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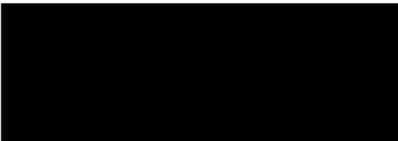
U.S. Department of Homeland Security
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FILE: LIN 06 051 51226 OFFICE: NEBRASKA SERVICE CENTER Date: APR 04 2007

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Washington corporation, operates as a subcontractor in the construction industry. It claims to be a subsidiary of Newway Forming, Ltd., located in Canada. The beneficiary is currently employed by the petitioner in L-1B status, and the petitioner now seeks to change the beneficiary's classification from specialized knowledge worker to manager or executive (L-1A) and extend his period of stay for two additional years.

The director denied the petition concluding that the petitioner had failed to establish that the beneficiary would be employed in a managerial or executive capacity. The director observed that the evidence submitted contained several discrepancies with respect to the staffing of the U.S. entity, thus preventing a determination regarding the structure of the petitioner's business and the beneficiary's specific project. The director thus found that the evidence did not persuasively establish that the proposed position involves managerial or executive authority.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner submits an explanation with respect to the alleged staffing discrepancies observed by the director, and asserts that the beneficiary will indeed be employed in a managerial capacity. 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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate 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 sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed by the petitioner in a managerial capacity. The petitioner does not claim that the beneficiary will be employed in an executive capacity.

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.

The nonimmigrant petition was filed on December 7, 2005. In a letter dated December 6, 2005, the petitioner described the beneficiary's proposed duties as follows:

The Company wishes to employ [the beneficiary] as the Project Director for the Legend Project located in San Diego, California. . . . [The beneficiary] will be responsible for oversight and administration of Company's project, and directing, securing, and coordinating Company resources (which may include technical resources, equipment, personnel, administrative services, and professional services) to achieve operational efficiency and maximum profitability. He will be responsible for direction and oversight of company liaison activities and functions with the affiliate company

Additionally, he will direct and control the compilation, analysis, and processing of all economic and administrative data and information required for the company operation with respect to the Benson tower project in Portland, Oregon. He will have authority to approve and enter into contracts, agreements, contract alterations or modifications and settlements for connection with the project. He will be responsible for exercising oversight authority to ensure that all phases of Company's project are in compliance with plans, budgets and schedules. [The beneficiary] will conduct, determine, and execute financial agreements within the scope of Company operations.

As indicated above, [the beneficiary's] position is a managerial position involving a high degree of unsupervised administrative discretion and oversight, innovative thinking and analysis, effective and decisive management, contractual and budgetary authority (including authority in hiring promotion, termination). His primary responsibility is to assure overall construction management and attainment of the Company's short/long range goals and objectives.

The petitioner submitted an organizational chart for the U.S. company, but the chart did not identify the beneficiary by name. The chart indicates that the company employs five project managers, each of whom reports to the operations manager. Underneath the "Benson Tower" project, the chart depicts a general superintendent, a project coordinator and a project scheduler, a second level of employees which includes a crane manager, a quality control technician and a flyform truss technician, and a third tier of employees consisting of "tradesmen." The petitioner stated on Form I-129 that the U.S. company has eight employees.

The director issued a request for evidence on December 13, 2005, in part, instructing the petitioner to submit additional evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the director requested: (1) a complete detailed description of the duties to be performed by the beneficiary in the United States on each of the assigned projects and the percentage of time the beneficiary will spend performing each duty; (2) a revised organizational chart that identifies all employees by name, job title and job duties for each project to be managed by the beneficiary; (3) evidence to establish that the beneficiary meets each of the four statutory criteria for either managerial or executive capacity; (4) if the beneficiary will be managing a function, evidence to thoroughly document the essential nature of the function and evidence concerning the specific nature of the beneficiary's involvement in the function; (5) copies of the petitioner's IRS Forms W-2, Wage and Tax Statement, for the 2004 year; and (6) a list identifying all eight of the petitioner's employees by name, job title and job duties, and an explanation of the beneficiary's duties in relation to the other employees.

