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U.S. Citizenship and Immigration Services

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[redacted]

FEB 15 2005

File: LIN-02-262-53614 Office: NEBRASKA SERVICE CENTER Date:

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)

IN 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, Nebraska 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 President and Chief 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 limited liability company organized in the State of Minnesota that seeks to engage in the business of stainless steel product manufacturing and distribution. The petitioner claims that it is the subsidiary of T.M.I. Food Industries and Equipment, Ltd., located in Misgav, Israel. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that: (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; and (2) the petitioner has been doing business throughout the one-year period prior to filing the petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a managerial or executive capacity, and the fact that the beneficiary is the petitioner's sole employee does not undermine such a finding. Counsel further asserts that the evidence of record clearly demonstrates that the petitioner has been doing business over the previous year. In support of these assertions, counsel submits a brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision making; and

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

In the initial petition filed on August 15, 2002, the petitioner did not provide a direct description of the beneficiary's job duties. In an attached support letter, the petitioner discussed its operations over the previous year, including the ordering of metal-working machinery and developing relationships with potential customers. The petitioner stated that "[the beneficiary] is now interviewing prospective employees and is functioning in his multiple role as the Human Resources Director as well."

On October 18, 2002, the director requested additional evidence. Regarding the beneficiary's employment capacity, the director requested: (1) copies of the petitioner's Forms 941, Employer's Quarterly Tax Return, for the year prior to filing the petition; (2) copies of the petitioner's State Unemployment Compensation Form for the prior year; (3) a more detailed description of the beneficiary's duties that indicates his actual day-to-day tasks, with an accounting of the percentage of time he previously dedicated and currently dedicates to each task; (4) a detailed organizational chart for the petitioner that illustrates the structure as of August 15, 2002, including the names of all departments, teams, employees, their titles, and a detailed description of their job duties; and (5) evidence of each worker's employment such as pay stubs.

In a response dated January 7, 2003, in part the petitioner submitted: (1) copies of Forms 941, Employer's Quarterly Tax Return, for the second and third quarters of 2002; (2) a prospective organizational chart for the petitioner with descriptions of various positions; (3) a letter further describing the beneficiary's duties as follows:

> [The beneficiary] spent most of the initial few months developing relationships with manufacturers and customers, while continuing to direct [the foreign entity's] operations in Israel.

As President and Chief of [the petitioner], [the beneficiary] is responsible for the overall organization and operation of the new company. He has executive direction over the management of the following functions: company formation/legal, sales and marketing, operations and production and administration.

* * *

[The beneficiary] has been instrumental in securing initial contracts with suppliers and customers, the procurement of tools and equipment and the establishment of income projections. Once these have been concluded, he will expand and amend the business proposal included in the previously submitted documentation. [The beneficiary] has established business objectives for the company. He also planned and developed operational, sales, production, personnel, and administrative policies to guide [the petitioner] in its daily operations.

As President, [the beneficiary] has been intimately involved with all initial sales contracts as well as major projects. He has established and maintained a client base and sought out new areas of investment. These are currently (January 2003) being transferred to David Mastbaum, who will serve as the company's Sales Manager. In addition, Mr. Mastbaum will call on customers, maintain current account relationships, arrange appointments with prospective customers, open new accounts and execute new and current projects. He will advise clients with regard to use of optimal materials, delivery times and prices as well as negotiate contracts and coordinate established production delivery times.

[The beneficiary] has also been responsible for the performance of Operations and Production at [the petitioner's] facility. He has established production and delivery goals, communications processes, and standards for the quality of design and manufacture. He has procured all equipment necessary for the manufacture and design of industry-specific equipment. As business expands, he will be instrumental in the initial hiring of the production staff to include a shop manager, welders, a welder's assistant, and a machine operator.

* * *

He also directs the Administrative responsibilities of the company. The central office staff currently consists of an Accountant, who is contracted to audit the company records and handle tax issues with additional employees to be hired, as business requires. [The beneficiary] is the primary person responsible for the management of finances, handling of accounts payable and accounts receivable, establishing personnel practices and maintaining personnel records and inventory control. . . . [The beneficiary] thus far has directed payment, acceptance or pricing arrangements and bill collecting.

