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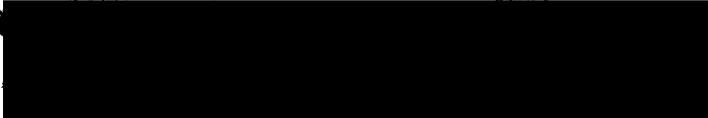
Office: VERMONT SERVICE CENTER

Date: MAY 23 2005

IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner claims to be a branch of Almacen Escarcha, located in Colombia. The petitioner plans to engage in the import, retail and wholesale of various products. The U.S. entity was incorporated in the State of New York on June 20, 2002. The petitioner seeks to hire the beneficiary as a new employee to open its U.S. office. Accordingly, on July 2, 2002, the U.S. entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an executive or manager for one year. The petitioner endeavors to employ the beneficiary's services as the U.S. entity's general manager.

On October 9, 2002, the director denied the petition. The director determined that the petitioner failed to establish that the petitioner had secured sufficient physical premises to house the new office and that the business would support a managerial or executive position within one year of the approval.

On appeal, the petitioner's counsel refutes the director's findings.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. 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. Furthermore, 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.

Pursuant to 8 C.F.R. § 214.2(l)(3), 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.

Pursuant to 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The first issue in this proceeding is whether the petitioner has secured sufficient physical premises to house the new office pursuant to 8 C.F.R. § 214.2(l)(3)(v)(A).

Initially, the petitioner failed to submit evidence that it had secured sufficient physical premises to house the new office. As a result, on July 11, 2002, the director requested additional evidence. Specifically, the director requested the petitioner's original lease agreement or other legal agreement such as a bill of sale, the telephone number and a statement from the company's lessor identifying the square footage of the leased premises. In addition, the director requested photographs of the leased premises and a copy of further types of evidence such as a copy of the petitioner's utility bills, trash removal bills, telephone bills, water bills, and financial records. Finally, the director requested evidence that the leased premises is of sufficient size to conduct international trade, including shipping and receiving facilities. The director requested a statement from the petitioner's lessor identifying the square footage of the premises, and the telephone number of the lessors.

On October 3, 2002, the petitioner responded to the director's request by submitting a commercial lease agreement commencing on July 5, 2002 and ending on July 5, 2003. In addition, counsel

claimed, "There will be no need at the onset for warehouse facilities. Import brokers will be retained and space rented on an as needed basis until the volume justifies permanent rental of warehouse facilities."

On October 9, 2002, the director denied the petition. The director determined that the petitioner failed to establish that the petitioner had secured sufficient physical premises to house the new office. The director found that the record contained no photos or other historical documentation of the business, or evidence that the office site is zoned for commercial use.

On appeal, the petitioner's counsel claims that the "petition was denied because lease was not in commercial zone. Regulations do not require this. Many businesses are run from home offices, especially businesses involving Internet sales such as this one."

Upon review, counsel's assertions are not persuasive. Although the petitioner submitted a lease agreement, the petitioner did not submit the requested photographs of the leased premises, describe its anticipated space requirements for its import business, or submit any further additional evidence such as a copy of the petitioner's utility bills, trash removal bills, telephone bills, water bills, and financial records as requested by the director. Therefore, the existence of the office is questionable. 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). Furthermore, the petitioner initially presented its lease as a commercial lease and indicated in its business that the leased premises is a retail store. On appeal counsel concedes that the petitioner's lease is merely for a home office. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Moreover, willful misrepresentation in these proceedings may render the beneficiary inadmissible to the United States. Section 212(a)(6)(C) of the Act.

In sum, based on the insufficiency of the information furnished, it cannot be concluded that the petitioner had secured sufficient space to house the new office. For this reason, the petition may not be approved.

The second issue in this proceeding is whether the petitioner will support an executive or managerial position within one year of the approval of the petition.

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

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

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

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

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

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.

