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U.S. Citizenship
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Services

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FILE: SRC 05 041 50579 Office: TEXAS SERVICE CENTER Date: **JAN 19 2007**

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:



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, 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 employ the beneficiary 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 claims to be a sole proprietorship owned by the beneficiary. It intends to operate a home renovation and repair business in the state of Florida. The petitioner claims that it is an affiliate of ██████████ Company, located in Poland. The petitioner seeks to employ the beneficiary as the general manager of its new office in the United States for a three-year period.

The director denied the petition concluding that the petitioner did not establish: (1) that the U.S. company had secured sufficient physical premises to house the new office; (2) that the beneficiary had been employed by the foreign entity in a qualifying managerial or executive capacity; (3) that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity within one year; or (4) that the U.S. entity has sufficient funding to operate the intended business. The director further noted that the U.S. entity, which claimed to be a sole proprietorship at the time the petition was filed, did not file its articles of organization until February 4, 2005. The director did not specifically enter a determination as to whether the U.S. entity is a qualifying organization for the purposes of this visa classification.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director placed undue emphasis on the size of the U.S. company without considering its reasonable needs. Counsel contends that the beneficiary will be employed in a managerial capacity and will have sufficient staff to perform the non-managerial functions of the business. Counsel further asserts: that the physical premises secured by the petitioner is sufficient for the operation of the business; that the director failed to consider the financial status of the foreign entity when determining whether the U.S. company would be adequately funded; and that a sole proprietorship is a legal entity and can file a petition for an L-1A intracompany transferee. Counsel submits a brief and additional evidence in support of the appeal.

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)(3)(v) also provides that 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 matter is whether the petitioner has secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A).

The nonimmigrant petition was filed on November 30, 2004. The petitioner indicated its intention to operate a home renovation and repair business, and submitted a lease agreement dated November 3, 2004 for the premises located at [REDACTED]. The lease agreement indicates that the premises are to be used for a home repair business.

The director issued a request for evidence on January 4, 2005, in part instructing the petitioner to submit evidence of a valid business lease or purchase for the U.S. entity and evidence it is zoned for commercial use. The director also requested photographs of the interior and exterior of the U.S. entity's business site.

The petitioner's response to the director's request for evidence was received on May 4, 2005. The petitioner's response included an affidavit from the beneficiary, which was executed on April 22, 2005. The beneficiary stated:

The main office is located at [REDACTED] Santa Rosa Beach, FL 32549. Unfortunately, this area is restricted for commercial use so I am now looking for other premises for [the petitioner].

Counsel for the petitioner nevertheless stated that the petitioner was submitting a new lease agreement with [REDACTED] Warehouses, noting that "its zoning has no restrictions as to commercial use." The petitioner submitted a partial copy of a rental agreement contract for a 12 x 30 storage unit, signed on April 11, 2004. According to the terms of the contract, "the premises shall be used solely for the purpose of storage. . . . and for no other purpose whatsoever."

The petitioner also submitted an April 5, 2005 letter from the lessor of the property at [REDACTED] who stated that the property is zoned for residential use only. The petitioner did not submit the requested photographs of its business premises.

The director denied the petition on June 7, 2005, concluding that the petitioner "has not secured a sufficient physical location in order to conduct business." The director noted that the original place of business was not zoned for commercial business and that the new location is to be used for storage purposes only.

On appeal, counsel for the petitioner asserts that sufficient physical premises have been acquired. The petitioner submits a letter from the general manager of Tops'L Warehouse, who states that he is aware that the beneficiary is "using the rented premises for a business purpose (specifically as an office) in order to operate his company." He further states that although the rental agreement states that the premises is to be used for storage premises only, "the consensual agreement" allows the U.S. company to use the premises as an office. He states that the premises are "safe and appropriate for such purpose" and that the same contract is used for all tenants, the majority of whom rent storage space rather than office space.

The petitioner submits a May 23, 2005 invoice for rent due for "Office D-28." The petitioner submits photographs of the exterior and interior of the premises, which show two desks, a computer and file cabinet, and a bathroom located inside the premises.

Upon review, the petitioner has not established that the U.S. company had secured sufficient physical premises to house the new office as of the date the petition was filed.

