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D7



File: SRC 06 123 51222 Office: TEXAS SERVICE CENTER Date: **AUG 18 2006**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

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Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president/chief executive officer as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of South Carolina that claims to be a subsidiary of [REDACTED], located in Tianjin, China. The petitioner states that it is engaged in import/export trade development. The beneficiary was initially granted a one-year period of L-1A classification in order to open a new office in the United States, and the petitioner now seeks to employ the beneficiary for an additional period of three years.

The director denied the petition on March 21, 2006, concluding that the petitioner had not established: (1) that the beneficiary would be employed in the United States in a primarily managerial or executive capacity under the extended petitioner; or (2) that the U.S. company had been doing business for the previous year. In her decision, the director noted the petitioner's incomplete response to a request for evidence issued on March 14, 2006.

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 notes that the director sent the request for evidence to the petitioner by facsimile on March 14, 2006, while counsel did not receive the notice by regular mail until March 21, 2006.¹ Counsel asserts that the petitioner responded immediately to the request for evidence with only partial and incomplete information, and without any direction from counsel. Counsel requests that the AAO consider additional evidence submitted on appeal, which addresses the issues raised in the request for evidence and notice of denial. Upon review, the AAO will accept the evidence.

Upon review and for the reasons discussed herein, counsel's assertions are not persuasive. The L-1 visa classification is not an entrepreneurial visa or intended for nonfunctional start-up companies. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of a new office petition to support an executive or managerial position. The only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii). Here, the petitioner has failed to demonstrate that the U.S. company has expanded to the point where it can support the beneficiary in a primarily managerial or executive capacity. Further, the petitioner's claim that the U.S. company has been doing business is not supported by sufficient documentary evidence. As the petitioner has failed to establish these essential elements of eligibility for the extension of its "new office" petition, the appeal will be dismissed.

¹ Although counsel claims that he did not receive the request for evidence until March 21, 2006, the AAO notes that counsel submitted a voluminous response to the director's request for evidence that was dated March 20, 2006 and received by the Texas Service Center on March 21, 2006. Nevertheless, as the response was received on the same day the director issued her decision, the evidence will be considered herein.

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 managerial or executive

capacity; and

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

The first issue in this proceeding is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

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.

The nonimmigrant petition was filed on March 10, 2006. On Form I-129, the petitioner stated that as president/CEO of the U.S. company the beneficiary: "Will oversee all management/administrative duties; will

organize exhibition fairs for all investors and assist them with macro-economy development, transportation logistics and foreign affairs.”

In a March 6, 2006 letter, the Executive Vice President of the foreign entity explained that the U.S. entity “serves as a consulting firm for Chinese investors and businesses interested in identifying opportunities for business in the United States.” The foreign entity’s officer further explained that the U.S. company is a service-oriented organization which assists companies in the marketing of their products and whose daily function “continues to be recruitment of Chinese companies and assisting them in interacting with local South Carolina businesses for the sale and distribution of their products, as well as sourcing USA products from South Carolina to China.” The letter references the “sister city relationship” between the city of Greenville, South Carolina and Tianjin City, China, noting that “the government of Tianjin has reached an agreement with a South Carolina business, [REDACTED] to develop a trade center . . . for Tianjin companies in the USA.”

The foreign entity’s letter included the following description of the beneficiary’s duties in the United States:

[The beneficiary] will continue to exercise substantial discretionary authority in all decision making for the U.S. operation. His duties include oversight of all management of the growing U.S. facility. As President and CEO, [the beneficiary] is our primary and critical link to the new U.S. trade facility and receives general direction from the Chinese parent company. He oversees the marketing plans, site selection and distribution of all Chinese clients. Further, he exercises full authority in establishing the goals and policies of the U.S. organization and in directing the overall management of all employees. His duties have not changed since he obtained his original L-1 visa.