In a response dated February 6, 2006, the petitioner clarified that the beneficiary will be assigned as project director of only one project, the Benson Tower project in Oregon, and submitted the following description of his proposed duties:

Manage day-to-day activities of the construction project. 45%

- Confer with supervisory personnel, owners, contractors, and design professionals to discuss and resolve matters such as work procedures, complaints, and construction problems. (20%)

- Direct and supervise workers, including overseeing hiring, training and firing of employees (20%)
- Direct and control the compilation, analysis and processing of all economic and administrative data and information required for the project (5%)

Plan, organize, and direct activities concerned with the construction and maintenance of structures, facilities, and systems. 50%

- Schedule the project in logical steps and budget time required to meet deadlines. (5%)
- Study job specifications to determine appropriate construction methods. (5%)
- Determine labor requirements and dispatch workers to construction sites. (5%)
- Inspect and review projects to monitor compliance with building and safety codes, and other regulations and contractual obligations. (10%)
- Ensure all necessary permits and licenses are obtained. (5%)
- Interpret and explain plans and contract terms to administrative staff, workers, and clients, representing the owner or developer. (10%)
- Prepare contracts and negotiate revisions, changes and additions to contractual agreements with architects, consultants, clients, suppliers and subcontractors. (10%)

Direction and oversight of liaison activities with [the foreign entity]. (5%)

The petitioner submitted an organizational chart which depicts the beneficiary as project director, reporting to a senior project manager, who in turn reports to the operations manager. The chart shows a vacant position for a project engineer directly beneath the beneficiary's position, and a subordinate level of employees that includes a crane manager, a carpenter foreman, a layout surveyor, a rigger, a labor foreman, and two flyform truss technicians. The chart depicts six carpenters reporting to the carpenter foreman, and four laborers reporting to the labor foreman.

The petitioner submitted its 2004 Form 1120, U.S. Corporation Income Tax Return, which is for the fiscal year ending on September 30, 2005. The tax return indicates that the petitioner paid salaries and wages in the amount of \$75,649. The petitioner also provided its Washington State Form 5208-B, Quarterly Wage Detail Report, for the second quarter of 2005, which identifies 26 employees and total wages of \$295,218. Only one of these employees, a carpenter, was identified on the submitted organizational chart.

The petitioner submitted copies of its IRS Forms W-2 for both 2004 and 2005. In 2004, the petitioner paid gross wages in the amount of \$1,144,852.13 to 37 employees, and in 2005, the petitioner paid gross wages in the amount of \$167,576.31 to 17 employees. In 2005, these employees included the beneficiary, who earned \$11,149, the crane manager, the carpenter foreman, the layout/surveyor, the rigger, the labor foreman, five carpenters and four laborers.

Finally, the petitioner submitted a payroll summary for the pay period ending January 7, 2006, which appears to include the company's Oregon-based employees only, and reflects employment of the same employees as those listed on the 2005 Forms W-2.

Counsel for the petitioner asserted that the beneficiary meets the requirements for managerial capacity because he manages an essential function, department, or subdivision of the company by managing a multi-million dollar contract; has the ability to hire, fire and take other personnel actions for employees assigned to the project; and exercises discretion over the day-to-day operations of the project.

The director denied the petition on February 21, 2006, concluding that the petitioner had failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director found that the wage and tax information submitted raised "serious questions regarding the operations of the petitioner's business." Specifically, the director noted the following:

Most notably the petitioner's 2004 U.S. Corporation Income Tax Return indicates distributed wages in the amount of \$75,649. . . . However, the 2004 W-2 wages statements indicate the petitioner distributed gross wages of \$1,144,852.13. This is a clear discrepancy which the petitioner has not explained. Further the petition indicates the petitioner has 8 employees. However. . . the petitioner claims that it has 14 employees at the Benson Tower project and additional employees at its project sites in Washington and California. The 2004 W-2s submitted account for 37 employees. It is unclear why the petitioner only claimed 8 employees on the initial petition. Also the petitioner submitted 2005 W-2s for 17 employees. The evidence submitted constitutes a clear discrepancy regarding the staffing of the petitioner's business. It is also worth noting that the organizational chart submitted in response to the request for evidence is substantially different than the chart originally submitted. Several positions have either been added or deleted. It is therefore impossible for the Service to determine the actual structure of the petitioner's business and the beneficiary's related project.

The director concluded that the discrepancies cast serious doubt on the petitioner's operations and the actual staffing of the business, and also on the record as a whole, including the petitioner's organizational charts. Consequently, the director determined that the petitioner did not establish that the position offered involves managerial/executive authority or that the petitioner can actually support a managerial/executive position.

On appeal, counsel for the petitioner addresses each of the discrepancies with respect to the petitioner's wages and tax record. Counsel asserts that the gross wage figure of \$75,649 reported on the petitioner's 2004 tax return reflect administrative wages only, and explains that revenue and expenses, included the wages of employees directly assigned to construction jobs, are reflected on the petitioner's balance sheets and tax returns as contract costs in the year the contract is completed.