* * *

> [The petitioner] has retained the services of a Corporate Counsel, who has advised the President in the initial legal establishment of the company, assisted the company in its further legal needs as well as its plans for future expansion.
>
> * * *
>
> Current Percentage breakdown of duties:
>
> 20% Duties relating to President of [the foreign entity]
>
> 25% Establishing financial and production goals; coordinates production and delivery times; oversees accounts and finances
>
> 35% Calls on customers, maintains current account relationships, arranges appointments with prospective customers
>
> 15% Engineer, design and manufacture product according to terms of agreement with customers
>
> 5% Produce inventory, financial, production and other reports.

On March 12, 2003, the director denied the petition. The director determined, in part, that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director stated that:

> [A]s the sole employee, [the beneficiary's] primary assignment cannot be supervising a subordinate staff of professional, managerial, or supervisory personnel. The service is not persuaded that operating a company in its entirety constitutes managing an essential function within an organization as set forth at § 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not demonstrated that the beneficiary is operating at a senior level within an organizational hierarchy as required for a manager of an essential function.

On appeal, counsel asserts that that petitioner provided sufficient evidence to show that the beneficiary will be employed in a primarily managerial and executive capacity, and that "[t]he Service Center failed to give any weight and credibility to that evidence." The petitioner submits: (1) an affidavit from the beneficiary further describing his duties; and (2) extensive documentation that discusses the petitioner's operations and employees hired after the date of filing the petition. In his brief, counsel states that "the Service Center incorrectly treated [the] Petitioner's . . . small corporate size as dispositive with regard to being disqualified for eligibility" and cites *Johnson-Laird, Inc. v. INS*, 537 F. Supp. (D. Or. 1981) to stand for the proposition that a sole proprietor can qualify for L-1 classification. In his affidavit, the beneficiary describes his duties as follows:

> [A]t this time; I am performing most of the executive functions . . . . I am responsible for manufacturing, marketing, sales, purchasing, finance, personnel, training, overseeing administrative functions, property management, transportation and legal accounting service providers . . . . I negotiate contracts for in house vendors and leases . . . . I negotiated the leases for our warehouse space in Plymouth, Minnesota . . . . I was responsible for the entire process of purchasing the very expensive equipment [the petitioner] needs to manufacture to my quality standards . . . . I will monitor the products and meet with the employees to discuss methodology for improving efficiency if necessary, product modifications or improvements . . . . I am continually and actively seeking new business opportunities and keeping a pulse on the trends in the food industry . . . . My engineering and manufacturing skills allow me to develop a prototype piece to offer to a potential customer . . . . It is my responsibility to determine what the appropriate delivery-promise date would be based upon my extensive knowledge of the manufacturing processes . . . . Consequently, I must be familiar with the entire process of manufacturing – from the purchase of raw materials to the method of delivery on the other side of the world. Planning a roadmap for this assembly line of issues has become a critical part of my business philosophy . . . . I am actively involved in the day to day operations and am physically present on the floor everyday. I personally direct the design, development, fabrication delivery and installation of our custom manufactured stainless steel products and services . . . .

Upon review, counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In the instant case, counsel for the petitioner asserts that the beneficiary is primarily engaged in both managerial duties and executive duties. Therefore, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act.

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).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's tasks, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner provided a lengthy job description for the beneficiary, including a breakdown of the amount of time he will spend on categories of tasks. Yet, the record suggests that within each category there are non-qualifying duties that the beneficiary will perform. For example, the petitioner states that the beneficiary will spend 25 percent of his time "[e]stablishing financial and production goals; coordinat[ing] production and delivery times; [and] oversee[ing] accounts and finances." Within this

category, it is evident that "oversee[ing] accounts and finances" includes numerous non-managerial and non-executive tasks such as managing a checking account, paying routine bills, compiling and submitting payroll data, and performing basic accounting tasks. Further, the petitioner indicates that the beneficiary will spend five percent of his time "[producing] inventory, financial, production and other reports." Within this category, it is evident that "[producing] inventory . . . reports" includes the non-managerial and non-executive task of actually taking inventory of the petitioner's goods.

