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U.S. Citizenship  
and Immigration  
Services

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File: EAC 07 187 52217 Office: VERMONT SERVICE CENTER Date: OCT 01 2008

IN RE: Petitioner:  
Beneficiary:



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

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont 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 visa petition seeking to extend the employment of 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 is a corporation organized under the laws of the State of New Jersey and allegedly operates a restaurant. The beneficiary was granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) the financial status of the United States operation.

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 to the petitioner asserts that the director erred, that the beneficiary primarily performs qualifying duties, and that the petitioner has been, and is, engaged in doing business in the United States.

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

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

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

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an

assignment within an organization in which the employee primarily:

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

The petitioner does not clarify in the initial petition whether the beneficiary will primarily perform managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act, and counsel indicates in response to the director's Request for Evidence that the beneficiary has been employed in both capacities. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The petitioner describes the beneficiary's duties as "general manager" in a letter dated June 14, 2007 as follows:

- Directs and coordinates activities of the parent and subsidiary corporations to obtain optimum efficiency and economy of operations and maximize profits;
- Plans and develops corporation policies and goals, and implements goals through subordinate administrative personnel; coordinates activities of the Finance, Operations and Personnel functions to develop operational efficiency and economy;
- Analyzes department budget to identify areas in which reductions can be made, and allocates operating budget to those that are more profitable;
- Confers with personnel to reviews [sic] activity, operating, and sales reports to determine changes in programs or operations; review and analyze activities, costs, operations, and forecast data to determine progress toward stated goals and objectives; and
- Discuss with management and employees to review achievements and discuss required changes in goals or objectives of the company.

The petitioner also submitted an organizational chart for the United States operation showing the beneficiary at the top of the organization directly supervising a purchase manager, a sales manager, a food and beverage manager, and a cook.

On June 28, 2007, the director requested additional evidence. The director requested, *inter alia*, a list of all subordinate supervisors under the beneficiary's management, a description of the job duties of the

beneficiary's subordinate employees, a breakdown of the number of hours devoted to each of the employees' ascribed job duties, and a complete job description for the beneficiary's position.

In response, counsel submitted a letter dated August 20, 2007 in which he claims that beneficiary "has been acting in both a managerial and executive capacity" and that she will primarily perform these duties in administering the restaurant. Counsel also described the petitioner's staffing as follows:

There are currently two other supervisors and an accountant working beneath [the beneficiary]. The first supervisor is the floor manager at the restaurant. The second is assisting in the purchasing, contract negotiating, and development of the manufacturing side. That manager will head up the warehouse operations once it is operational. [The beneficiary] is dividing her time between the two, doing everything she can to minimize inefficiencies and to get everything finished.

\* \* \*

The Floor Manager has responsibility of the operations of the restaurant. He makes sure the employees are presentable, the food is up to standard, the customers are happy, and that the restaurant's ambiance is appropriate. He oversees scheduling, purchasing, inventory, and miscellaneous customer-related issues, and he performs some waiter service in urgent situations. (full time)

\* \* \*

Manufacturing Supervisor is helping [the beneficiary] to coordinate all of the leasing, purchasing, marketing, of the new side of the business. He will be overseeing the factory workers (who have not yet been hired) once [the petitioner] starts operations here. (full time)

Finally, although counsel claims that the petitioner currently employs eight people, the petitioner's quarterly wage report for the month in which the instant petition was filed indicates that the petitioner employed five workers, including the beneficiary, at that time.

On September 4, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel asserts that the beneficiary's duties are primarily those of a manager and an executive.

Upon review, counsel's assertions are not persuasive.

Title 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 Citizenship and Immigration Services (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. Future hiring

and business expansion plans may not be considered. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). At the time the instant petition was filed, the petitioner claimed to employ five workers, including the beneficiary, in the operation of a newly opened restaurant operation. The petitioner also identified these workers in an organizational chart as the beneficiary, a purchase manager, a sales manager, a food and beverage manager, and a cook. Accordingly, the petitioner's claim in its response to the director's Request for Evidence, and on appeal, to have employed additional workers after the filing of the instant petition, and its attempt to ascribe to its workers new job titles and duties, will not be considered by the AAO. Likewise, the petitioner's speculative business expansion plans beyond its existing restaurant operation, other than in the context of the beneficiary's current performance of tasks associated with the set up of this side business, will not be considered. 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. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). In view of the above, the United States operation in this matter has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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(1)(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.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. As explained above, a petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary, in her operation of its restaurant operation, will direct the petitioner's "activities;" plan, develop, and implement policies and goals; analyze budgets; review reports; and confer and discuss activities, operations, achievements, and goals with personnel. However, the petitioner does not specifically define these policies and goals or explain who will prepare the reports and budgets to be analyzed and reviewed. Likewise, the petitioner fails to explain how, exactly, the beneficiary will be relieved of the need to perform the non-qualifying administrative and operational first-line supervisory tasks inherent to the operation of the restaurant by a subordinate tier of managers and supervisors when the petitioner only appears to employ four subordinate restaurant workers. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14

I&N Dec. 190 (Reg. Comm. 1972).