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. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

The petitioner initially submitted minimal evidence describing the nature of the proposed United States operation. On July 11, 2002, the director issued a request for additional evidence. In particular, the director requested: 1) a description in detail of the type of business to be conducted in the United States; 2) an explanation of how the new company will grow to be a sufficient size to support a managerial or executive position; 3) a copy of the U.S. entity's business plan for

commencing the start-up of the company that gives specific details and dates; and, 4) a detailed proposed organizational chart and position descriptions for the U.S. entity's future employees.

In response, the petitioner submitted a business plan describing its purpose, the company's history, marketing, and management plan, the timetable for operations, customers and services, market analysis, profit and loss statements, and an organizational chart.

On October 9, 2002, the director denied the petition because the petitioner failed to establish that the petitioner would support a managerial or executive position within one year of the approval. The director found that the petitioner submitted: 1) an insufficient description of the day-to-day duties inherent in each of the subordinate employees' positions; 2) insufficient evidence that the beneficiary will function at a senior level within an organizational hierarchy; and, 3) no evidence to support the business plan projections.

On appeal, counsel claims the "the director failed to justify or explain his conclusion that the business plan is inadequate, and asserts that the denial was based on mere speculation."

In examining the business plan, the precedent decision, *Matter of Ho*, 22 I&N Dec. 206, 213 (Comm. 1988), lists possible criteria for establishing an acceptable business plan. "The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions." The decision concluded, "Most importantly, the business plan must be credible." *Id.* at 213. Although *Matter of Ho, id.*, addresses the specific requirements for the immigrant investor visa classification, the discussion of the business plan requirements is instructive for the L-1A new office requirements.

On review, the petitioner's business plan is general. For instance, the business plan lists the company's history, marketing trends, timetables, and an overview of the products. These goals are non-specific and broad as the petitioner indicated that from October to December 2002, "[a]rrangements are made for import of clothing items from Colombia. A campaign is initiated for the wholesale marketing of ethnic food products to local outlets." In addition, the petitioner described in an organizational chart and in the business plan that the proposed U.S. management plan included two directors and Internet and retail sales personnel. However, it is unclear, as correctly stated by the director, how the company will grow to a size capable of supporting a managerial level position within one year. Although the petitioner submitted brief descriptions of two of the subordinate employees' duties, the descriptions are uninformative in determining whether the U.S. office will support a managerial or executive position within one year of its approval. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, although the AAO acknowledges that the beneficiary may perform some non-managerial or non-executive tasks during the first year of operation, it is uncertain how the beneficiary will be relieved from primarily performing these nonqualifying duties. The petitioner failed to adequately describe the beneficiary's duties. Specifics are clearly an important indication

of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In sum, the petitioner has failed to clearly establish the proposed nature of the office describing the scope of the entity and its organizational structure. See 8 C.F.R. § 214.2(l)(3)(v)(C)(1). Thus, given the business plan's generalities and lack of applicable information, it cannot demonstrate whether the new office will support a manager or executive within one year of filing this petition. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the record contains insufficient evidence to establish that the overseas company employed the beneficiary in a primarily managerial or executive capacity. As previously stated, the petitioner must submit evidence that within three years preceding the beneficiary's application for admission into the United States, the foreign organization employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. See 8 C.F.R. § 214.2(l)(3)(v)(b). On review, the petitioner provided a vague description of the beneficiary's duties that failed to establish what day-to-day duties the beneficiary performs. For instance, on the Form I-129, the petitioner described the beneficiary's foreign duties as "Manages Company." The petitioner did not, however, describe how the beneficiary managed the foreign entity or what duties are required to manage the foreign operation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The AAO concludes that the petitioner has failed to establish that the beneficiary has been employed in a qualifying managerial or executive capacity abroad as required by 8 C.F.R. § 214.2(l)(3)(v)(b). For this additional reason, the petition may not be approved.

Another issue not raised by the director is whether the petitioner had established that a qualifying relationship existed between it and the foreign entity abroad. On review, based upon the minimal documentation submitted, the petitioner had not persuasively demonstrated that there was a qualifying relationship between and U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G).