Additionally, several of the categories of tasks described by the petitioner address duties that are exclusively non-qualifying. For example, the petitioner states that the beneficiary will spend 15 percent of his time "[engineering], design[ing] and manufactur[ing] product[s] according to [the] terms of agreement[s] with customers." In his affidavit on appeal, the beneficiary states that his "engineering and manufacturing skills allow [him] to develop a prototype piece to offer to a potential customer." These tasks involve directly producing the petitioner's products and providing the petitioner's services. 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). Further, the petitioner states that the beneficiary will spend 35 percent of his time "[calling] on customers, maintain[ing] current account relationships, [and] arrang[ing] appointments with prospective customers." These tasks appear to be routine sales functions, and do not fall directly under traditional managerial or executive duties as defined in the statute.

Thus, the record suggests that up to 75 percent of the beneficiary's time is invested in non-qualifying duties, and the petitioner has not established that he will be primarily employed in a managerial or executive capacity. *See* section 101(a)(44)(A) and (B) of the Act; *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). 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.

The petitioner operates as a stainless steel product manufacturer and distributor. Thus, it is evident that the reasonable needs of the petitioner require its employees to perform numerous non-managerial and non-executive tasks such as designing stainless steel products, operating manufacturing machinery, soliciting sales and executing sales transactions, performing basic accounting and managing a checking account, paying bills, tracking inventory and ordering materials, receiving deliveries, arranging shipping of goods, answering the telephone, and providing custodial services. As the beneficiary is the sole employee of the petitioner, it is clear that he must perform all of these non-qualifying tasks. Thus, the reasonable needs of the petitioner

suggest that the beneficiary must spend a significant amount of time performing the tasks necessary to provide the petitioner's services. Again, 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. at 604. The petitioner has failed to establish that these non-managerial and non-executive tasks do not constitute the majority of the beneficiary's time. *See* 8 C.F.R. § 214.2(l)(3)(ii).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* Section 101(a)(44)(A)(ii) of the Act. Counsel indicates and the record confirms that the beneficiary was the petitioner's sole employee as of the date of filing the petition. The petitioner hired additional employees after the filing date. Yet, 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, the fact that the petitioner hired employees after filing the petition is not probative of the beneficiary's eligibility as of the filing date. The petitioner provides that it uses the services of an accountant and corporate attorney. Yet, the record contains no evidence to suggest that the beneficiary has direct supervisory authority over the accountant or attorney. Thus, the petitioner has not shown that the beneficiary manages subordinate employees who are supervisory, professional, or managerial. *See* Section 101(a)(44)(A)(ii) of the Act.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, as noted above the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248. Furthermore, 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. 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. In the instant matter, the petitioner states that the ongoing conflict between Israelis and Palestinians produced a negative impact on the petitioner's operations during the first year of business. However, the regulations do not provide for the consideration of such external factors in this proceeding. The petitioner has not shown that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Counsel states that "[t]he record is void of any evidence that [the beneficiary's] responsibilities as President of [the foreign entity] and as President and Chief Manager of [the petitioner] are clerical or that the duties described are vague or nondescript." However, in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). In denying a visa petition, the director and the AAO do not have the burden to point to evidence that proves that the petitioner is not eligible for the benefit sought.

Counsel references the director's statement that "the fact that an individual operates a small business does not establish eligibility for classification as a manager/executive within the meaning of . . . the Act." Regarding this statement, counsel asserts that "the Service erred in applying an incorrect legal standard and/or confusing the applicable burdens of proof." The plain meaning of the director's statement provides that, *by itself*, the fact that an individual operates a small business does not serve as prima facie evidence that he is eligible for classification as a multinational manager or executive. Further evidence must be examined to determine if such a beneficiary is employed in a primarily managerial or executive capacity. The record does not reflect that the director applied an incorrect legal standard regarding the beneficiary's employment capacity or eligibility for L-1A classification.

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily executive or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3). For this reason, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner has been doing business throughout the one-year period prior to filing the petition.

The regulation at 8 C.F.R. § 214.2(l)(ii)(H) defines the term "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.

In the initial petition, the petitioner stated that it seeks to engage in the business of stainless steel product manufacturing and distribution. The petitioner submitted evidence of its operations, including: (1) documentation of the petitioner's purchase of metal working equipment in June, July, and August 2002; (2) an untranslated document purported to relate to the petitioner's purchase of metal working equipment; (3) a business proposal for the petitioner; (4) a letter from an attorney, dated July 25, 2002, attesting to the fact that he represented the petitioner in transactions from November 2001; (5) a letter from an accountant attesting to the fact that his firm has been engaged by the petitioner for accounting, tax compliance, and planning since May 29, 2001; (6) an account printout from a bank or financial institution, dated July 22, 2002; and (7) evidence of a $20,000 deposit into the petitioner's Wells Fargo bank account on June 26, 2002.

