identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 02 155 50421 Office: TEXAS SERVICE CENTER Date: SEP 22 2003

IN RE: Petitioner: [redacted]
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 PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, 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 filed this nonimmigrant petition seeking to extend the employment of its general manager as an L-1A nonimmigrant intracompany transferee pursuant to § 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 in the State of Florida that provides energy management planning to residential and commercial establishments. The petitioner claims that it is the affiliate of the beneficiary's foreign employer, located in Bremen, Germany. The petitioner now seeks to extend the beneficiary's stay for one year.

The director denied the petition concluding that the petitioner had failed to demonstrate that: (1) a qualifying relationship exists between the beneficiary's foreign employer and the United States entity; (2) the beneficiary's foreign employer and the petitioner are doing business in each respective country; (3) the beneficiary has been employed abroad and would be employed in the United States in a qualifying capacity; and (4) the beneficiary's assignment in the United States is temporary.

Counsel subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, counsel states that Citizenship and Immigration Services' (CIS) denial of the nonimmigrant petition was based on CIS' misinterpretation of the evidence and incomplete documentation in the record. Counsel provides a brief and additional documentation on appeal addressing the issues raised by the director in her denial.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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 AAO will first address the issue of whether a qualifying relationship exists between the beneficiary's foreign employer and the United States entity as required in the Act at section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

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

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

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

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) Affiliate means

> *(1)* One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
>
> *(2)* One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

On the nonimmigrant petition, filed on April 22, 2002, the petitioner noted that an affiliate relationship exists between the beneficiary's foreign employer and the petitioning organization, as both are owned solely by one individual, [redacted] In an April 17, 2002 letter from the petitioner, the petitioner's president stated that both the beneficiary's foreign employer and the United States organization are wholly owned by [redacted] The petitioner submitted a stock certificate dated April 17, 2000, indicating that 1,000 of the petitioner's 10,000 authorized shares of common stock are owned by [redacted] The petitioner also submitted a translated document, titled Register of Documents No. 17/1998, relating to the formation of the beneficiary's foreign employer [redacted] was identified in the document at the sole shareholder of the foreign limited liability corporation, having contributed DM 50,000 to the business. An attached list of shareholders indicated that [redacted] is the sole shareholder.

In a request for evidence, dated July 13, 2002, the director asked that the petitioner submit the following documentation with regard to the qualifying relationship: (1) copies of each organization's 2001 annual report; (2) a current certificate of status for each organization; (3) a current clearance certificate for the beneficiary's foreign employer; and (4) the petitioner's Form SS-4, Application for Employer Identification Number.

Counsel responded in a letter dated October 18, 2002 and submitted the petitioner's 2001 corporate income tax return, articles of incorporation and application for an employer identification number. Counsel also submitted the foreign entity's 2001 annual financial statement, its trade corporation register, and certificate of good standing.

In the decision dated March 18, 2003, the director determined that the petitioner had failed to demonstrate a qualifying relationship between the beneficiary's foreign employer and the petitioning organization. Specifically, the director stated that Schedule K and Question 5 of the petitioner's 2001 corporate income tax return indicates that [redacted] the beneficiary, is the sole shareholder of the U.S. entity, not his wife, [redacted] The director noted that stock ownership alone is not sufficient to establish a qualifying relationship, and concluded that the petitioner had not established and affiliate relationship between the foreign and U.S. companies. Accordingly, the director denied the petition.

In an appeal filed on April 17, 2003, counsel states that the tax return referencing [redacted] as the sole shareholder of the petitioning organization is incorrect. Counsel submits a letter from the accounting firm that prepared the petitioner's tax return, in which the petitioner's accountant acknowledges the error and submits an amended Schedule K and Question 5 from the petitioner's corporate tax return reflecting [redacted] as the sole shareholder. Counsel states that because both companies are under the same ownership, an affiliate relationship exists between the two entities.