The petitioner submitted an organizational chart for the U.S. company which depicts the beneficiary’s supervision of one other employee, a vice president. The petitioner provided the following job description for the vice president:

- a. Organizing the Chinese enterprises to exhibit their products in the Global Trade Center, and
- b. Marketing the products in the Center and help the exhibitors to set up business relationship with the US customers, and
- c. Dealing the import affairs for the exhibitors, and
- d. Seeking business chances for Chinese products in the US, and
- e. Consulting the US enterprises on their developing in China.

On March 14, 2006, the director issued a request for additional information, instructing the petitioner to provide: (1) a description of the beneficiary’s position including an enumeration of the duties he performs and the percentage of time he spends on each duty; and (2) a description of the duties performed by the petitioner’s other employee, along with documentary evidence of his educational credentials.

On March 16, 2006, the petitioner submitted brief job descriptions for the beneficiary and the company's other employee, noting that the beneficiary is "in charge of setting up Global Trade Center and the joint venture with [REDACTED] and promoting the business and economic exchange between the US and Tianjin." The petitioner stated that the vice president is "in charge of organizing exhibition products of Global Trade Center and do [sic] marketing and international trade for the members of the Center."

The director denied the petition on March 21, 2006, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive position under the extended petition. The director noted the insufficiency of the job descriptions submitted in response to the request for evidence, and observed that CIS cannot determine the beneficiary's eligibility based on his job title alone. The director found that the petitioner did not have a sufficient support staff to relieve the beneficiary from having to perform non-qualifying duties.

As noted above, the director sent the request for evidence by facsimile directly to the petitioner, who submitted a response to the request before counsel received a copy of the notice by mail. Counsel's response to the director's request for evidence was received by the Texas Service Center on March 21, 2006 and will be considered herein.

Counsel's response included the following position descriptions for the beneficiary and the petitioner's other employee:

President of the company:

- a. Coordinates with [REDACTED] to run the joint venture (20%)
- b. Coordinates with U.S. government, chambers of commerce and Chinese business organizations in the USA (15%)
- c. Directs the operation of the Global Trade Center (35%)
- d. Studies USA business systems and gives reports to the Administrative Committee (15%)
- e. Manages the financial and personnel affairs of the company (15%)

Vice President of the company:

- a. Oversee marketing and distribution plans (15%)
- b. Oversee client business strategies (15%)
- c. Oversee client office site selections (10%)
- d. Oversee client/investor's applications for business incorporation and USA tax registration (20%)
- e. Oversee client/investor's construction planning (10%)
- f. Hire/terminate office personnel (15%)
- g. Set office goals; supervise employees (15%)

Counsel submitted evidence that the company's vice president possesses a bachelor's degree in international business and trade from a Chinese university.

On appeal, counsel for the petitioner further describes the beneficiary's role within the U.S. entity:

As President and Chief Executive Officer, [the beneficiary] is the primary and critical link between the Chinese parent company and the growing U.S. trade facility and its U.S. joint venture, [REDACTED]. He exercises full authority in establishing the goals and policies of the U.S. organization and in directing other managers. A Vice President with professional credentials and experience has been hired to oversee certain key functions, such as marketing. The Vice President oversees the marketing and distribution plans drawn up by the many Chinese companies now involved in the trade center and directs those companies' marketing personnel in their activities for the U.S. operation. This activity is, in fact, the primary function and reason for the trade facility. [The beneficiary] has no personal role in carrying out this function directly or in providing any direct services; however, as President he is responsible for the success of the goals and strategies for the trade center's operation. [The beneficiary] will continue to exercise substantial discretionary authority in all decision making for the U.S. operation. His duties have not changed since he obtained his original L-1 visa.

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity under the extended petition.