On October 18, 2002, the director requested additional evidence. Regarding the petitioner's business operations, the director requested: (1) a copy of the petitioner's 2001 United States Corporate Federal Tax Return; (2) copies of the petitioner's Forms 941, Employer's Quarterly Tax Return, for the year prior to filing the petition; (3) copies of the petitioner's State Unemployment Compensation Form for the prior year; (4) a detailed organizational chart for the petitioner; and (5) evidence that the petitioner was engaged in the regular, continuous and systematic provision of goods and services.

In a response dated January 7, 2003, in part the petitioner submitted: (1) a copy of the petitioner's 2001 Form 1065, U.S. Return of Partnership Income; (2) copies of Forms 941, Employer's Quarterly Tax Return, for the

second and third quarters of 2002; (3) a prospective organizational chart for the petitioner; (3) a document titled "Expense List" detailing expenses from May to November of an unspecified year; (4) a letter from the owner of City Bagels, indicating that it conducted business with the petitioner during October and November of 2002; (5) invoices that the petitioner issued to clients for services performed, dated October 5, October 24, November 14, November 19, November 21, December 2, and December 13, 2002; and (6) a letter from Seelye Craftsmen Co., dated November 22, 2002, thanking the petitioner for business "conducted in the past year."

On March 12, 2003, the director denied the petition. The director determined, in part, that the petitioner did not establish that it has been doing business throughout the one-year period prior to filing the petition. Specifically, the director stated that:

> The submitted tax documents reflect little or no economic activity. The petitioner submitted invoices for goods and services provided, all issued subsequent to the filing of the petition. The record contains no evidence to establish that at the time this petition was filed the petitioner was engaged in the regular, systematic and continuous provision of goods and services.

On appeal, counsel asserts that the evidence of record clearly demonstrates that the petitioner has been doing business over the previous year. Counsel states that, in response to the director's request for evidence, "[u]nfortunately, a complete response with a sufficient evidentiary showing was not made at that time nor was an accurate flow chart submitted which evidenced the true operations of the companies . . . . In connection with this motion, [the] Petitioner has now furnished complete and accurate records . . . ." In support of these assertions, the petitioner submits: (1) an opinion letter from Jeffrey Rose, CPA, dated April 7, 2003, discussing the petitioner's operations; (2) an affidavit from the beneficiary; and (3) a document prepared by Edward F. Schultz titled "Business Validation Report" compiled from March 26 to April 2, 2003.

Upon review, counsel's assertions are not persuasive. As stated above, in the request for evidence the director requested evidence that the petitioner was engaged in the regular, continuous and systematic provision of goods and services. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. 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).

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). Counsel concedes that the petitioner's response to the director's request for evidence was inadequate. The petitioner now provides numerous documents on appeal to address the director's concerns, including an opinion letter and a detailed report on the petitioner's business activities. If the petitioner had wanted this evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency

of these documents submitted on appeal. *Id.* The appeal will be adjudicated based on the record of proceeding before the director.

In the support letter submitted with the initial petition, the petitioner described various metal-working machines that it had purchased from a company in Italy, and indicated that "delivery is expected any day now." The petitioner further described machines it intended to purchase in the future. The petitioner provided documentation of its purchase of metal working equipment in June, July, and August 2002. These statements and documents reflect that, as of the filing date of the petition, the petitioner did not have possession of equipment necessary to provide its stainless steel products. The petitioner did not commence purchasing such equipment until two months before filing the present petition. The fact that the petitioner did not have the necessary equipment to provide its products at any time during the one-year period prior to filing seriously undermines a finding that the petitioner was doing business during that period. *See* 8 C.F.R. § 214.2(l)(ii)(H).