On review, the record does not conclusively establish a qualifying relationship between the beneficiary's foreign employer and the United States entity. The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International, supra* at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, at 364-365. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In the present matter, counsel submits on appeal the petitioner's stock certificate and two pages of the petitioner's amended corporate tax return as clarification of [redacted] ownership of the petitioning organization. Even though the petitioner provided a stock certificate, the record does not contain additional documentation, such as the petitioner's stock certificate ledger, confirming that the petitioner issued only 1,000 of its 10,000 authorized shares of stock. This information is relevant to establishing an affiliate relationship as it would indicate whether the [redacted] is the sole shareholder, or, if not the sole shareholder, a majority stockholder. The record also lacks evidence that [redacted] contributed funds for her claimed interest in the petitioning organization. Relevant evidence would include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership, stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest. 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).

Additionally, the petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Providing two amended pages of the petitioner's 2001 corporate tax return along with a letter from the accountant acknowledging the error is not sufficient to clarify the petitioner's ownership. As the petitioner neglected to provide a complete certified copy of the revised tax return for the record, the AAO cannot determine the authenticity of the

revisions. Like a delayed birth certificate, the amended tax returns and the late filing one year after the claimed transaction raise serious questions regarding the truth of the facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991)(discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings). Moreover, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner failed to conclusively establish ownership and control of the United States entity by Sabine Zachow. Therefore, the AAO cannot conclude that an affiliate relationship exists between the beneficiary's foreign employer and the petitioning organization. For this reason, the appeal will be dismissed.

The AAO will next address whether the foreign and United States entities are doing business in each company's respective country.

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.

As evidence of the foreign company's business operations in Germany, the petitioner submitted with the nonimmigrant petition the foreign entity's year 2000 annual financial statement, an "indefinite" lease for office premises, and a statement of gross/net income for October 2000.

As evidence of the petitioning organization doing business in the United States, the petitioner provided its articles of incorporation, a county land use and zoning permit for use of the home as office space, a February 2002 bank statement, Form 1120, U.S. Corporation Income Tax Return, and a projected income and expenses statement.

In the director's July 2002 request for evidence, the director asked that the petitioner submit evidence that the foreign entity is currently engaged overseas in the regular, systematic, and continuous provision of goods and services. The director noted that such documentation should include tax returns, annual reports, profit and loss statements, bank records, personnel records, invoices, bills of sale, product brochures, check registers, statements of cash flow, insurance policies, and customs records. The director also requested that the petitioner submit the following evidence: (1) telephone and utility bills; (2) the owner's residential lease; and (3) an explanation as to who is running the business during the beneficiary's absence.

With regard to the operations of the U.S. entity, the director asked that the petitioner provide the above-named financial statements, employment records, invoices and brochures. The director also asked that the petitioner submit its 2001 and 2002 federal and state quarterly tax returns, its current lease agreement, and telephone and utility bills for 2001 and 2002.

In response, the petitioner submitted the foreign entity's 2001 balance sheet, a trade corporation register, a certificate of good standing, untranslated invoices from August 2002, two pages of untranslated account statements, and untranslated telephone statements. The petitioner also provided a letter stating that during the beneficiary's absence from the foreign entity, its corporate attorney would act as the company's financial

manager, during which he would spend his time managing the financial affairs of the business. The record also includes a letter from the foreign entity's attorney, dated September 9, 2002, in which he states that his responsibilities include providing legal advice, controlling management, observing the finances, fulfilling legal requirements, meeting with management on a monthly basis, and providing weekly updates for the beneficiary and his wife on the company's status.

An additional letter submitted by the foreign entity indicated that the business' current assistant general manager would temporarily occupy the position of manager during the beneficiary's absence and would perform the following job duties: (1) hire, supervise and terminate employees; (2) train and schedule employees; (3) develop advertising and promotional programs; (4) meet with existing and potential clients; (5) prepare customer proposals; (6) purchase supplies; (7) inspect completed projects; and (8) meet with customers to determine satisfaction and collect final payment.