Consequently, the record is not persuasive in establishing that the beneficiary will primarily perform qualifying duties in her operation of the restaurant, and it appears more likely than not that the beneficiary will primarily perform non-qualifying first-line supervisory, administrative, or operational tasks. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. § 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As asserted in the record, the beneficiary will directly supervise a purchase manager, a sales manager, a food and beverage manager, and a cook. However, it does not appear as if these workers are supervisory or managerial employees given that none of the employees supervises a subordinate staff. Furthermore, the job descriptions submitted in response to the Request for Evidence for the beneficiary's subordinate workers, to the extent these are even applicable to the workers identified in the organizational chart, fail to credibly describe any of the subordinate employees as performing managerial or supervisory duties. To the contrary, it appears more likely than not that these four workers are all performing the tasks necessary to the operation of the restaurant. Also, the petitioner also failed to provide breakdowns of the number of hours devoted to each of the employees' ascribed job duties, even though this evidence was specifically requested by the director. 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). Finally, as the petitioner failed to establish the skills and education required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary will manage professional employees.<sup>1</sup> Accordingly, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.<sup>2</sup>

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<sup>1</sup>In evaluating whether the beneficiary will manage professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

<sup>2</sup>While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. As explained above, it appears instead that the beneficiary will be employed as a first-line supervisor and will primarily perform the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, the AAO notes that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS), or *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, the AAO is not bound to follow the published decision of a United States district court in matters arising within even the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district

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101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the tasks related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. Also, as explained above, the record indicates that the beneficiary will be a first-line supervisor of non-professional employees and will primarily perform non-qualifying tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In both *National Hand Tool Corp.* and *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, the AAO has required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from having to primarily perform operational and/or administrative tasks. Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on the conclusion that the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

Furthermore, it is emphasized that in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9<sup>th</sup> Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991)); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). Moreover, 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).<sup>3</sup>

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.<sup>4</sup>

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<sup>3</sup>It is also noted that counsel cited the unpublished opinion in *Matter of Irish Dairy Board*, A28-845-42 (AAO Nov. 16, 1989), in support of her contention that the beneficiary is primarily employed as an executive or manager. In that decision, the AAO recognized that the sole employee could be employed primarily as a manager or executive provided he or she is primarily performing executive or managerial duties. However, counsel's reliance on this decision is misplaced. First, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Second, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Third, as explained above, the petitioner has not established that the beneficiary will primarily be employed in an executive or managerial capacity. This is paramount to the analysis, and a beneficiary may not be classified as a manager or an executive if he or she will not primarily perform managerial or executive duties regardless of the number of people employed by the petitioner. Therefore, as the petitioner has not established this essential element, the decision in *Matter of Irish Dairy Board* would be irrelevant even if binding or analogous.

<sup>4</sup>Counsel cited the Foreign Affairs Manual (FAM) in the brief as authority. It must be noted that the FAM is not binding upon CIS. *See Avena v. INS*, 989 F. Supp. 1 (D.D.C. 1997); *Matter of Bosuego*, 17 I&N 125

The second issue in the present matter is whether the petitioner has established the financial status of the United States operation. 8 C.F.R. § 214.2(l)(14)(ii)(E).

As noted above, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(E) 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 "evidence of the financial status of the United States operation."

In support of the petition, the petitioner claims to operate a newly renovated and reopened restaurant in Toms River, New Jersey. However, while the petitioner submitted payroll summaries beginning in March 2007, the record is devoid of evidence addressing the financial status of this business operation.

On June 28, 2007, the director requested additional evidence. The director requested, *inter alia*, evidence establishing the petitioner's financial status, copies of the United States operation's bank statements for the past three months, and a copy of the petitioner's most recent United States income tax return.

In response, the petitioner submitted copies of bank statements for the beneficiary's personal bank account and invoices related to the renovation and set up of the restaurant. The record is devoid of evidence addressing the financial status of the petitioner, a New Jersey corporation. Furthermore, the petitioner failed to submit a copy of its 2006 United States income tax return even though the "new office" petition was approved, and the petitioner was to commence operations, in June 2006.

On September 4, 2007, the director denied the petition. The director concluded that the petitioner failed to establish the petitioner's financial status.

On appeal, counsel argues that the petitioner operates a financially viable enterprise. In support, counsel submits additional evidence, including copies of the petitioner's bank statements.

Upon review, counsel's assertions are not persuasive.

In this matter, the petitioner has failed to establish its financial status as required by 8 C.F.R. § 214.2(l)(14)(ii)(E). The underlying record is devoid of evidence establishing that the petitioner has received any revenue since its establishment or that it has any assets. The only evidence properly submitted by the petitioner regarding its liquid assets were copies of the beneficiary's personal bank statements, even though the director specifically requested evidence of the petitioner's financial viability in the Request for Evidence. 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). Once again, 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 non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

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(BIA 1979). The FAM provides guidance to employees of the Department of State in carrying out their official duties, such as the adjudication of visa applications abroad. The FAM is not relevant to this proceeding.

Furthermore, the petitioner's attempt to supplement the record on appeal with copies of the petitioner's bank statements was inappropriate, and this evidence will not be considered by the AAO. 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 and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Accordingly, the petitioner has failed to establish the financial status of the United States operation, and the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner has failed to establish that the United States operation has been "doing business" for the previous year.

As noted above, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) 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 evidence that the United States operation has been "doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year." "Doing business" is defined in relevant part as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization." 8 C.F.R. § 214.2(l)(1)(ii)(H).

In this matter, the petitioner has failed to establish that it has been doing business for the previous year. The petitioner claims that its first year in existence was devoted primarily to renovating and setting up its restaurant operation in Toms River, New Jersey. The restaurant did not open for business until, at the earliest, spring 2007. However, these types of activities do not constitute "doing business" under the regulations which is defined as the regular, systematic, and continuous provision of goods and/or services. In order to be eligible for the benefit sought, the petitioner must establish that it was "doing business" during its first year in operation and not that it managed to set up and commence doing business at some point during its first year in existence. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H).

Accordingly, as the record is devoid of evidence establishing that the petitioner was engaged in the regular, systematic, and continuous provision of goods and/or services during its first year in operation, the petition may not be approved for this additional reason.

The previous approval of an L-1A petition does not preclude CIS from denying an extension based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361.

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).

