitive business in the market.

The director issued a request for additional evidence on March 19, 2005, instructing the petitioner to submit the following: (1) a description of the beneficiary's employment over the course of the past year, including a list of all duties and the percentage of time spent on each duty, the number of subordinate employees who report to the beneficiary, and their job titles, job duties and educational credentials; (2) evidence of the current staffing level in the United States, including copies of all Employer Quarterly Reports for 2004 and evidence of payments to any independent contractors; and (3) if applicable, copies of employment agreements/contracts with independent contractors, along with the job titles, duties and work schedule for all contracted workers.

In a response dated April 5, 2005, counsel for the petitioner noted that the beneficiary had established agreements with six dealers in the United States to sell the company's products, and further described the beneficiary's duties as follows:

[The beneficiary's] primary responsibilities with the company include: planning and attending trade shows, planning advertising, following up on shipments, responding to emails and phone calls about the products, product development on a day-to-day basis, negotiating leases, client and market development, and training dealers throughout the US with the help of the company's marketing director, Salima Westera.

* * *

With the growing interest in the company's products, [the beneficiary] has utilized feedback from customers and dealers to help create new product lines.

Counsel noted that the U.S. entity opened a new warehouse and assembly line facility on March 1, 2005 that will offer complete vehicles and kits to customers, and eventually be used as a wholesale distributorship and retail relocation. Counsel noted that the beneficiary is responsible for establishing this facility and interviewing people for assembly and warehouse positions, with additional positions added "once the warehouse and retail shop are set up."

With respect to the staffing of the U.S. company, the petitioner instead provided an organizational chart depicting the current staffing level of the Italian company, "which continues to be the management of the US entity until the US company is established in Miami." Counsel stated that the foreign entity's vice president and marketing director travel to the United States "to assist [the beneficiary] in his efforts to expand the US business operations." Counsel noted that the U.S. company does not utilize subcontractors, but stated that the beneficiary has begun to conduct interviews to fill staff positions in the company's Miami warehouse.

The petitioner's response included an organizational chart for the Italian company depicting the beneficiary as president over a vice president and a marketing director. The vice president is shown to supervise two technicians, a "testing and approval" employee, and a receptionist. The chart also lists eight subcontractors who appear to be engaged in the manufacturing of motorcycles or motorcycle components.

Finally, the petitioner submitted the U.S. company's 2004 IRS Form 1120, U.S. Corporation Income Tax Return, which reflects no payments to either payroll, contract or commissioned employees.

The director denied the petition on April 25, 2005, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director noted that as of the date the petition was filed, the U.S. company did not have a sufficient support staff to relieve the beneficiary from having to perform non-qualifying duties.

On appeal, counsel for the petitioner emphasizes that the beneficiary, "like owners of all small business, is involved in all areas of his business to the extent it is necessary to keep things running smoothly." Counsel

asserts that the beneficiary is the creative force behind the company and states that “it is his ‘hands-on’ involvement in all aspects of design, advertising, and sales that make [sic] his company successful.” Counsel notes that the foreign entity is small and “only employs staff to the extent they are needed to manage the sales and marketing, run the office, and assemble and test the products.” Counsel asserts that the petitioner will eventually employ a small number of people to assemble products that arrive from Europe, to manage the shipping to dealers, take orders from dealers and train the dealers to assemble the products in their own shops. Counsel further notes that the majority of sales will be by independent dealers while subcontractors in Europe will manufacture the products.

Counsel states that the beneficiary “will manage the production and design of goods through subcontractors, and manage the sale of goods through his dealer network.” Counsel emphasizes that the beneficiary operates at the most senior level within the company, has the final word on financial investments, is the only employee authorized to sign agreements with subcontractors and dealerships, and is responsible for the company’s long-range planning.

Counsel asserts that the beneficiary’s position is in a managerial capacity as defined at 8 C.F.R. § 214.2(l)(1)(ii)(B) because he: (1) manages the organization as well as several essential functions, including the design and production of the products, and doesn’t actually work in the factories or sell products to the consumers; (2) supervises the production and sales through independent contractors; (3) has the authority to hire and fire employees and independent contractors; and (4) supervises the independent contractors both in sales and manufacturing. The petitioner states that the beneficiary also qualifies as an executive as defined at 8 C.F.R. § 214.2(l)(1)(ii)(C) because he: (1) manages the entire organization as well as several major components; (2) establishes the goals and policies of the company, by deciding to bring his product to the U.S. market and contract with manufacturers in Europe to modify the product for the U.S.; and (3) exercised his discretion in deciding how to invest approximately \$250,000 in the start up of his new business and in choosing dealers to sell his product.