Counsel further clarifies that the eight employees listed on the Form I-129 represented the number of employees working in Oregon at the time the petition was filed. Counsel asserts that additional employees will be added as the project progresses, and that the number of employees had grown to 14 at the time the petitioner responded to the request for evidence. Counsel indicates that the company also has three employees in Seattle, and 56 employees working on a project in San Diego, noting that the number of employees changes as the petitioner's projects "ramp up and wind down." Counsel asserts that the number of management and specialized employees remains roughly the same, while the number of laborers and tradesmen is constantly fluctuating.

In addition, counsel asserts that the discrepancies between the submitted organizational charts are attributable to the growth of the Benson Tower project. Counsel states that the first organizational chart depicted the general structure of each of the petitioner's projects, while the second chart was submitted to clarify the positions currently on-site in the Benson Tower project as of the date of filing. Counsel further asserts: "Although the titles of some positions differed, the general structure did not. There are still three layers of subordinates below [the beneficiary]. He supervises six to eight individuals who are either responsible for an area of the project's operation . . . or individuals who manage other employees."

Counsel concludes by emphasizing that the beneficiary has multiple layers of subordinates working under him, is responsible for hiring and firing staff, and is ultimately responsible for the projects' day-to-day activities, as well as responsible for ensuring that the project is completed on time, on budget, and according to specifications.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial capacity under the extended petition. Preliminarily, the AAO notes that the evidence submitted on appeal resolves many of the discrepancies noted by the director with respect to the petitioner's staffing levels. However, upon review of the totality of the record, there is insufficient evidence to establish that the beneficiary's duties would be primarily managerial in nature.

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 in either an executive or a 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 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). 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, or the performance of other non-managerial or non-executive duties.

The petitioner has provided a fairly detailed breakdown of the duties to be performed by the beneficiary in his role as project director, however, the job description fails to establish that the beneficiary's duties will be primarily managerial in nature. For example, the beneficiary's responsibilities include project scheduling, studying job specifications, determining labor requirements and dispatching workers to construction sites, inspecting and reviewing projects, ensuring that licenses and permits are obtained, explaining plans and contract terms to workers, and preparing contracts with architects, consultants, clients, suppliers and subcontractors. These duties, which account for approximately half of the beneficiary's time, appear to be more akin to those of a first-line supervisor rather than the high-level responsibilities contemplated by the statutory definition of managerial capacity.

Further, although the petitioner has resolved many discrepancies regarding the staffing of the U.S. company and the beneficiary's specific project, the AAO notes the record does not support the petitioner's claims

regarding the beneficiary's level of authority over his assigned project. The original organizational chart submitted showed that the petitioning company's construction projects are typically staffed by a project manager, who in turn supervises a tier of supervisory employees, including a general superintendent, a project coordinator and a project scheduler, who then supervise specialists, and various tradesmen. The more detailed chart submitted in response to the director's request for evidence clearly shows that the beneficiary, as "project director" is not the highest-level manager responsible for the project, nor does he supervise a superintendent, project coordinator or project scheduler, or any other tier of supervisory employees. Rather, the chart shows that the beneficiary is supervised by a senior project manager, and that he directly supervises the employees who are providing the petitioner's construction services. The chart depicts a vacant project engineer position between the beneficiary and the skilled workers assigned to the project, but such role was clearly not filled at the time the petition was filed or at the time the petitioner responded to the request for evidence. Therefore, a review of the petitioner's organizational structure further supports a conclusion that the beneficiary's duties and level of authority, notwithstanding his job title, are similar to those of a project coordinator or superintendent.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Here, the record does not establish that the beneficiary is primarily supervising professional, managerial, or supervisory employees. The majority of the beneficiary's subordinates appear to be skilled workers engaged in providing construction services. Though requested by the director, the petitioner did not provide job descriptions for the beneficiary's subordinates, nor the level of education required to perform the duties of the positions subordinate to the beneficiary. Any 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). Thus, the petitioner has not established that these employees possess or require a bachelor's degree, such that they could be classified as professionals. Because the petitioner failed to provide the requested job duties for the beneficiary's subordinates, it has not shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees.

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 "primarily" 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.

While the record establishes that the beneficiary will have oversight authority over the day-to-day activities of the project to which he has been assigned, as discussed above, the record shows that he will be supervised by a senior project manager, who is reasonably assumed to exercise the highest level of authority over the employees, activities and functions of the project. The petitioner has not shown that the beneficiary will function at a senior level within the organizational hierarchy with respect to the function managed, or that his duties will be primarily the high-level managerial duties required by the statutory definitions.