The petitioner submitted the following evidence in support of its claim that it is doing business in the United States: (1) 2001 corporate income tax return; (2) Form 941, Employer's Quarterly Federal Tax Return for the quarter ending on June 30, 2002; (3) copies of checks written by the company in July 2002; (4) an October 2002 bank statement reflecting a business checking account balance of $8,269.68; (5) invoices from April through August 2002; (6) receipts for goods purchased; (7) telephone statements; and (8) a residential lease.

The director determined in her decision that the petitioner had failed to establish that both the foreign entity and the U.S. entity are doing business. With regard to the foreign corporation, the director noted that the company is located at the residential address of Richard and Sabine Zachow. The director stated that although a certificate of current status was requested, the petitioner neglected to submit it for the record, instead providing a certificate of good standing. The director also stated that because none of the submitted invoices were translated into English, "they cannot be relied on as evidence that the German company is currently doing business." The director further noted that the petitioner provided invoices for the month of August only. The director therefore concluded that the evidence did not demonstrate that the German company was engaged in the regular, continuous, and systematic provision of goods or services.

The director also determined that the U.S. company was not presently doing business. The director stated that "[b]y the petitioner's own admission, from 4/01 until 11/01, the petitioner and the beneficiary were in Germany," and therefore did not begin doing business in the United States until November 2001, seven months after the approval of the petition. The director noted an unexplained discrepancy in the petitioner's use of three different addresses, including Richard and Sabine Zachow's residential address. The director further noted that the petitioner had failed to submit a lease for the premises identified on the petitioner's bank statement. The director denied the petition stating that the petitioner had failed to demonstrate that either company was presently doing business in Germany and the United States.

On appeal, counsel contends that the foreign company is operating its business from the first floor of the owners' "multi-story" building. Counsel explains that it is common in Europe for business owners to reside in the same building that houses their business. Counsel submits photographs of the business premises. Counsel also provides a letter from a German bank confirming that the foreign entity has held an account at the financial institution since May 1998.

Counsel also submits a letter from the foreign entity's accountant as verification of the viability of the German company. The accountant states that the foreign company was formed in February 1998 and has

been providing electrical engineering services since that time. The accountant provides the following explanation as to the operation of the foreign entity during the beneficiary's absence:

> In [the beneficiary's] absence and due to mismanagement by a co-owner in [the beneficiary's] previous company (resulting in a loss of approximately $250,000) [the beneficiary] has divided the company's responsibilities into three prongs, as follows: Mr. [redacted] assures that the customer contracts are carried out to specification, assigns employees to particular projects and maintains production standards.
> The company's attorney, [redacted] has power of attorney to handle the legal and major financial aspects, he authorizes payment to vendors, etc.
> As the accountant, my office handles the bookkeeping and day-to-day financial matters such as payroll.
> Upon [the beneficiary's] return to Germany the financial and business aspects are once again his control.

With regard to the U.S. operation, counsel states that prior to filing the instant petition the petitioning organization had only six months during which to begin its operations in the United States. Counsel claims that "[s]ince businesses require a considerably longer time period in which to establish themselves, the revenues for such a brief time period cannot be significant." Counsel submits a letter from the petitioner's accountant, in which the accountant states that the beneficiary began establishing the U.S. company upon his arrival in the United States in November 2001. The accountant claims that "[i]n our experience as tax and business consultants, it typically takes at least a year or longer for a business to make an entry into the marketplace." Counsel further claims that it would therefore "have been quite an exception for the company to have generated revenues and employ workers within six month of commencing business operations."

On review, the record demonstrates that the foreign entity is presently doing business in Germany. However, it does not appear that the petitioning organization has been doing business in the United States for the previous year as required in the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B). Therefore, the director's decision will be withdrawn in part and affirmed in part.

With regard to the foreign corporation, the petitioner documented the current operations of the foreign business. While the director noted that the company's invoices and statements were not translated into English, it is clear that the documentation includes telephone and electrical statements for the foreign company during August 2002. Additionally, the petitioner identified three individuals who would run the business during the beneficiary's absence, and documented the employment of eight employees through recent employee records. Moreover, although the director noted in her decision that the petitioner submitted invoices for August 2002 only, it appears from the request for evidence that the director asked for "current" documentation. The petitioner demonstrated that the foreign company is doing business in Germany. The director's decision on this issue only will be withdrawn.