The petitioner has conceded that the lease submitted with the initial petition was not in a location that was zoned for business or commercial purposes. Furthermore, the petitioner has not described its anticipated space requirements for its home renovation and repair business and the lease in question did not specify the amount or type of space secured. Therefore, the petitioner has not established that it had secured the required physical premises to house its new office as of the date of filing. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

However, since the director addressed the sufficiency of the subsequent lease agreement submitted in response to the request for evidence, the AAO notes that the director properly found the storage rental agreement to be insufficient. The petitioner submitted a partial copy of the rental agreement which stated that the premises were to be used for storage purposes only, and failed to provide the requested photographs of the rented premises. 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). In addition, the beneficiary's affidavit, executed eleven days after the rental agreement with the warehouse was signed, indicated that he was still in the process of identifying a suitable location for the business. Neither counsel nor the petitioner has explained why the beneficiary would make such a statement if he had actually secured office space at the warehouse and storage facility. 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).

The evidence submitted on appeal suggests that the U.S. entity had secured sufficient premises as of July 2005, when the appeal was filed. Again, a visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Based on the foregoing discussion the petitioner has not established that it had secured sufficient physical premises to house the new office as of the date the petition was filed. Accordingly, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

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

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

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner indicated on the Form I-129 that the beneficiary's duties with the foreign entity included: "Oversee all business aspects of the entire company, including operational, accounting, promotional, and executive." The petitioner submitted evidence that the foreign entity is a sole proprietorship owned by the beneficiary, which was registered in Poland in 1994.

On January 4, 2005, the director issued a request for evidence and instructed the petitioner to submit the following: (1) convincing evidence that the beneficiary was employed abroad by the qualifying foreign entity for at least one year in the previous three years prior to the filing of the instant petition; and (2) an organizational chart for the foreign entity, which was to include the names, job titles and detailed job description for each employee.

In response, the petitioner submitted a letter, dated March 25, 2005, from the foreign entity's vice president, who stated that the beneficiary owns the foreign entity and has been its president since September 1, 1995. The petitioner also submitted an organizational chart for the foreign entity which depicts the beneficiary as president, a vice president, a senior salesperson, and a salesperson. The petitioner provided letters from the foreign entity confirming each employee's job title and salary, but did not provide the requested detailed job descriptions for the foreign entity's employees.

The director denied the petition on June 7, 2005, concluding that the petitioner had not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. The director noted that the foreign entity has only three other employees and the record did not demonstrate that he would perform primarily qualifying duties as defined in the regulations.

On appeal, counsel for the petitioner does not address the beneficiary's employment with the foreign entity. Upon review, the AAO concurs with the director's determination that the petitioner failed to establish that the beneficiary was employed in a primarily managerial or executive capacity with the foreign entity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

In the instant matter, the petitioner has provided only a vague description of the beneficiary's job duties that fails to identify what tasks he performs on a day-to-day basis. The only information provided by the petitioner regarding the beneficiary's foreign duties was that he "oversee[s] all business aspects of the entire company, including operational, accounting, promotional, and executive." 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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).

Furthermore, the director specifically requested that the petitioner provide additional evidence to establish that the beneficiary has been employed in a qualifying managerial capacity with the foreign entity, including detailed job descriptions for each of the foreign entity's employees. The petitioner failed to provide the requested job descriptions in response, and instead submitted a letter from the foreign entity confirming that the beneficiary is the owner and president of the foreign entity. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The fact that the beneficiary owns and manages a business 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 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).

Therefore, while the beneficiary in this matter evidently exercises discretion over the foreign entity's business as its owner and manager, the petitioner must still establish that he is not primarily involved in performing the company's day-to-day operations. Absent the required description of the beneficiary's duties, the AAO cannot conclude that the beneficiary has been employed in a primarily managerial or executive capacity with the foreign entity.

Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

The foreign entity appears to operate a grocery store and employs the beneficiary as president, a vice president, and two salespeople. Although specifically requested by the director, the record contains no information regarding the duties performed by any of these employees. The business has a reasonable need

for employees to manage the company's day-to-day finances and banking matters, purchase and monitor inventory, receive deliveries, stock merchandise in the store, assist customers, and handle sales transactions. Based on the lack of information regarding the nature of the employees' duties, the record does not establish that the beneficiary's three subordinates would relieve him from performing the business's routine operational duties such that he would reasonably be able to devote the majority of his time to managerial or executive responsibilities. 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)).