The AAO acknowledges the petitioner's claim that the project to which the beneficiary is assigned was not fully staffed as of the date of filing, and that the number of employees is expected to increase in the future. While the project may eventually grow to the point where the petitioner requires the beneficiary's services in a primarily managerial capacity, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner has not submitted evidence that the beneficiary's role in the project at the time of filing was higher than that of a first-line supervisor of skilled workers. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the AAO finds that even if the petitioner had established that the beneficiary's proposed position as project director would be in a managerial capacity, such that he would be eligible for a change of status from L-1B classification to L-1A classification, the record does not establish that the beneficiary is eligible for an extension of his L-1 status.

The regulation at 8 C.F.R. § 214.2(l)(15)(ii) states the following, in pertinent part:

The total period of stay may not exceed five years for aliens employed in a specialized knowledge capacity. The total period of stay for an alien employed in a managerial or executive capacity may not exceed seven years. No further extensions may be granted. When an alien was initially admitted to the United States in a specialized knowledge capacity and is later promoted to a managerial or executive position, he or she must have been employed in the managerial or executive position for at least six months to be eligible for the total period of stay of seven years. The change to managerial or executive capacity must have been approved by [Citizenship and Immigration Services] in an amended, new, or extended petition at the time that the change occurred.

In support of the petition, the petitioner submitted the beneficiary's most recent Form I-797B Approval Notice, granting the beneficiary L-1B classification from December 23, 2002 until December 22, 2005 (LIN

03 076 50036). The petitioner did not complete Section 1, Question 2 of the L Classification Supplement to Form I-129, which requests a list of the beneficiary's prior periods of stay in the United States in L classification for the last seven years, along with photocopies of Forms I-94 and Forms I-797 documenting these periods of stay. However, the foreign entity stated in a letter dated December 6, 2005 that the beneficiary "was transferred to the U.S. five years ago."

U.S. Citizenship and Immigration Services records show that the petitioner filed a Form I-129 petition requesting L-1B classification on behalf of the beneficiary on January 7, 2000, and that the petition was approved with an expiration date of December 23, 2002 (LIN 00 069 50862). Although the beneficiary's exact dates of stay in the United States have not been provided, it appears that he had been granted L-1B classification for a period of more than four years and six months at the time the instant petition was filed on December 7, 2005. Thus, the petitioner did not file, and Citizenship and Immigration Services (CIS) did not approve, an amended, new or extended petition changing the beneficiary's classification to L-1A status within six months of the expiration of the beneficiary's total permissible period of stay of five years.

While neither the petitioner nor counsel specifically address the beneficiary's eligibility for an extension of stay pursuant to 8 C.F.R. § 214.2(l)(15)(ii), the petitioner suggested that the beneficiary was employed in a managerial capacity prior to his transfer to the United States, and that he has been employed in such a capacity with the petitioner, although the U.S. company also had a need for his specialized knowledge. However, the petitioner was nevertheless obligated to document the beneficiary's assumption of managerial duties in an amended, new, or extended petition at least six months before the beneficiary reached the end of his L-1B five-year period of stay if it had wanted to preserve its opportunity to extend the beneficiary's stay through the seventh year. *See* 8 C.F.R. § 214.2(l)(15)(ii) (requiring that "the change to managerial or executive capacity must have been approved by [CIS] in an amended, new, or extended petition at the time the change occurred.") Therefore, in this case, as the petitioner chose not to document the beneficiary's assumption of managerial duties as required by the regulations, the regulations prohibit an extension beyond the fifth year even if the beneficiary could be established to have been performing managerial duties from the beginning of his employment in 2000. Even if the director had granted the request for L-1A classification, the beneficiary's status could not be extended beyond the maximum five-year period permitted by regulation, taking into account the total time the beneficiary has spent physically present in the United States. The exact date on which the beneficiary would reach his five-year period of stay has not been determined; therefore, the AAO notes this deficiency for the record and will not discuss this issue further.

Finally, beyond the decision of the director, it is noted that the petitioner indicated under penalty of perjury in Part 4 of the Form I-129 petition that the beneficiary had never been denied the requested classification. This petition was filed on December 7, 2005. However, CIS records show that the petitioner filed a Form I-129 petition requesting L-1 classification on February 12, 2005, which was subsequently denied on July 22, 2005 (LIN 03 076 50036). The regulations at 8 C.F.R. § 214.2(l)(2)(i) state that "[f]ailure to make a full disclosure of previous petitions filed may result in a denial of the petition." As the petitioner indicated on the Form I-129 that the beneficiary had never been denied the requested classification, and the petitioner failed to fully disclose the previously filed petitions, this petition will be denied as a matter of discretion.

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*

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

ORDER: The appeal is dismissed.