In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, branch, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(l)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). CIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. See *Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); see also *Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982)(stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick*, *supra* at 649-50.

The petitioner has failed to submit documentation to establish that the U.S. entity is a branch office of the foreign company. The petitioner did not submit probative evidence such as a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States. Further, the petitioner submitted a copy of its stock certificate and evidence that it was incorporated in the State of New York on June 20, 2002. If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *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). If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer.

Although the petitioner submitted a copy of its stock certificate indicating that the foreign entity is the owner of 100 shares of the U.S. entity, 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 Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. The record does not contain sufficient evidence demonstrating that the petitioner qualifies as a subsidiary or affiliate of the foreign entity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Further, as a matter of law, the beneficiary is ineligible for the classification sought. It is fundamental to this nonimmigrant classification that there be a United States entity to employ the beneficiary. In order to meet the definition of "qualifying organization," there must be a United States employer. *See* 8 C.F.R. 214.2(l)(1)(ii)(G)(2). The petition includes evidence, including an IRS Form 1040 with Schedule C, that demonstrates that the beneficiary is doing business as a sole proprietorship. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual proprietor. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). As in the present matter, if the petitioner is actually the individual beneficiary doing business as a sole proprietorship, with no authorized branch office of the foreign employer or separate legal entity in the United States, there is no U.S. entity to employ the beneficiary and therefore no qualifying organization. Therefore, after careful consideration, the AAO concludes that the petitioner failed

to establish that a qualifying relationship exists between the petitioner and foreign entity. For this further reason, the petition may not be approved.

One remaining issue beyond the decision of the director is whether the beneficiary's services are for a temporary period. The petitioner indicates that the beneficiary is the sole owner of both companies. The regulation at 8 C.F.R. § 214.2(1)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States.

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 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 appeal will be dismissed.

ORDER: The appeal is dismissed.

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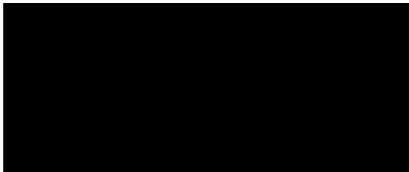


File: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: MAY 23 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner claims that it is a subsidiary of Invest One Sp. z.o.o., located in Poland. The petitioner is a distributor of print media products. The U.S. entity was incorporated in Arizona on October 24, 2001. The petitioner seeks to hire the beneficiary as a new employee to open its U.S. office. Accordingly, in April 2002, the U.S. entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an executive or manager for two years. The petitioner endeavors to employ the beneficiary's services as the U.S. entity's chief operating officer.

On May 20, 2002, the director denied the petition because the petitioner has not established that the beneficiary has been employed abroad in a managerial or executive capacity. The director also determined that the beneficiary will not be employed in a primarily executive or managerial capacity for the U.S. entity and that the U.S. entity will not support a managerial or executive position within one year of operation.

On appeal, the petitioner's counsel claims that the petitioner is exempt from the new office regulatory requirements. Counsel also states that the beneficiary's duties abroad are primarily executive and that the petitioner will support a manager or executive within one year.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must meet certain criteria. 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. Furthermore, 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.

Pursuant to 8 C.F.R. § 214.2(l)(3), 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.

(v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or(C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The first issue in this proceeding is whether the petitioning entity is considered a new office as defined by 8 C.F.R. § 214.2(l)(1)(ii)(F).

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(F) and (H) state:

(F) New office means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

(H) Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

On appeal, counsel asserts that the new office standard should not be applied because at the time of filing the L-1 petition the U.S. entity can already support the services of a full-time manager or executive. At the time of filing on April 25, 2002, the petitioner submitted the employment contracts dated March 18, 2002 and a copy of its payroll records for the periods ending April 5, 2002, April 19, 2002, and May 3, 2002 for these two employees.

