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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 03 083 51087 Office: CALIFORNIA SERVICE CENTER Date: MAR 03 2005

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, California Service Center, denied the petition for a nonimmigrant visa. Counsel for the petitioner subsequently filed a motion to reopen and reconsider. The director granted the motion and affirmed the previous decision. 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 section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized under the laws of the State of California that is doing business as a construction company. The petitioner claims that it is the branch of the beneficiary's foreign employer, located in Homs, Syria. The beneficiary was granted an L-1A visa to open a new United States office. The petitioner now seeks to employ the beneficiary for an additional four years.

The director denied the petition concluding that the petitioner did not demonstrate that: (1) a qualifying relationship exists between the beneficiary's foreign employer and the petitioning organization; or (2) the beneficiary is employed by the United States entity in a primarily managerial or executive capacity.

In a motion to reopen and reconsider filed by the petitioner's current counsel on July 25, 2003, counsel claimed that the petitioner's former counsel filed inaccurate documents for the requested visa extension and did not provide proper evidence with regard to the beneficiary's employment capacity and the petitioner's relationship with the foreign entity. Counsel submitted a brief and additional documentation in support of the motion.

The director granted the motion and in a decision dated August 11, 2003, affirmed the previous decision. The director stated that "[t]he failure of the previous legal representative to fully represent the petitioner in this case, does not relieve the petitioner of [sic] proving eligibility at the time of filing the petition." The director also noted that the petitioner may not make material revisions to a petition in order to make a deficient petition comply with Citizenship and Immigration Service (CIS) requirements.

On appeal, counsel claims that the petitioner did not make material changes to the petition in an effort to conform to CIS requirements, as the evidence was available when requested by CIS, but was not submitted by the petitioner's former counsel. Counsel also contends that the actions of the petitioner's former counsel "constituted ineffective assistance of counsel which resulted in depriving petitioner of a fair and complete review of its submitted I-129 petition." Counsel submits a brief in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of 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 petitioning organization and the beneficiary's foreign employer as required at § 101(a)(15)(L) of the Act, 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.

The petitioner filed the nonimmigrant petition on December 21, 2002. As the petitioner did not submit an accompanying letter or supplement to Form I-129, the record did not contain a description of the petitioner's relationship with the foreign organization. The director issued a request for evidence on March 3, 2003, asking that the petitioner submit evidence of a qualifying relationship including its articles of incorporation, the minutes from organizational meetings, and the company's stock transfer ledger, clearly identifying all stock certificates and shares issued. The director also requested a detailed list of the owners of the foreign entity and the percentage owned by each.

Counsel responded in a letter dated March 13, 2003, explaining that the petitioning organization, [redacted] of Stanton California [redacted] was established as a wholly owned subsidiary of [redacted] of New York, [redacted], which is where the beneficiary was initially employed "to seek out and obtain new business for [redacted]. In addition to his letter, counsel submitted Form I-129 Supplement, wherein the petitioning entity was identified as a branch of the beneficiary's foreign employer. Alternatively, the petitioner included on the Supplement a description that the foreign entity owns 100% of the stock of [redacted] a New York corporation." Counsel also submitted a stock certificate, which identified the beneficiary as the holder of "Five Thousand Dollars" of stock issued by the petitioning organization, [redacted] of California.

In a decision dated June 19, 2003, the director determined that the petitioner had failed to establish the existence of a qualifying relationship between the petitioning entity and the foreign organization. The director noted that counsel's response to his request for evidence failed to include evidence of the claimed qualifying relationship thereby precluding a material line of inquiry. Accordingly, the director concluded that the petitioner did not demonstrate ownership and control of the petitioning organization by the foreign entity. The director denied the petition.

The petitioner's present counsel filed a motion to reopen and reconsider on July 18, 2003 stating that the petitioning organization is a wholly owned subsidiary of the foreign entity. Counsel submitted a second stock certificate, dated July 18, 2003, identifying the foreign employer as the owner of 1,000 shares of the petitioner's issued stock, and explained that "[the petitioning organization] was organized at the suggestion of [former counsel] to act in California in place and instead of the sister New York corporation." Counsel attached copies of wire transfers, which counsel stated confirmed the foreign entity's contribution of capital to the petitioning organization.