Counsel further refers to two unpublished decisions in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel notes that the beneficiaries in the cited matters utilized the services of independent contractors. In support of the appeal, the petitioner submits copies of three dealer agreements and copies of contracts between the petitioner and European manufacturers.

Upon review, counsel'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 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 144470 (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 are related to operational or policy management, not to the supervision of lower-level employees, performance of the duties of another type of non-managerial or non-executive position, or other involvement in the operational activities of the company.

Here, the petitioner's description of the job duties fails to establish that he would perform primarily managerial or executive duties under the extended petition. For example, the petitioner initially stated that the beneficiary during the first year of operations "created a new client base, managed the daily operations of the company, hired and supervised employees, coordinated the sales of the company." Based on this vague description, the director was unable to determine what specific role the beneficiary had in creating a client base or "coordinating sales" and could not reasonably determine whether he was directly involved in sales or marketing, or whether he supervised the performance of these functions through subordinate employees. In addition, the initial description did not identify the number or type of employees supervised by the beneficiary, nor did it indicate what day-to-day tasks the beneficiary performs to manage the company's daily operations. 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).

Accordingly, the director requested a detailed statement regarding the beneficiary's actual duties and the percentage of time the beneficiary devotes to each duty, as well as the duties performed by each of the beneficiary's subordinates. The job description submitted in response to this request suggests that the beneficiary is not primarily engaged in duties which fall under the statutory definitions of managerial or executive capacity. For example, counsel stated that the beneficiary's primary duties are planning and attending trade shows, planning advertising, following up on shipments, responding to emails and phone calls about products, product development on a day-to-day basis, client and market development and training dealers. These duties depict an employee who is engaged in performing the company's day-to-day marketing, sales, customer service, advertising, shipping and product development functions, rather than an employee who performs primarily managerial or executive tasks. 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. 593, 604 (Comm. 1988).

Although the petitioner stated that the beneficiary performs these duties "with the help of the company's marketing director," and also states that the vice president of the foreign entity assists in the operation of the U.S. entity, the petitioner has provided no explanation of these employees' duties, nor indicated how much time they actually spend in the United States. 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)). Accordingly, the petitioner has not established that the foreign company's employees actually relieve the beneficiary from performing non-qualifying duties associated with the majority of the petitioner's day-to-day functions. Furthermore, the AAO notes that the petitioner initially indicated that the beneficiary had hired and supervised employees during the previous year, and then in response to the request for evidence indicated that the beneficiary had not yet hired any direct or contract employees in the United States. 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).

The petitioner has failed to establish any clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary. The director specifically requested a detailed description of the beneficiary's duties, including the percentage of time he devotes to each duty. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). 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).

On appeal, rather than clarifying the beneficiary's duties, counsel merely paraphrases the statutory definitions of managerial and executive capacity in an attempt to establish that the beneficiary meets the criteria of either classification. However, 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.).

Further, counsel seems to concurrently acknowledge the beneficiary's "hands-on" involvement in the company's design, advertising and sales functions and "all areas" of his small business. The AAO does not doubt that the beneficiary, as the sole owner and president of the U.S. entity, exercises discretion over the day-to-day operations of the company, holds the authority to hire employees, and makes decisions regarding company plans, policies and strategies. The fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). There may be certain situations in which a beneficiary who is the sole employee of a company may qualify as a manager or executive. It is the petitioner's obligation to establish however, through independent documentary evidence, that the majority of the day-to-day non-managerial and non-executive tasks of the petitioning entity are performed by someone other than the beneficiary. The petitioner has failed to meet this burden.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In the present matter, however, the regulations

provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

The U.S. entity is a one-year-old company engaged in the import and wholesale distribution of motorcycles and related accessories which are manufactured in Europe to the company's specifications, and then sold through a dealership network that is being established in the United States. The petitioner indicates that the U.S. entity will also engage in some direct retail sales of its products. The petitioner claims that the beneficiary is relieved from performing the actual manufacturing of the products and from selling the products to consumers, noting that the European factories and the U.S. dealers, respectively, handle these responsibilities. However, the petitioner has a reasonable need for employees to negotiate agreements with dealers, to answer telephone and e-mail inquiries from potential dealers and consumers, to market and advertise the petitioner's products in the United States, to attend trade shows, to perform product and market research to enable the product to be customized to the U.S. market, to manage the company's day-to-day finances, to pay bills and issue invoices, to take orders from dealers and direct customers and relay such orders to the foreign entity and/or European manufacturers, to handle shipping, warehousing and assembly of the imported products, to provide training to dealers, and to perform various administrative and clerical tasks associated with operating any business. All of these tasks, while essential to the petitioner's business, have not been shown to be managerial or executive in nature. The petitioner has not established that the beneficiary had an organizational structure in place as of the date the petition was filed to relieve him from performing these non-qualifying tasks.