On review, the AAO finds that the petitioning entity has been doing business less than one year. The petitioning entity was incorporated on October 24, 2001. The petitioner filed for L-1A classification for the beneficiary on April 4, 2002. In addition, at the time of filing, the petitioner indicated on Form I-129 that the beneficiary was coming to the U.S. to open a new office. Since the petitioner has been doing business less than one year, it qualifies as a new office as defined by 8 C.F.R. § 214.2(l)(1)(ii)(F) and (H).

The AAO notes that counsel cites a letter issued by the Office of Adjudications to support counsel's assertion regarding the new office standard. However, the letters and correspondence issued by the Office of Adjudications are not binding on the AAO. Letters written by the Office of Adjudications do not constitute official Citizenship and Immigration Services policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

The AAO now turns to the second issue in this proceeding of whether the beneficiary has been employed in a managerial or executive capacity abroad. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not

considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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 initial filing, the petitioner described the beneficiary's foreign entity duties as the "CEO of [REDACTED] and distribution and investment company. Oversee company operations. Oversee establishment of new subsidiaries."

The petitioner also submitted an organizational chart describing the foreign entity's hierarchy. The foreign entity's organizational chart indicated that the beneficiary supervises four employees including a vice president, office director, advertising director, and one secretary. The petitioner described the beneficiary's duties as:

40%: Manage on a daily-basis all investment of corporate finances (includes analysis of cash flow, allocation of financial resources in foreign currency diversifying investments and stock portfolio, review of stock market quotes in Polish stock market and international stock markets and coordination of stock investments.) Establish investment goals for the company

30%: Direct and oversee establishment of new corporate subsidiaries; participate (in capacity as President/CEO on Invest [REDACTED] on board of directors for new corporate subsidiaries.

20%: Attend exhibitions to locate new investment opportunities and market current investments; for locating and determining new business opportunities (e.g. via investment publications and the Internet)

10% Communicate with lawyers, financial advisors, partners, vendors, and clients via e-mail and telephone; meet with same

The petitioner also submitted an April 24, 2002 letter stating that "the beneficiary has been continuously employed in an executive capacity since January 1999 and is talented in marketing and management."

In a request for additional evidence, the director requested a copy of the foreign entity's organizational chart listing the employees under the beneficiary's supervision. The director also requested a more detailed description of the beneficiary's duties abroad indicating the percentage of time the beneficiary spends in each of the listed duties.

In response, the petitioner resubmitted the foreign entity's organizational chart described above. In the May 14, 2002 response letter, the petitioner stated that the number of employees is not determinative. The petitioner stated that the beneficiary is an executive and reiterated the statutory definition of an executive pursuant to section 101(a)(44)(B) of the Act.

In his decision, the director denied the petition and determined that the petitioner had not established that the beneficiary had been employed abroad in a primarily managerial or executive capacity. The director found that the beneficiary was providing the services of the business. The director also found that the employees working under the supervision of the beneficiary perform the duties of their particular position rather than work through other executives, managers, or professionals.

On appeal, counsel states that the beneficiary's duties as president and CEO of the foreign entity are primarily executive in nature. Counsel states the beneficiary directs the company's investment activities which is a major function of the organization. Counsel describes the beneficiary as being "directly responsible for the investment by overseeing the investment of all corporate finances and is directly responsible for the investment opportunity. He establishes goals and policies for the investment component of the foreign entity and all investment decisions are completely within his discretion." In addition, counsel asserts that the beneficiary fits into the definition of an executive because he acts independently and receives no supervision or direction from higher-level executives. Finally, counsel asserts that the director's findings were based on the fact that the foreign entity is small.