In a decision dated August 11, 2003, the director affirmed his previous decision that the petitioner failed to establish a qualifying relationship between the two organizations at the time of filing the petition. The director stated that the alleged failure of the petitioner's prior counsel to adequately represent the petitioner does not relieve the petitioner from establishing eligibility at the time of filing the petition. The director further noted that a petitioner may not make material changes to a petition for the purpose of making a deficient petition comply with CIS requirements.

On appeal, counsel claims that the petitioner did not make material changes to the nonimmigrant petition in an attempt to comply with CIS requirements. Counsel contends that the director's reliance on *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), is misplaced as the documentation establishing a qualifying relationship was available when requested by the director in March 2003. Counsel explains that the petitioner's former counsel never asked the petitioner for the relevant documents.

Upon review, the petitioner has not demonstrated the existence of a qualifying relationship between the petitioning and foreign entities.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or 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*, 19 I&N 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.*, 19 I&N at 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

The record contains many unresolved inconsistencies regarding the ownership of the petitioning organization, [redacted] of Stanton California. On the I-129 Supplement, the petitioner identified the United States organization as a branch of the foreign entity. Counsel, however, indicated in his March 13, 2002 letter submitted with the Supplement that the petitioning organization is a wholly owned subsidiary of a United States company [redacted] of New York. Alternatively, counsel provided with his letter a stock certificate issued by the petitioning entity and dated July 23, 2002, identifying the beneficiary as the owner of "Five Thousand Dollars" of shares. Moreover, the petitioner's current counsel submitted a second stock certificate, dated July 18, 2003, which is after the filing of the instant petition, identifying the foreign entity as the owner of 1000 shares of the petitioner's 1,000,000 authorized shares of common stock. The AAO notes that the second stock certificate was not signed by the company's president or secretary.

Clearly, the record fails to specifically identify the owner of the petitioning entity and the petitioner's true relationship with the beneficiary's foreign employer. The July 2002 stock certificate, while unclear on the actual number of shares issued, seems to imply that the beneficiary owns $5,000 worth of stock in the petitioning organization. This contradicts the petitioner's claim on the I-129 Supplement that the petitioning organization is a branch of the foreign entity. The AAO notes that because the petitioner is incorporated in the United States as a separate company, it cannot be considered to be a branch, as defined in the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(J). See *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980) (concluding if the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as branch since that corporation is a distinct legal entity separate and apart from the foreign organization.).

In addition, the July 18, 2003 stock certificate, dated approximately seven months after the filing of the instant petition, prevents a finding that at the time of filing the petition a parent-subsidiary relationship existed between the foreign and United States organizations. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978) (stating that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition, and may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts). Even if the stock certificate were issued prior to the date of filing the petition, the petitioner has not reconciled its subsequent issuance of stock with the stock initially issued to the beneficiary in July 2002. This explanation is material to the instant issue in order to determine the petitioner's exact number of shareholders and each stockholder's ownership interest. 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). Here, the petitioner has clearly failed to explain or reconcile the obvious inconsistencies in the record related to ownership of the petitioning organization.

The AAO notes that counsel also failed to address the claim that the petitioning entity is a wholly owned subsidiary of [redacted] of New York. It is unclear whether this claim was mistakenly made by counsel or whether counsel was attempting to demonstrate indirect ownership of the petitioning organization by the foreign entity. Regardless, the record does not contain evidence establishing a relationship between [redacted] and the foreign entity. Without this documentation, the claim of a parent-subsidiary relationship between the two United States organizations is irrelevant in demonstrating an indirect qualifying relationship between the petitioner and the beneficiary's overseas employer.

Furthermore, despite counsel's claim on appeal, the revised July 2003 stock certificate submitted by the petitioner on motion appears to be an attempt on the part of the petitioner to conform to CIS requirements following the director's identification of a deficiency. As noted previously, the stock certificate bears a date subsequent to the filing of the petition. As correctly noted by the director in his decision, 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).

Counsel contends on appeal that relevant documentation establishing a qualifying relationship was available when requested by the director, but not requested of the petitioner or submitted by the petitioner's former counsel. Counsel states that the evidence is now submitted as proof that it existed when requested in March 2003, and to rebut the director's finding that the petitioner is attempting to make a material change to the nonimmigrant petition on appeal.