The director correctly concluded that the petitioner failed to demonstrate that the petitioning organization has been doing business in the United States during the previous year. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. There is no provision in CIS regulations that allows for an

extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. As noted by the director, the petitioner acknowledges that it did not begin operating in the United States until November 2001, approximately six months after the approval of the petition. The petitioner provides documentation that the beneficiary was unable to come to the United States until November 2001 as a result of his wife's medical condition. The regulations clearly require that a petitioning organization requesting a petition extension as a new office show that it has been doing business for the previous year. As the petitioner failed to satisfy this element, the AAO will affirm the director's decision. For this additional reason, the appeal will be dismissed.

The AAO will next address the issue of whether the beneficiary had been employed abroad in a primarily managerial or 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

> The term "executive capacity" means an assignment within an organization in which the employee primarily-
>
> (i) Directs the management of the organization or a major component or function of the organization;
>
> (ii) Establishes the goals and policies of the organization, component, or function;
>
> (iii) Exercises wide latitude in discretionary decision-making; and

(iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the April 17, 2002 letter submitted with the petition, the petitioner explained that the beneficiary has been employed as the foreign entity's manager since 1998 and has been responsible for supervising the company's business functions, including: soliciting and procuring new projects; preparing bids and plans for customers; advertising for the company; interviewing, hiring, and training employees; overseeing payroll; procuring bids for supplies; purchasing supplies; inspecting projects; directing billing and payments; preparing monthly and annual budgets; maintaining the business' books and records; and keeping the owner informed of the daily operations of the business. The petitioner submitted the beneficiary's resume as evidence of his employment and qualifications.

In her July 13, 2002 request for evidence, the director requested that the petitioner submit a "definitive statement" describing the beneficiary's foreign employment, including such information as: (1) the beneficiary's position title and qualifications; (2) a list of all duties performed by the beneficiary and the time spent on each; (3) the number of subordinate managers and employees who report directly to the beneficiary, including a description of each subordinate's job title and duties; (4) a description of the essential function managed by the beneficiary; (5) the level of authority held by the beneficiary; (6) the level at which the beneficiary functioned in the foreign organization; and (7) the beneficiary's position within the organizational hierarchy. The director also asked that the petitioner describe the current staffing of the foreign business, including each employee's name, title, job duties, qualifications, length of employment, and the hours worked per week in 2001 and 2002.

In response, the president of the petitioning organization submitted an undated letter outlining the following responsibilities of the beneficiary as the foreign entity's manager:

1. Solicitation and procurement of projects
2. Preparing bids and plans for customers
3. Advertising and promotion
4. Interviewing and hiring of employees
5. Training of employees
6. Payroll
7. Procurement of bids for supplies
8. Purchasing of supplies
9. Supervision of employees
10. Inspection of completed projects
11. Billing
12. Collecting and depositing payments from customers
13. Preparing monthly and annual budgets
14. Maintaining books and records for the company
15. Maintaining the fleet of service vehicles
16. Keeping the owner of the company current

The petitioner submitted employee records from July and August 2002, and documentation identifying each employee's job title, length of employment and the amount of hours worked per week.

In her decision, the director determined that except for the letter from the beneficiary's foreign employer, the record does not contain any evidence that the beneficiary was employed in a qualifying capacity by the foreign entity. The director stated that the only employee records submitted for the German company were from October 2000. The director therefore determined that the petitioner had failed to demonstrate that the beneficiary had been employed abroad in a primarily managerial or executive capacity.

On appeal, counsel states that the beneficiary was employed by the foreign entity in a managerial capacity and continues to receive income from the German company. Counsel submits an organizational chart for the foreign entity, in which the beneficiary is identified as the general manager with the following subordinate employees: assistant general manager; secretary; cleaner; three electronic technicians; and two apprentices.