In 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). On review, the petitioner has failed to establish that the beneficiary is employed in a managerial or executive capacity abroad as required by 8 C.F.R. § 214.2(l)(3)(v)(B). The petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to establish what the beneficiary does on a day-to-day basis. The beneficiary's foreign duties include "analysis of cash flow, allocation of financial resources in foreign currency diversifying investments and stock portfolio, review of stock market quotes in Polish stock market and international stock markets and coordination of stock investments." The petitioner did not, however, define or clarify these duties, or explain how they are executive in nature. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in

these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, the beneficiary attends exhibitions to locate new investment opportunities and markets current investments. The petitioner describes the beneficiary as being involved in the negotiating process of setting up prospective investments. Since the beneficiary actually researches, markets, and negotiates, he is performing the tasks necessary to provide a service or product rather than directing a function of the foreign entity. 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 AAO will now turn to whether the beneficiary is acting as a function manager for the foreign entity. On appeal, the petitioner claims that the beneficiary is an executive who directs a function of the foreign entity. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. As previously stated, 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*, *supra*. In this matter, the petitioner claims that the beneficiary is directly responsible for the function of investment opportunities. However, to allow the broad application of the term "essential function" to include such broad claims, without identifying a specific function, would render the term meaningless. The beneficiary's duties indicate that the beneficiary is performing the function rather than directing the function.

Moreover, counsel also asserted that the director based his decision on the small size of the foreign entity. 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. 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 nonimmigrant visa to a 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

After careful consideration of the evidence, the AAO concludes that the beneficiary has not been employed in a qualifying managerial or executive capacity abroad. For this reason, the petition may not be approved.

The third issue in this proceeding is whether the petitioner will support an executive or managerial position within one year of operation. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

On April 25, 2002, the petitioner filed Form I-129. On Form I-129 the petitioner described the beneficiary's proposed U.S. duties as:

Overseeing the initial start-up of the Company, representing the shareholders, managing the corporation, naming, hiring and supervising officers, and developing new business opportunities, including attending major product shows to advertise the [U.S. entity's] folio.

In addition, the petitioner described the beneficiary's proposed duties in an April 24, 2002 letter as the chief operating officer in a new office who will perform the duties listed above in addition to reporting directly to the foreign entity.

On June 28, 2002, the director denied the petition and determined that the proposed duties did not establish that the beneficiary will be employed in a primarily executive or managerial capacity within one year if the petition was approved. The director stated that "given the fact that the foreign entity does not support the beneficiary in an executive or managerial capacity, it is not clear how the petitioning entity will support the beneficiary in a managerial or executive capacity within one year if the petition was approved."

On appeal, counsel states that the director's decision to deny the petition stating that the new office will not support the beneficiary in a primarily "executive or managerial capacity within one year is entirely based on the erroneous determination that [the beneficiary] is not primarily engaged in executive duties with the foreign entity."

As previously stated, in 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). On review, the AAO is not persuaded that the beneficiary will be employed in a primarily managerial or executive capacity or that the petitioner will support a managerial or executive position within one year of the visa approval. The petitioner has provided a very brief, vague, and nonspecific description of the beneficiary's proposed duties that fail to establish what the beneficiary's duties will be on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "Overseeing the initial start-up of the Company, representing the shareholders, managing the corporation" However, these duties are generalities that fail to describe how the beneficiary will oversee the initial start-up phase or manage the corporation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici, supra.*

In addition, the petitioner describes the beneficiary as being involved in developing new business opportunities. Since the beneficiary will actually be developing the business opportunities, he will be performing a task necessary to provide a service or product. As previously stated, 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, supra*. The beneficiary's proposed duties suggests that the beneficiary will not be relieved from performing nonqualifying managerial or executive duties within the first year of operation. Although the petitioner stated that it supports two full-time managers, the petitioner failed to provide evidence of the claimed employees or adequately describe the organizational structure of the U.S. entity. It is also unclear how the foreign organization supports the petitioner's business plan or its relationship to the U.S. entity. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava, supra*.

After careful consideration of the evidence, the AAO concludes that the petitioner will not support a managerial or executive position within one year of operation. For this additional reason, the petition may not be approved.

Beyond the decision of the director, a related issue is whether the petitioner has established that it has secured sufficient physical premises to house the new office. The petitioner submitted a copy of its lease. However, the lease that the petitioner submitted is a residential rental agreement rather than a commercial lease for the distribution of its print media products. Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner has secured sufficient space to house the new office. 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). For this additional reason, the petition may not be approved.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.