Counsel's claim is not persuasive. The regulation allows the director to request additional evidence. 8 C.F.R. § 204.5(j)(3)(ii). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Based on the foregoing discussion, the petitioner has not demonstrated the existence of a qualifying relationship between the petitioning entity and the foreign organization. Accordingly, the appeal will be dismissed.

The AAO will next consider whether the beneficiary would 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), 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.

The petitioner noted on the nonimmigrant petition that the beneficiary would be employed in the United States as the petitioner's general manager and would "oversee construction operations." In his March 3, 2003 request for evidence, the director requested that the petitioner clarify the beneficiary's place of employment in the United States and explain how the beneficiary's employment capacity would continue without change from his current position. The director also asked that the petitioner submit an organizational chart of the United States company clearly identifying its managerial hierarchy, staffing levels, and the beneficiary's position within the organization. The director stated that the chart should include a list of all employees under the beneficiary's supervision and a description of each employee's job duties, educational level and salary. The director further requested a detailed description of the daily job duties performed by the beneficiary, and asked that the petitioner submit copies of its federal and state quarterly wage reports.

In his March 13, 2002 response to the director's request for evidence, counsel explained that the beneficiary was presently and would continue to be employed as the petitioner's general manager in its Stanton, California office location. Counsel stated that the beneficiary's job duties include "setting up the business structures necessary to operate [the petitioning organization]," and performing as both project manager and general manager on all construction projects, including such tasks as researching new projects, obtaining financing, permits and materials, and meeting and negotiating with sub-contractors and real estate brokers. Counsel provided the petitioner's federal and state quarterly tax returns for the quarters ending March, June and September 2002. The beneficiary was identified on the forms as the sole employee of the petitioning organization.

The director issued a decision on June 19, 2003, concluding that the petitioner had failed to demonstrate that the beneficiary would be employed by the petitioning organization in a primarily managerial or executive capacity. The director stated that because the petitioner does not employ personnel other than the beneficiary, "it becomes questionable as to whether the operator of the business is engaged *primarily* in managerial or executive duties." (emphasis in original). The director determined that the record was insufficient to conclude that the beneficiary would supervise and control the work of other supervisory, professional or managerial employees who would relieve him from performing the daily non-qualifying tasks of the business. The director also stated that the beneficiary was not shown to be employed at a senior level within the organizational hierarchy. The director stated "[i]n light of the overall purpose and stage of development of the organization, the petitioner has not demonstrated that the beneficiary is performing primarily managerial or executive responsibilities within the meaning of 8 C.F.R. [§] 214.2(l)(ii)(B)." Consequently, the director denied the petition.

In the July 18, 2003 motion to reopen and reconsider, counsel claimed that the beneficiary would be employed in an executive capacity as the company's chief executive officer. Counsel stated:

> [The] Beneficiary is or will be responsible in planning, developing and establishing policies; in conferring with company officials to plan business objectives; in developing organizational policies; in coordinating functions and operations between divisions and departments; in establishing responsibilities and procedures for attaining objectives; in directing and coordinating formulation of financial programs to provide funding for new or continuing operations to increase company growth; in developing marketing strategies and tactics; in directing ongoing competitive analysis; in overseeing the hiring of management personnel and in overseeing outside management personnel involved in assisting the Petitioner in the development of its enterprise.

Counsel stated that the beneficiary would also be employed in a primarily managerial capacity as he performs the high-level responsibilities outlined in the definition of "managerial capacity" and does not devote the majority of his time to performing day-to-day functions of the company. Counsel explained that until recently, the beneficiary has overseen outside contractors in the construction of homes. Counsel stated that during the past quarter, the petitioner expanded its business activities and now oversees two staff members, an administrative assistant, a cost estimator, and outside contractors. Counsel explains that its two employees and the outside contractors are personally responsible for performing the daily routine operations of the business and for completing the petitioner's construction projects.

In his August 11, 2003 decision, the director affirmed his previous decision that the petitioner had not established that the beneficiary would be employed in the United States entity in a primarily managerial or executive capacity. The director again stated that the alleged failure of the petitioner's prior counsel to adequately represent the petitioner does not relieve the petitioner from establishing eligibility at the time of filing the petition. The director further noted that a petitioner may not make material changes to a petition for the purpose of making a deficient petition comply with CIS requirements.