The petitioner provided an untranslated document purportedly relating to its purchase of metal working equipment during the one-year period prior to filing the petition. Because the petitioner failed to submit certified translations of the document, the AAO cannot determine whether it supports the petitioner's claim to be doing business. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

The petitioner provided a letter from an attorney, dated July 25, 2002, attesting to the fact that he represented the petitioner in transactions from November 2001. Yet, the petitioner has failed to describe the transactions to which the attorney refers. 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). The petitioner submitted a letter from an accountant attesting to the fact that his firm has been engaged by the petitioner for accounting, tax compliance, and planning since May 29, 2001. Yet, the fact that the petitioner engaged in planning and filed tax forms does not serve as evidence that the petitioner has engaged in "the regular, systematic, and continuous provision of goods and/or services" throughout the previous year. *See* 8 C.F.R. § 214.2(l)(ii)(H). Further, the petitioner's July 22, 2002 bank statement and evidence of a $20,000 deposit on June 26, 2002 do not serve as evidence of doing business from August 2001 to August 2002, as they do not indicate the source of referenced funds, and only address a one-month period. *See id.*

In response to the director's request for evidence, the petitioner submitted a copy of its 2001 Form 1065, U.S. Return of Partnership Income. As this document shows that the petitioner had no income in 2001, it suggests that the petitioner was not doing business during that period. The petitioner's Forms 941, Employer's Quarterly Tax Return, for the second and third quarters of 2002, both show that the petitioner paid no salaries or wages during those respective periods, and thus do not serve as evidence that the petitioner was doing business during those periods. The petitioner provided a document titled "Expense List" detailing expenses from May to November of an unspecified year. As the year is not provided, the AAO cannot determine if the document supports that the petitioner was doing business for the previous year. The petitioner submitted a letter from Seelye Craftsmen Co., dated November 22, 2002, thanking the petitioner for business "conducted in the past year." Yet, the letter does not describe what business was conducted, or the frequency that it was

conducted. Again, 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. at 190.

The petitioner further submitted a letter from the owner of City Bagels, indicating that it conducted business with the petitioner during October and November of 2002, as well as invoices that the petitioner issued to clients for services performed, dated October 5, October 24, November 14, November 19, November 21, December 2, and December 13, 2002. These documents relate to the petitioner's business activity that occurred after August 15, 2002, the date 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 Dec. 248 (Reg. Comm. 1978). As this evidence relates to activity that occurred after the date of filing, it is not probative of whether the petitioner was doing business during the one-year period prior to filing,

Based on the foregoing, the evidence provided by the petitioner is insufficient to establish that it has been doing business for the previous year. 8 C.F.R. § 214.2(l)(14)(ii)(B). For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it has a qualifying corporate relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). Though the director commented that "[t]he regulations defining qualifying organizations specifically excludes [sic] the mere presence of an agent or office of the organization," the director did not specifically find that the petitioner and the beneficiary's foreign employer do not possess a qualifying relationship. However, in the appellate brief counsel states that "the record establishes the existence of the requisite affiliate relationship between [the foreign entity] and [the petitioner] . . . in order to be considered qualifying organizations, contrary to the Service Center's unsupported findings."[1] Upon examination of the evidence of record, the petitioner has failed to submit sufficient documentation to show its ownership and the ownership of the foreign entity as of the date of filing the petition.

In the initial petition, the petitioner indicated that the foreign entity is 100 percent owned by the beneficiary. As evidence of this, the petitioner provided a brief letter from an accountant, dated July 21, 2002, attesting that the beneficiary owns the foreign entity. The accountant does not specify, and the petitioner does not submit, the documents that the accountant presumably examined to form this conclusion. In response to the director's request for evidence, the petitioner provided another brief letter from the same accountant, claiming that the foreign entity is 100 percent owned by the beneficiary. Again, the accountant fails to identify the basis for his conclusion. The petitioner submitted an undated document from the Israeli Ministry of Justice, Registrar of Companies, that states that the beneficiary owns the foreign entity's 100 issued shares. The document further indicates that the foreign entity has the potential to issue a total of 27,100 shares. As this

[1] Regarding counsel's comment that the director's findings are unsupported, the AAO again notes that, in visa 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. The director and the AAO do not have the burden of affirmatively pointing to evidence to support negative findings. *Id.*

document is not dated, it is unclear whether the foreign entity issued additional shares after its creation, and if so, who owns such shares. 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. at 190. Though counsel states that the foreign entity is wholly-owned by the beneficiary, without sufficient 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 Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, the record is inconclusive regarding who owned the foreign entity as of the date of filing the petition.

Based on the foregoing, the record is insufficient to show a qualifying corporate relationship. *See* 8 C.F.R. § 214.2(l)(14)(ii)(A). 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.