On review, the petitioner has not established that the beneficiary was employed abroad in a primarily managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

In the instant matter, the petitioner's description of the beneficiary's job duties in the foreign entity clearly demonstrates that the beneficiary was performing the services of the organization rather than managing or supervising the employees who perform the operations of the business. The petitioner outlines the beneficiary's responsibilities as including the following non-qualifying job duties: preparing bids and plans for customers, obtaining bids for materials, purchasing supplies, inspecting completed projects, preparing budgets and maintaining the corporation's books, including billing, collections, and deposits. The petitioner has not identified any employees who would have been responsible for relieving the beneficiary from performing these non-managerial and non-executive job duties. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Additionally, the petitioner neglected to specifically respond to the director's request for additional evidence. The petitioner did not identify the amount of time the beneficiary spent on each job duty, and provided only limited two-word descriptions of the remaining staff's job responsibilities. The petitioner's 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).

The AAO cannot conclude that the beneficiary was employed by the foreign entity in a qualifying capacity. For this additional reason, the appeal will be dismissed.

The AAO will next consider the issue of whether the beneficiary would be employed under the extended petition in a primarily managerial or executive capacity.

In the petitioner's April 17, 2002 letter submitted with the petition, the petitioner explained that as general manager of the U.S. entity the beneficiary would perform job duties similar to those performed in the foreign entity. The specific job duties include: soliciting and procuring new projects; preparing bids and plans for customers; advertising and promoting the company; interviewing, hiring, and training employees; overseeing payroll; procuring bids for supplies; purchasing supplies; inspecting projects; directing billing and payments; preparing monthly and annual budgets; maintaining the business' books and records; and keeping the owner

informed of the daily operations of the business. The petitioner submitted a brief business plan for the petitioning organization indicating that the petitioner anticipated employing two individuals, and electrician and a secretary, during the second and third year of the business' operations.

In the director's July 2002 request for additional evidence, the director asked that the petitioner document the beneficiary's qualifying employment, including a description of the petitioner's current staffing, and each employee's name, job title, job duties, qualifications, length of employment and the amount of hours worked in the years 2001 and 2002.

In response, the petitioner provided the following description of the beneficiary's job responsibilities:

1. Hiring, supervising, and terminating employees. [The beneficiary] will spend approximately 8% of his time with these duties.

2. Training and scheduling of employees. [The beneficiary] will spend approximately 12% of his time with these duties.

3. Develop advertising and promotional programs to introduce Global Home Service, Inc. into the marketplace. [The beneficiary] will spend approximately 22% of his time with these duties.

4. Meeting with clients and potential clients to establish ways to manage their energy. [The beneficiary] will spend approximately 22% of his time with these duties.

5. Planning and preparing proposals for customers based on their needs. Determining the needed supplies and getting cost estimates form suppliers. [The beneficiary] will spend approximately 6% of his time with these duties.

6. Purchasing supplies. [The beneficiary] will spend approximately 4% of his time with these duties.

7. Inspecting completed projects, meeting with customers to determine their satisfaction with the complete projects and final billing. Collecting and depositing payments from customers. [The beneficiary] will spend approximately 20% of his time with these duties.

8. Manage the financial affairs of the company to ensure fiscal soundness. Prepare a monthly balance sheet to keep the owner of the company informed of the current and projected financial situation. [The beneficiary] will spend approximately 12% of his time with these duties.

The petitioner submitted a list of three employees: a secretary, a laborer, and the beneficiary. The secretary was noted as working four hours per week and the laborer working twenty hours per week. The petitioner also provided its Florida Department of Revenue Employer's Quarterly Report for the quarter ending June 30, 2002, which identified the beneficiary and the secretary as the petitioner's two employees during that period.