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. Accordingly, the appeal will be dismissed.

The third issue addressed by the director is whether the U.S. company was funded at the time the petition was filed. When filing a petition for a beneficiary who is to be employed in a new office, the petitioner is required to submit evidence to establish the size of the United States investment and the financial ability to commence doing business in the United States. *See* 8 C.F.R. § 214.2(l)(v)(C)(2).

The nonimmigrant petition was filed on November 30, 2004. In support of the petition, the petitioner submitted the foreign entity's 2003 "Deposition of Accrued Revenue" from Poland, with a brief summary English translation.

In her January 4, 2005 request for evidence, the director requested the following: (1) evidence of sufficient funding for the U.S. entity such as copies of wire transfers showing transfers of funds from the foreign organization, evidence of financial resources committed, copies of bank statements for checking and savings accounts, profits and loss statements, or other accountant's reports; and (2) evidence of the financial viability of the foreign entity, such as current financial records, tax records, employees rosters, annual reports, and evidence of business currently being conducted such as invoices, bills of sale, and product brochures of goods sold or produced by the entity.

The petitioner submitted a response on May 3, 2005, which included the following documents: (1) a March 11, 2005 bank statement for the beneficiary's personal savings account, indicating a balance of \$5,007.02; (2) a [REDACTED] receipt dated February 9, 2005, showing funds in the amount of \$3,600 transferred to the beneficiary from [REDACTED]; (3) the beneficiary's 2004 Polish income tax return, showing total income in the amount of PLN 122,255.15; and (4) evidence that the beneficiary purchased two cars in the United States. Counsel noted that the beneficiary's income from the foreign business was approximately \$39,000 in 2004 and stated that the foreign entity "is poised to invest a substantial amount of money in [the petitioner] after the Beneficiary has secured his immigration visa."

In her June 7, 2006 decision, the director acknowledged the \$5,000 bank balance and the wire transfer received by the beneficiary, but concluded that "these amounts do not appear to be sufficient in order to start and operate a business." Consequently, the director denied the petition.

On appeal, counsel for the petitioner asserts that the director failed to consider the beneficiary's 2004 tax return from Poland and the income he earned during that year as evidence of the financial viability of the foreign entity. Counsel states that "this evidence should have been considered as proof of the willingness from [the foreign entity] to invest in the new office in the U.S. and to support the Beneficiary." Counsel further asserts that considering the company's size, the two money transfers from the foreign entity, the two cars owned by the beneficiary, and the U.S. attorney's fees paid to date "adequately provides the financial ability to start and operate a new business."

Counsel further argues that the regulations at 8 C.F.R. § 214.2(l)(3)(v)(C)(2) requires consideration of the foreign entity's financial viability, while U.S. Citizenship and Immigration Services (USCIS) appears to interpret the regulation to require funding rather than the financial ability to commence operations. Finally, counsel contends that "a small company does not need a great deal of funding to start its operations and the statute has no minimum amount."

Upon review of the record, the AAO finds insufficient evidence of the size of the United States investment and the ability of the company to commence doing business in the United States. The petitioner has submitted evidence that the beneficiary has \$5,000 in a savings account and, three months subsequent to the filing of the petition, received \$3,600 in funds from an individual whose connection to the foreign entity has not been explained. The petitioner has neither clarified the purpose of this money nor identified its anticipated start-up costs, therefore, it is not clear whether these funds would be sufficient for the purpose of commencing operations in the United States, or that the funds were even intended for such purpose. Going on record without supporting documentary evidence is not sufficient for the purpose 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)). Furthermore, the monies appear to belong to the beneficiary, rather than to the company. If the money is to be used for start-up costs for the company, it is reasonable to expect the money to be deposited into a business checking or savings account, rather than the beneficiary's personal savings account. Similarly, the petitioner did not establish how the beneficiary's ownership of two cars establishes the financial ability of the U.S. company to commence business operations in the U.S.