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 addition, 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 show 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). Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his or her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

The initial job descriptions submitted by the petitioner were brief and vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. The petitioner's statement on Form I-129 indicated that the beneficiary would "organize exhibition affairs for all investors" and "assist them with macro-economy development, transportation logistics and foreign affairs." In addition, the foreign entity initially stated that the beneficiary "oversees the marketing plans, site selection and distribution of all Chinese clients," duties which were subsequently attributed to the company's vice president. These statements suggest that the beneficiary would be directly providing the international trade consulting and marketing services that the petitioner identifies as the primary function of the U.S. company, rather than managing or supervising the provision of such services through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one

“primarily” perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The remainder of the initial job description submitted merely paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act; 8 U.S.C. § 1101(a)(44)(B). For example, the foreign entity stated in its March 6, 2006 letter that the beneficiary would “exercise substantial discretionary authority in all decision making for the U.S. operation,” “receive general direction from the Chinese parent company,” and “exercise full authority in establishing the goals and policies of U.S. organization.” Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Based on a review of an initial job description which consisted of duties which appeared to be non-managerial and non-executive in nature and conclusory assertions regarding the beneficiary's executive capacity, the director reasonably requested that the petitioner provide a more detailed description of the beneficiary's duties and the percentage of time he would allocate to each duty. This evidence is critical as it is needed to establish that the beneficiary not only has the requisite authority described in the statutory definitions of managerial and executive capacity, but that a majority of his or her duties are related to operational or policy management, not to the supervision of lower-level employees or the performance of the duties of another type of non-managerial or non-executive position.

While the petitioner's response to the director's request for evidence included a breakdown of how the beneficiary will allocate his time among various broad responsibilities, the description fails to enumerate the specific managerial or executive job duties to be performed by the beneficiary on a daily basis as the company's president. For example, the petitioner stated that the beneficiary devotes 20 percent of his time to coordinating with [REDACTED] to “run the joint venture,” and 35 percent of his time to directing the operation of the Global Trade Center. The petitioner, however, provided no explanation of what actual tasks the beneficiary performs on a day-to-day basis to “direct the operation” or to “run” the joint venture, nor does it explain what activities it “coordinates” with [REDACTED].

In addition, the petitioner has provided no evidence of a joint venture agreement between the two companies, which presumably would outline the responsibility of each company with respect to the operation and management of the [REDACTED]. 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)). Based on a review of numerous newspaper articles submitted by counsel on appeal, it is evident that [REDACTED] is the primary investor in the trade center. Accordingly, it is reasonable to assume that this company and its management play an equal if not larger role in managing operation of the trade center. Absent additional evidence regarding the nature of the relationship between the petitioner and [REDACTED], the AAO cannot determine the beneficiary's level of authority with respect to operation of the trade center.

The petitioner further stated that the beneficiary devotes 15 percent of his time to studying "USA business systems" and to reporting his findings to the parent company's Administrative Committee. Without further explanation, this appears to be a market research function, rather than a task that involves managerial or executive-level authority or duties. The petitioner indicated that the beneficiary allocated an additional 15 percent of his time to coordinating with the U.S. government, chambers of commerce and Chinese business organizations in the United States. Again, without further explanation as to what specific tasks are involved in "coordinating" with these parties or the purpose of these activities, the AAO cannot determine whether these duties would be qualifying in nature, or merely the operational tasks necessary for the company to provide its services of acting as an international trade consultant to Chinese companies. Finally, the petitioner indicated that the beneficiary allocates the remaining 15 percent of his time to managing the "financial and personnel affairs of the company." Although the petitioner stated that the beneficiary manages "financial" affairs, the petitioner does not claim to employ any lower level employees charged with performing the day-to-day financial functions of the company. For this reason, the AAO cannot find that the beneficiary's duties associated with this responsibility would be primarily managerial.

Overall, due to the lack of detail, the job description submitted failed to establish that the beneficiary performs primarily managerial or executive duties. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The AAO will not accept a vague job description and speculate as to the related managerial or executive duties.

Finally, as noted above, the petitioner initially indicated that the beneficiary himself would be responsible for performing the services of the company, including organizing exhibition fairs for all investors, assisting them with macro-economy development, transportation logistics and foreign affairs, and overseeing marketing plans, site selection and distribution activities for all Chinese clients. These service-oriented duties are conspicuously absent from the job description submitted in response to the director's request for evidence, suggesting that the petitioner's response presented an incomplete account of the scope and nature of the beneficiary's tasks. 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).