Collectively, the lack of a subordinate staff brings into question how much of the beneficiary's time can actually be devoted to the claimed managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties.

Counsel further refers to unpublished decisions in which the AAO determined that a beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has not furnished sufficient evidence to establish that the facts of the instant petition are analogous to those in the cited matters. Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO

precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Although the petitioner claims that the U.S. company will be staffed in the future, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner established that the U.S. company has been doing business in the United States for the previous year, as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The term “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. 8 C.F.R. § 214.2(l)(1)(ii)(H).

The nonimmigrant petition was filed on March 15, 2005. The beneficiary’s “new office” petition was previously granted for a one-year period commencing on April 1, 2004. In support of the initial petition, the petitioner submitted copies of several shipping and customs documents for products shipped to the company in November 2004, with evidence of one shipment received from the foreign entity in June 2004. The petitioner also submitted: a balance sheet for the four-month period ended on December 31, 2004, which shows total sales of approximately \$160,000; evidence that the company received authorization to transact business in the State of Florida on September 22, 2004; a business lease for warehouse space, commencing on March 1, 2005; and product brochures and web site information.

On March 19, 2005, the director requested documentary evidence of the business conducted by the United States entity during the past year, such as completed and signed sales contracts, invoices, and evidence of taxes paid, as well as a copy of the U.S. company’s IRS Form 1120, U.S. Corporation Income Tax Return, for 2004.

In response, the petitioner submitted: (1) the U.S. company’s 2004 Form 1120 showing approximately \$160,000 in sales; (2) copies of three dealer agreements, two of which were undated, and one which was dated August 4, 2004; (3) six invoices for purchases made by the company between August and October 2004; (4) November 2004 invoices for domestic courier services; (5) evidence of e-mails received from potential customers and dealers in February and March 2005; (6) an exhibitor application for a 2005 trade show; and (7) a certificate of use for the U.S. company’s leased premises issued by Miami Dade County, Florida in March 2005.

The director denied the petition on April 25, 2005, concluding that the petitioner had submitted insufficient evidence to establish that the U.S. company had been doing business for the previous year. The director noted that the petitioner only provided two shipping invoices reflecting the shipment of goods to other companies, dated in October and November 2004, while the remainder of the documentation submitted shows only purchases. The director acknowledged that the 2004 Form 1120 indicates that the petitioner conducted business during 2004;

however, the director found insufficient evidence that the petitioner conducted business in a regular, systematic and continuous manner, rather than on a “sporadic” basis.

On appeal, counsel for the petitioner emphasizes that the beneficiary arrived in the United States only eight months before filing the instant extension and since that time has obtained a license to conduct business in Florida, rented warehouse/retail space, invested \$250,000 in the business, established six dealers to sell the product, entered contracts with European companies to manufacture products for the U.S. market, placed ads in American trade magazines, and set up a quarterly shipping schedule of goods to the United States of which there have already been two shipments. Counsel asserts that the U.S. company is doing business as defined by the regulation.

In support of the appeal, the petitioner submits copies of previously submitted documentation, and new evidence, including copies of five invoices for products shipped to the U.S. company’s dealers between November 2004 and April 2005; and copies of magazine advertisements for the U.S. company dated July 2004, January 2005 and March 2005.

Upon review, the AAO finds sufficient evidence to establish that the U.S. company began doing business since shortly after the beneficiary’s arrival in the United States. The evidence suggests that the company has experienced fairly slow, but steady, growth since that time, and the company does not appear to be inactive or merely an agent of the foreign entity that is not doing business. Accordingly, the director’s decision on this issue will be withdrawn.

Beyond the decision of the director, the record as presently constituted does not contain evidence of a qualifying relationship between the foreign petitioner and the U.S. entity, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). To establish eligibility, the petitioner must show that the beneficiary’s foreign employer and the proposed U.S. employer are the same entity or are related as a “parent and subsidiary” or “affiliates.” The petitioner indicates that both companies are wholly owned and controlled by the beneficiary. However, the petitioner has not submitted documentary evidence to establish the ownership and control of either company in support of this claim. 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. As the director failed to request this required initial evidence in her request for evidence, the AAO notes this deficiency for the record and finds that the petition is not approvable for this additional reason.

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.

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ORDER: The appeal is dismissed.