Counsel states that the beneficiary's 2004 income from his business in Poland should be considered as evidence of the financial viability of the foreign company. However, the beneficiary's tax return alone provides little information regarding the beneficiary's financial ability to invest in the U.S. company, as there is no indication how much of this money would reasonably be available for investment into the U.S. entity, nor evidence, such as a business plan or financial projections, outlining the projected start-up costs of the U.S. entity. The director also requested bank statements and other financial documents to establish the financial viability of the foreign entity. The petitioner provided no other documentation. Again, going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

While it is true that the regulations do not establish a minimum investment amount, the AAO cannot accept counsel's unsupported assertions that the company has sufficient funds to commence business operations 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). The petitioner has not submitted evidence on appeal to overcome the director's determination on this issue. For this additional reason, the appeal will be dismissed.

The fourth issue in this matter is whether the petitioner established that the United States operation, within one year of the approval of the petition, will support an executive or managerial position, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

In a letter dated November 26, 2004, the beneficiary indicated that the U.S. company would be engaged in providing home repair and renovation services, particularly for those affected by the recent hurricanes in Florida, and would also subcontract its services to larger companies for new construction projects. The beneficiary further stated:

Once the company is established, I will oversee every aspect of the business, including legal, accounting, advertising, and the important operational aspect. I plan to recruit, hire and train assistants until more business can be generated. Once the company's revenue increases, I wish to recruit competent repairmen to lead a crew and function in my absence.

I expect my plan will take several years to accomplish.

In a cover letter dated November 26, 2004, counsel for the petitioner stated that the beneficiary will "oversee the entire operation by directing the employees toward the company's overall goal of generating business and delivering services." Counsel further stated that the beneficiary plans "to develop and nurture business contacts and to generate new relationships through an advertising campaign" and "to recruit, hire and train competent, trustworthy workers to assist him at first, then work jobs on their own after they obtain a degree of competence." Counsel asserted that the described duties meet the definition of managerial capacity pursuant to the regulations.

In her January 4, 2005 request for evidence, the director instructed the petitioner to submit: (1) convincing evidence that the beneficiary will be employed in a managerial capacity by the U.S. entity; and (2) an organizational chart for the U.S. entity including the job titles and job duties for each employee.

In response, the petitioner submitted the above-referenced affidavit from the beneficiary who stated that he founded the U.S. company and intends to manage the business "starting from the hiring of employees, developing business policy and supervising all business operations." The petitioner also submitted an organizational chart for the U.S. entity which depicts the beneficiary as president, a secretary, a foreman, and three workers.

The director denied the petition on June 7, 2006, concluding that the beneficiary would not be employed in a primarily managerial or executive position within one year. The director observed that based on the evidence submitted, "it would appear that the beneficiary will be engaged in the actual performance of the described 'functions' instead of managing such function(s)." The director also noted the projected staffing levels of the U.S. company, and noted that while the size of the company should not be the determining factor in deciding the beneficiary's eligibility, it is appropriate to consider the size of the company in conjunction with other factors, such as the absence of employees who would perform the non-managerial functions of the company.

On appeal, counsel for the petitioner asserts that the director placed undue emphasis on the size of the U.S. company and failed to consider any other factors in determining whether the beneficiary would be employed in a managerial or executive capacity. Counsel further asserts:

[T]he organizational chart and evidence submitted explain in greater detail the employees' duties. Of the five employees: one performs administrative and clerical work; one supervises and directs the task addressed to produce the product; and three perform the work necessary to provide a service. Therefore, it is quite evident that the Service failed to evaluate the evidence and incorrectly held that this evidence is insufficient to determine the managerial duties of the beneficiary.

Actually, the Petitioner is a small business in its infancy and, and [sic] as a consequence has a small personnel size. The Petitioner is not a large corporation with departments and divisions where several branches require separate management.

* * *

With a small company, the president, owner and manager, must fulfill all the functions essential to run the company. These functions include standard managerial and executive duties and the performance of any other tasks the owner held essential to better improve the business.