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position. Rather the job description added new generic duties to the job description and removed the above-referenced non-managerial duties, suggesting an attempt to conform to CIS requirements for this visa classification. Although counsel asserts unequivocally

on appeal that the beneficiary does not provide any direct services, counsel has not explained why such duties were included in the beneficiary's initial job description. 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).

Based on the limited and inconsistent job descriptions provided, it is evident that the beneficiary likely performs a combination of marketing, consulting and financial tasks, and some qualifying managerial or executive responsibilities. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. This failure of documentation is important because, as discussed above, several of the beneficiary's responsibilities, as initially described, do not fall directly under traditional managerial duties as defined in the statute. Absent a clear and credible breakdown of the beneficiary's actual duties and the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a manager or executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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* § 101(a)(44)(A)(ii) of the Act. The record shows that the petitioner has one other employee, a vice president, who appears to be employed in a professional capacity. However, there is no indication that the beneficiary devotes a substantial proportion of his time to supervising this employee, as the petitioner's job description for the beneficiary does not delineate any supervisory responsibilities. It cannot be found that the beneficiary will be primarily supervising professional employees. On appeal, the petitioner has submitted a new position description for the vice president which appears to add duties to his position which were not included in the previous job description submitted with the initial petition. In fact, some of the duties now ascribed to the vice president, such as oversight of client's office site selections, and marketing and distribution plans, were in fact initially attributed to the beneficiary. Further, the petitioner now indicates that the vice president hires/terminates and supervises "office personnel," yet there is no evidence that the petitioner actually has employees other than the beneficiary and the vice president. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

Without a comprehensive job description of the beneficiary's duties on which to base his determination, the director looked to the petitioner's staffing levels in order to determine whether the beneficiary could be deemed to be serving in a primarily managerial or executive capacity. The petitioner's vague description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organization's hierarchy.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" 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 does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

In its March 6, 2006 letter, the foreign entity indicated that the U.S. company's four major functions are "international trade, logistics distribution, port-related processing and commodities exhibition." The foreign entity further indicated that the U.S. company serves as a consulting firm for Chinese investors, and noted that the petitioner's daily functions include recruitment of Chinese companies, assisting them in interacting with local South Carolina businesses for the sale and distribution of their products and sourcing American products from South Carolina to China. Finally, the foreign entity indicated that the petitioner had brought 130 Chinese companies to the United States as of the date of filing. At the time of filing, the petitioner employed a president (the beneficiary) and a vice president. Although counsel asserts on appeal that the vice president alone is responsible for providing the services of the organization, the record does not sufficiently establish that one employee could plausibly be solely responsible for providing the above-referenced services for 130 clients. Nor has the petitioner accounted for any employees who would handle other administrative and financial tasks associated with operating the business. Collectively, the petitioner's initial indication that the beneficiary would be directly providing services to clients, considered with the petitioner's small personnel size and the lack of employees to perform the non-managerial and non-executive functions, brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. Here, the evidence of record suggests that the petitioner would reasonably require that the beneficiary spend a significant amount of time performing the tasks necessary to provide 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 "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility, due to its failure to provide a consistent and comprehensive description of the beneficiary's proposed duties.

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the fact that the beneficiary manages a business, regardless of its size, does not

necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. The AAO acknowledges that in certain situations, even a beneficiary who is the sole employee of a company may qualify as a manager or executive. It is the petitioner's obligation to establish however, through independent documentary evidence that the day-to-day non-managerial and non-executive tasks of the petitioning entity are performed by someone other than the beneficiary. Here, the petitioner has not met that burden, nor has it met its evidentiary burden with respect to providing a comprehensive description of the beneficiary's actual duties, despite multiple opportunities to do so. Again, 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. at 165.