On appeal, counsel again claims that the petitioner did not make material changes to the nonimmigrant petition in an attempt to comply with CIS requirements. Counsel contends that the director's reliance on *Matter of Izummi* is misplaced as the documentation establishing the beneficiary's employment in a qualifying capacity was available when requested by the director in March 2003. Counsel explains that the petitioner's former counsel never asked the petitioner for the relevant documents.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

The petitioner has not specifically identified the position in which the beneficiary would be employed in the United States entity. Both the petitioner and counsel indicated on the nonimmigrant petition and in its response to the director's request for evidence that the beneficiary would occupy the position of "general manager" in the organization. Counsel also stated in its March 13, 2002 response that the beneficiary would perform as both the "project manager" and "general manager" on construction projects, yet did not define how the beneficiary's role in each position would differ. In the motion to reopen and reconsider, petitioner's counsel identified the beneficiary as the "chief executive officer" of the company. Neither the petitioner nor counsel has addressed the inconsistent references to the beneficiary's position, nor clarified the position of the beneficiary. In order to determine the beneficiary's true employment capacity the petitioner must be consistent in identifying the position offered to the beneficiary. As the regulations allow for employment in either a "managerial capacity" or an "executive capacity," it is essential that the petitioner clearly identify the beneficiary's specific job position and how the position satisfies either capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii).

Notwithstanding the inconsistent job titles assigned to the beneficiary, the petitioner's description of the beneficiary's job duties indicate that he would be engaged in performing non-qualifying operations of the business. Counsel stated in its March 13, 2002 response to the director's request for evidence that the beneficiary's tasks as project and general manager would include obtaining financing, permits and materials, and meeting and negotiating with contractors and real estate brokers. Based on counsel's description, the beneficiary would personally perform the non-managerial and non-executive functions associated with the petitioner's business as a construction company, rather than managing employees who would relieve the beneficiary from performing these day-to-day operations. In addition, the record contains proposals signed and sent from the beneficiary to prospective customers, thereby demonstrating that the beneficiary is personally performing the negotiations and sales of the petitioning organization. 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 at 604.

The director correctly observes that the reasonable needs of the petitioning organization would not be met by the services of petitioner's staff, which includes the beneficiary only. 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. On motion, although counsel submitted a list of contractors used by the petitioning organization, there is no evidence that the company utilized these contractors or the claimed subcontractors at the time of filing the petition. 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 at 248. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Moreover, the additional job description provided by counsel on motion fails to define the specific job duties the beneficiary would perform as either a general manager or a chief executive officer. Counsel's broad claims that the beneficiary would plan and establish policies and business objectives, develop organizational policies, coordinate functions between divisions and departments, direct financial programs, develop marketing strategies and oversee hiring are mere generalizations of high-level responsibilities. The petitioner is obligated to provide a detailed description of the services to be performed by the beneficiary. *See* 8 C.F.R. § 214.2(l)(3)(ii). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N at 534; *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO recognizes counsel's claim that since the filing of the petition the petitioner has expanded its personnel to include an administrative assistant and cost estimator. This evidence however will not be considered as the workers were not employed by the petitioner at the time the petition was filed. 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 at 248.

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed for this additional reason.

The AAO will next address counsel's claim on appeal that the actions of the petitioner's former counsel constituted ineffective assistance of counsel.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with

respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

Here, counsel has not satisfied the above-outlined requirements. Therefore, the AAO will not consider the claim of ineffective assistant of counsel. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N at 503.

Beyond the decision of the director, an additional issue is whether 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). While the petitioner submitted invoices and statements dated throughout the year 2001, this documentation actually applies to the business operations of [redacted] of New York. The petitioner's articles of incorporation indicate that the petitioning organization was not incorporated under the laws of the State of California until December 2001. Of the additional documentation reflecting transactions by the petitioner in 2002, the earliest is dated July 26, 2002. As the instant petition was filed on December 21, 2002, five months after the petitioner began its business operations, the petitioner has failed to satisfy the regulatory requirement that it has been doing business for the year prior to filing the petition. For this additional reason, the appeal will be dismissed.

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).

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.