Regardless of the nature of a small company, the aforesaid evidence sufficiently demonstrates that: if the secretary performs the administrative and clerical job, the foreman and the three workers are enough to perform all the necessary work in order to provide the service. Since the business is of a limited size, the employees perform all the non-managerial functions. As a consequence, the beneficiary can not perform any other function than those managerial and executive. No one else is entitled to manage the company, and the beneficiary does not need to perform non-managerial duties because the personnel employed for that purpose is sufficient.

The petitioner submits a July 27, 2005 letter, in which the beneficiary states: "I have five employees and I plan to hire more as my business will expand." The petitioner provides a position description for all positions within the company, including general manager, secretary foreman and worker. As the petitioner's statement is part of the record these job descriptions will not be repeated here.

Upon review, the petitioner has not established that the U.S. entity would employ the beneficiary in a primarily managerial or executive capacity within one year of approval of the 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.*

The petitioner's initial description of the beneficiary's proposed position was brief and vague, and conveyed little understanding of the managerial or executive duties to be performed by him as general manager of the U.S. entity. The petitioner did not indicate what specific tasks the beneficiary would perform to "oversee every aspect of the business, including legal, accounting, advertising, and the important operational aspect." Counsel further indicated that the beneficiary would "develop and nurture business contacts" and "generate new relationships through an advertising campaign," thereby suggesting that the beneficiary will be personally responsible for marketing and selling the petitioner's services, rather than supervising the performance of these non-managerial tasks through subordinate employees. Finally, the petitioner noted that the beneficiary would hire workers to assist him and eventually provide services on their own. However, the petitioner provided no timeline for the hiring of additional workers, nor any indication of when the beneficiary would be relieved of personally providing the services of the business. 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)).

Upon review of the minimal evidence submitted with the initial petition, the director requested convincing evidence that the beneficiary would be employed by the U.S. entity in a managerial capacity, an organizational chart, and detailed job descriptions for each position within the company. The petitioner failed to submit the detailed evidence requested. Instead, the petitioner merely stated that the beneficiary intends to manage the business "starting from the hiring of employees, developing business policy and supervising all business operations." 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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).

Although the petitioner provided a proposed organizational chart showing a secretary, a foreman and three workers under the beneficiary, the petitioner failed to provide the detailed position descriptions requested. 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).

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, the proposed organizational structure 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 has provided no business plan or hiring plan which would indicate when the proposed staff would be hired, what duties they would perform, or when the beneficiary would reasonably be expected to be relieved from performing the services of the business, or directly supervising non-professional employees

engaged in such services. Again, going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. 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. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

Id.

Based on the lack of a comprehensive position description for the beneficiary, and the petitioner's failure to provide a business plan or the requested job descriptions for the company's employees, the director reasonably concluded that there was insufficient evidence to establish that the beneficiary would be employed in a qualifying managerial or executive position within one year of commencing business operations.

On appeal, the petitioner submits a lengthy position description for the beneficiary and position descriptions for his subordinates or proposed subordinates. Counsel implies that the company is doing business, that the five subordinates have already been hired, and that the beneficiary is already managing the business, although the beneficiary has not been granted authorization to work in the United States and it appears that the U.S. company does not even have a tax identification number. However, no evidence has been submitted in support of these claims. Regardless, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence regarding the beneficiary's managerial employment and the duties to be performed by his subordinates, and now submits it on appeal. Under the circumstances, the AAO need not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 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).

In this matter, even if the petitioner had established that it would have the ability to hire the proposed employees within the first year of operations, the petitioner has not indicated that it will employ staff to perform many non-managerial tasks associated with operating the petitioner's business. For example, none of the beneficiary's proposed subordinates would be responsible for marketing or selling the petitioner's services, meeting with clients to obtain specifications and to provide estimates for their construction and renovation projects, drawing up plans for the projects, purchasing supplies and materials, or managing the day-to-day financial aspects of the business. It is reasonable to assume, and has not been proven otherwise, that these non-qualifying duties would be performed by the beneficiary. Furthermore, it is reasonable to assume that sales and business development tasks would require a substantial portion of the beneficiary's time, otherwise, there would be no work for the lower-level employees to perform. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The AAO has long interpreted the regulations and statute to prohibit discrimination against small businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. In the present matter, the petitioner has not established the basic eligibility requirement in this matter, that the beneficiary would be primarily performing managerial or executive duties for the U.S. entity within one year.