Finally, the AAO acknowledges counsel's assertion that "the beneficiary's duties have not changed since he obtained his original L visa." Prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Further, the petitioner's prior petition to which counsel refers was a petition to allow the beneficiary to enter the United States to open a new office. Thus, that petition was governed by the regulations pertaining to new offices. *See* 8 C.F.R. § 214.2(l)(3)(v). The present petition is a request for an extension of the beneficiary's status after completing a one-year period to open a new office. Thus, the present petition is governed by a different set of regulations pertaining specifically to new office extensions. *See* 8 C.F.R. § 214.2(l)(14)(ii). To establish such eligibility, the petitioner is required to submit a detailed description of the duties to be performed by the beneficiary under the extended petition. *See* 8 C.F.R. § 214.2(l)(14)(ii)(C). As discussed above, the petitioner did not satisfy this regulatory requirement.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner has established that the U.S. company has been doing business for the year preceding the filing of the petition as required by 8 C.F.R. § 214.2(l)(14)(B).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) states: "*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."

The petitioner must therefore establish that the U.S. company has been doing business since the approval of the initial "new office" petition in March 2005. The petitioner stated on Form I-129 that the U.S. company achieved gross annual income of \$13,000. As discussed above, the petitioner is described as a consulting firm which assists companies in the marketing of their products and international trade activities. The foreign entity mentioned in its March 6, 2006 letter that "the government of Tianjin China had reached an agreement with a South Carolina business, [REDACTED] to develop a trade center which acts as a market-entry incubator for Tianjin companies in the USA." The foreign entity mentioned that the petitioner

brought 130 companies to the U.S. "who have established exhibits and indicated an interest in incorporating businesses in the USA."

The petitioner's supporting documentation included: (1) the company's 2005 IRS Forms W-2 and W-3 and state and federal quarterly wage report, confirming the employment of the beneficiary and the vice president during the last quarter of 2005; (2) the petitioner's bank statements for the months of March 2005 through November 2005, along with copies of canceled checks; (3) a list of 130 "members of the [REDACTED], including a brief description of each Chinese company; (4) copies of contracts with the listed Chinese companies "to take part in [REDACTED] from May 2005 to June 20, 2006," accompanied by a summary translation identifying the submitted evidence as "final confirmation documents"; and (5) a lease agreement dated October 15, 2004, between the foreign entity and "[REDACTED] and T [REDACTED]" for 600 square feet of space for "retail/office" use at a rate of \$600 per month.

In her March 14, 2006 request for evidence, the director requested documentary evidence of the business conducted by the petitioner during the year preceding the filing of the petition, including invoices, bills of sale, sales contracts, receipts and similar documents, as well as a copy of the U.S. company's IRS Form 1120, U.S. Corporation Income Tax Return, for 2005. The petitioner's March 16, 2006 response to the director's request for evidence did not include any of the requested documentation. Therefore, the director denied the petition on March 21, 2006.

Counsel's March 21, 2006 response to the director's request for evidence included the following documents, which are re-submitted on appeal: (1) copies of bank statements dated March 2005 through November 2005 and January 2006, attached with copies of canceled checks; (2) evidence of reimbursements made by the petitioner to "[REDACTED]," for expenses totaling \$5,569.44, between February 2005 and July 2005, including payments for immigration counsel, travel, apartment rental and furnishings for the beneficiary, and one payment each to a logistics company and a customs brokerage; (3) evidence of reimbursements made by the petitioner to "[REDACTED]" for expenses totaling \$21,097.79, between July 2005 and December 2005, including three payments to a customs broker, travel expenses, multiple payments to the [REDACTED] for an "[REDACTED]" and an August 2005 payment for "semi-skilled labor/displays." The petitioner included copies of invoices and checks for all expenses paid by [REDACTED] and [REDACTED]. The documents include Customs Forms 7501 and 301 dated in July and August 2005, identifying the petitioner as the importer of various shipments of goods from China. The petitioner also resubmitted its client list and copies of its contracts with Chinese companies. Although counsel referenced the petitioner's 2005 tax return in his cover letter, it was not included among the documents submitted in response to the request for evidence.

With reference to the "reimbursements" to other companies, counsel stated: "[B]y way of explanation, the Petitioner coordinates with [REDACTED] to run a joint venture. [REDACTED] has several subsidiaries, among those being [REDACTED] and Fairforest of [REDACTED]. The reimbursements made by Petitioner to these two companies result from their joint venture."