In her decision, the director determined that the petitioner had failed to demonstrate that the petitioner would employ the beneficiary in a primarily managerial or executive capacity. The director noted that one employee, a secretary, had been hired to work at the U.S. company and was reported on the employer's quarterly return as earning $259.88 for the quarter. The director further noted that the petitioner reported on its Form SS-4, Application for Employer Identification Number, that no employees would be hired during the first twelve months. The director concluded that the beneficiary is providing the business' services, such as installing and repairing outside lamps, sidewalks, and sprinkler systems. Accordingly, the director denied the petition.

On appeal, counsel provides a letter from the petitioner's accountant, which counsel claims details the company's start-up, its projected future activities and the beneficiary's management responsibilities. In the letter, dated April 16, 2003, the petitioner's accountant states that during the six months of the petitioner's operation, "[the beneficiary] was acting as any general manager of a new company would, in first developing business relationships with area contractors and homeowners, with the intention of hiring employees as business dictates." The petitioner's accountant also states that three employees have been hired by the petitioner.

On review, the petitioner has not demonstrated that the beneficiary would be employed by the petitioning organization in a primarily managerial or executive capacity. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. In order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's job duties and the staffing of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

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). Here, the amount of time allotted by the petitioner to each of the beneficiary's job duties indicates that the beneficiary's responsibilities are not managerial or executive in nature. Specifically, the beneficiary would be responsible for the petitioner's advertising and promotions, meeting with clients, planning proposals, purchasing supplies, inspecting completed projects, and preparing financial balance sheets and projections. The beneficiary's proposed tasks are not characteristic of managerial or executive job duties. *See* sections 101(a)(44)(A) and (B) of the Act. Rather, the beneficiary is performing the petitioner's marketing, purchasing, and financial functions. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner has failed to demonstrate that the beneficiary would not spend a majority of his time performing the day-to-day functions of the business.

Additionally, the petitioner has not demonstrated that it employs a subordinate staff that would support the beneficiary in a primarily managerial or executive capacity. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. At the time of filing the petition, the petitioner employed the beneficiary as its general manager and a secretary who worked four hours per week. The petitioner also notes in its business plan that it anticipates employing two people until the fourth year of operations. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company, which involve providing energy management planning to residences and businesses, might plausibly be met by the services of the beneficiary as the general manager and a secretary. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility. The AAO cannot conclude that the beneficiary would be employed by the petitioning organization in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

The record contains evidence that the petitioner hired an additional employee, a general laborer, following the filing of the nonimmigrant petition. An April 2003 letter from the petitioner's accountant submitted on appeal also indicates that the petitioning organization has hired three employees, yet does not document the positions held by each. 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). Accordingly, these statements are not considered in the analysis of the beneficiary's employment capacity.

Lastly, the AAO will address the issue of whether the beneficiary's employment in the United States is temporary. Generally, the petitioner for an L-1 nonimmigrant classification need submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily. However, where the beneficiary is claimed to be the owner or a major stockholder of the petitioning company, a greater degree of proof is required. *Matter of Isovic*, 18 I&N Dec. 361 (Comm. 1982); *see also* 8 C.F.R. § 214.2(l)(3)(vii). Here, although the petitioner has demonstrated that the foreign entity is doing business during the beneficiary's absence, the record is not convincing that the beneficiary will eventually return to Germany. The record does not contain any evidence that the beneficiary retained a residence in Germany. While counsel claims on appeal that the beneficiary resides in the same location as the foreign business, it does not appear, after reviewing the photographs of the foreign entity's premises, that the beneficiary's name is identified on the door as a resident. Additionally, the beneficiary's wife's medical report indicates a different address than that of the foreign business. The record, therefore, does not conclusively establish that the beneficiary's services in the United States would be for a temporary period and that he would be transferred abroad upon the completion of his assignment in the United States.

Though not specifically addressed by the director, the petitioner did not file the petition for an extension within the required time frame. The regulation at 8 C.F.R. § 214.2(l)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the beneficiary's original petition expired on April 20, 2002. However, the petition for an extension of the beneficiary's L-1A status was filed on April 23, 2002, two days following the expiration of the beneficiary's

status. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. As the extension petition was not timely filed, the beneficiary is ineligible for an extension of stay in the United States.

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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.