While the AAO recognizes that the beneficiary would exercise discretion over the day-to-day affairs of the business, the fact that the beneficiary owns and manages a business 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). Again, the actual duties themselves reveal the true nature of the employment. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. As discussed above, the record provides no timeline for the hiring of employees to provide the services of the business and suggests that even after the proposed employees are hired, the beneficiary would be required to perform a number of non-qualifying tasks.

Overall, the minimal evidence submitted with this petition does not 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. Contrary to counsel's assertions, the director did take into account factors other than the petitioner's proposed staffing levels in reaching this determination. A petition requesting approval of a "new office" cannot be approved without a credible business plan, a detailed description of the petitioner's intended organizational structure, evidence of an investment in the U.S. company, and evidence of the financial viability of the foreign entity. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

Based on the foregoing discussion, the petitioner has not established that the U.S. entity would support the beneficiary in a managerial or executive capacity within one year of the approval of the petition. For this additional reason, the appeal will be dismissed.

The final issue to be discussed in this matter is whether the U.S. entity is a qualifying organization for the purposes of this visa classification, as required by 8 C.F.R. § 214.2(l)(3)(i). The director alluded to the fact that the U.S. entity was a sole proprietorship as of the date the petition was filed and did not file articles of organization until February 4, 2005. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G) defines “qualifying organization” as a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien’s stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

At the time the petition was filed, on November 30, 2004, the petitioner indicated that the U.S. company was a sole proprietorship owned by the beneficiary.

In her January 4, 2005 request for evidence, the director instructed the petitioner to submit the articles of incorporation for the U.S. entity along with evidence of a valid IRS tax identification number and occupational license.

In response, the petitioner submitted a copy of an electronic mail message from the Florida Department of State indicating that the company had filed its articles of organization electronically on February 4, 2005. The petitioner also submitted an occupational license which was issued to the beneficiary doing business as “Mr. [REDACTED] Renovation and Home Repair” on December 13, 2004. Counsel for the petitioner noted that the U.S. entity had not been able to obtain an IRS tax identification number due to the beneficiary’s inability to obtain a U.S. social security number.

As noted above, the director referenced in her June 7, 2005 decision the fact that the petitioner had not filed its articles of organization until February 2005. On appeal, counsel for the petitioner states:

[T]he Service implies that the Petitioner must take the form of a corporation.

The Petition [sic] was previously a sole proprietorship and is now Limited Liability Company. In fact, as per the decision in for [sic] *Johnson-Laird, Inc. v. INS*, 537 F. Supp. 52, while an entity is usually in the form of a corporation, partnership or sole proprietorship and is either a profit or non profit organization, the nature and form of the entity are not relevant.

Counsel's assertions are not persuasive. Upon review of the evidence submitted, the AAO finds that the U.S. entity is not a qualifying organization for the purposes of this visa classification. While the petitioner attempts to establish an affiliate relationship between the United States and foreign entities based on common ownership by the beneficiary, 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). As of the date of filing, the petitioner submitted evidence that the beneficiary intended to do business in the United States as a sole proprietor. For nonimmigrant purposes, a corporation is a separate legal entity from its stockholders and able to file a petition and employ them. *Matter of Tessel*, 17 I&N Dec. 631 (Comm. 1981). In contrast, 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).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(1) requires that the beneficiary seek to enter the United States temporarily in order to continue to render his services to a branch of the foreign employer or a parent, affiliate, or subsidiary thereof. As in the present matter, since the petitioner is actually the individual beneficiary intending to do business as a sole proprietor, 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. Counsel's reference to *Johnson v. Laird* is noted, and the AAO acknowledges that there are situations in which a U.S. sole proprietor could petition for a foreign beneficiary in this visa classification. However, approval of the instant case would effectively permit the beneficiary to self-petition for L-1A status. A sole proprietorship owned by the foreign beneficiary of an L-1A visa petition is not a qualifying organization.

Although the petitioner submitted evidence that the U.S. entity was eventually organized as a Florida limited liability company, the AAO must again emphasize that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. As there was no qualifying U.S. entity at the time the petition was filed, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.