On appeal, counsel states:

[The petitioner] is a \$2 million trade center located in Greenville, South Carolina along Interstate 85. Its 20,000 square foot office and exhibit facility is shared with its joint venture, [REDACTED] and serves as a consulting firm for Chinese investors and businesses interested in identifying opportunities for business in the United States. . . [The petitioner] does not produce or sell materials; it is a service-oriented organization which assists companies in the marketing of their products. Thus all imports received to date are on behalf of Chinese corporations seeking to do business in the USA with the assistance of [the petitioner]. Please note that this is a start-up company. Consequently, the beneficiary spent the majority of 2005 in start-up activities and no income was generated until the 4th quarter, as reflected by their 2005 Federal Corporate Income Tax Return.

Although counsel again refers to the petitioner's 2005 corporate income tax return, the document is not included among the evidence submitted on appeal. The record includes the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2005; IRS Form 940-EZ, Employer's Annual Federal Unemployment (FUTA) Tax Return for 2005; and IRS Forms W-2, Wage and Tax Statement. Upon review, the petitioner has not established that the U.S. company has been doing business as defined in the regulations. Although the petitioner claimed on Form I-129 that the company generated income of \$13,000, there is no documentary evidence in the record to substantiate this claim. Although requested by the director, the petitioner failed to provide a copy of its 2005 Form 1120, U.S. Corporation Income Tax Return. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The record contains no secondary evidence, such as financial statements or balance sheets, to establish that the petitioner has been doing business, or to establish the financial status of the company as required by regulation. See 8 C.F.R. § 214.2(l)(14)(ii)(E).

Although it appears that several shipments of goods arrived from China in the petitioner's name in July and August of 2005, the petitioner has failed to provide any evidence of regular business activities since that date. Most of the bank statements submitted show no deposits and few business-related withdrawals. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Absent additional evidence, such as invoices issued by the petitioning company for services rendered, evidence of payments received for services, or other business documents the AAO cannot conclude that the petitioner has been doing business on a regular and systematic basis.

The AAO acknowledges counsel's claim on appeal that the petitioner operates a \$2 million trade center, including a 20,000 square foot office and exhibit facility "shared with its joint venture." However, the petitioner is still required to support its claims with documentary evidence showing that the company is doing business as an international trade consulting firm in the United States. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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).

If the petitioner is operating a \$2 million trade center, it is reasonable to expect the company to be able to produce recent financial or business records to establish this fact. Furthermore, the joint venture relationship

between the petitioner and [REDACTED] has not been adequately explained or documented, and is relevant to this issue, as it pertains to the petitioner's actual role in operating the trade center. Again, 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. at 165.

Based on the foregoing discussion, the petitioner has not established that the U.S. company has been doing business for the previous year as required 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 AAO observes that the record as presently constituted does not establish that the petitioner and the foreign employer continue to maintain a qualifying relationship. 8 C.F.R. § 214.2(l)(14)(ii)(A). To establish eligibility, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same entity or are related as a "parent and subsidiary" or "affiliates." The petitioner claims to be a wholly-owned subsidiary of the Chinese foreign entity, but failed to submit any documentation in the form of stock certificates or other evidence, to establish the U.S. company's ownership and control. As the director did not request this required initial evidence of eligibility in her March 14, 2006 request, the AAO notes this deficiency for the record and will not discuss it further.

Finally, the AAO recognizes counsel's statements regarding the importance of "encouraging foreign direct investment" in the State of South Carolina, and the potential positive impact of the petitioner's business on industry in the state. However, CIS does not have the authority to confer an immigration benefit when the petitioner fails to meet its burden of proof. *See* section 291 of the Act. There is no precedent for exempting a petitioner from meeting the regulatory requirements for this visa classification simply because it falls within a certain class or category of businesses whose activities may be deemed particularly beneficial to the local economy.

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

ORDER: The appeal is dismissed.