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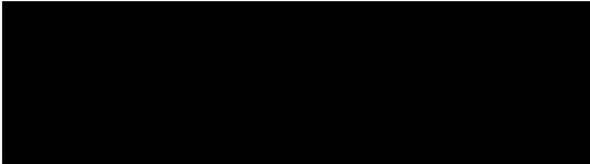
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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File: EAC 08 182 50606 Office: VERMONT SERVICE CENTER Date: **OCT 29 2009**

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:
[Redacted]

INSTRUCTIONS:

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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. 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, a Florida corporation established in January 2008, states that it intends to engage in trade. It claims to be a subsidiary of Decals Factory Design & Cia Ltda, located in Bogota, Colombia. The petitioner seeks to employ the beneficiary as the president and chief executive officer of its new office in the United States for a period of one year.

The director denied the petition on two separate grounds, concluding that the petitioner did not establish: (1) that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity; or (2) that it had secured sufficient physical premises to house the new office. In denying the petition, the director emphasized that the beneficiary appears to be the only employee of the U.S. company.

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, the petitioner asserts that the petitioner submitted sufficient evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year of approval. The petitioner emphasizes that the U.S. entity is a new office and, as such, is not required to establish that it has already hired subordinate personnel to perform the non-managerial functions of the company.

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 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 involves executive or managerial authority over the new operation; and
- (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.

As a preliminary matter, the AAO notes that the director erred by adjudicating the instant matter as a petition involving an established U.S. entity, rather than applying the regulations pertaining to new offices at 8 C.F.R. § 214.2(l)(3)(v). When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner must also establish that the beneficiary will have managerial or executive authority over the new operation. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

Accordingly, the director's analysis of the beneficiary's proposed position was flawed as it did not take into account the petitioner's proposed organizational chart or any other evidence submitted to establish that the U.S. company would hire additional staff during the first year of operations. Although the director's analysis with respect to the petitioner's current staffing levels will be withdrawn, the AAO concurs with the director's ultimate conclusion that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. As noted by the director, the petitioner has not provided a detailed description of the beneficiary's proposed duties, and, as discussed further below, the record is deficient with respect to other evidentiary requirements for new office petitions, as set forth at 8 C.F.R. § 214.2(l)(3)(v)(C).

As the AAO's review is conducted on a *de novo* basis, the AAO will herein address the petitioner's evidence and eligibility. *See 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 AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). As there was more than one ground for denial of the petition, it would serve no useful purpose to remand the matter to the director.

The first issue to be addressed is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the approval of the petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), 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 filed the nonimmigrant petition on June 18, 2008. In an attachment to Form I-129, Petition for a Nonimmigrant Worker, the petitioner described the beneficiary's proposed duties as president and chief executive officer as follows:

He will determine and formulate policies and will provide the overall direction of company. He will plan, direct, or coordinate operational activities at the highest level of management with the help of subordinate executives and staff managers.

In addition, he will direct and coordinate activities of businesses or departments concerned with the production, pricing, sales or distribution of products. He will manage staff, preparing work schedules and assigning specific duties. He will review financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement. He will establish and implement departmental policies, goals, objectives, and procedures. He will determine staffing requirements, and will interview, hire and train new employees, or oversee these personnel processes. He will monitor businesses and agencies to ensure that they efficiently and effectively provide needed services while staying within budgetary limits. He will oversee activities directly related to making products or providing services. He will direct and coordinate organization's financial and budget activities to fund operations, maximize investments, and increase efficiency. He will determine services to be rendered, prices and credit terms, based on forecasts of customer demand.

In a letter dated June 16, 2008, counsel for the petitioner stated that the U.S. company's "business is providing high quality artistic graphic design services for top commercial companies in the United States of America and overseas."

The petitioner did not submit a business plan or other evidence of the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals; evidence of 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; or evidence of the organizational structure of the foreign entity, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

Accordingly, the director issued a request for additional evidence (RFE) on July 28, 2008, in which he requested, *inter alia*, the following: (1) a comprehensive description of the beneficiary's proposed duties, with an explanation

as to how the duties will be managerial or executive in nature; and (2) complete position descriptions for all proposed employees in the United States, including one for the beneficiary's position, to include a breakdown on the number of hours to be devoted to each of the employee's duties on a weekly basis. The director also requested evidence of the petitioner's finances, evidence of assets purchased for the U.S. enterprises, evidence identifying the petitioner's import and export brokers, if applicable, and other evidence that would assist in determining the nature and scope of the new office.

In response, the petitioner submitted a letter dated August 1, 2008, in which it further described the beneficiary's proposed duties as follows:

His position will involve the management of the business enterprises operations including but not limited to the following:

- Plan and identify business opportunities in the U.S., and in international markets.
- Review financial and commercial contracts in order to assess the viability of these contracts.
- Attend meetings with other executives of the companies of the same branch.
- Exercise discretionary authority over the day to day operations.
- Supervised and controlled the subordinate staff.
- Attend exhibitions, widely recognized nationally, in order to establish commercial relations to obtain the best prices and quality.
- Will direct the relationship with providers, suppliers and clients.
- Will develop and implement new company strategy.
- Hiring and managing qualifying personnel in order to put in practice the policies and procedure of the company.
- Supervise the employees.
- Authorize purchase contract of services.
- Supervising the contract with the different vendors to attain the desired services.
- Planning, developing and implementing company strategy.
- Reviewing statements, invoices, bill of landing, and insurance certificates.

With respect to the organizational structure of the U.S. entity, the petitioner stated that "the hiring of the personnel will be carrying [*sic*] out gradually," and would include, initially, a president, a general manager, a secretary, a purchase representative and a warehouse assistant. The petitioner stated that "each one will have specific duties that will relieve [the beneficiary] from performing non-qualifying duties."

The petitioner described the duties of the proposed subordinate positions as the following:

General Manager: Confers with the President and assist in the development and establishment of the objectives of the company. Control financial assets and personnel management operations, oversees personnel, and establishes contact and direct negotiations. Direct hiring and training of personnel, enforces company policies and procedures, manages the importing and distribution of electronic technology, machinery and equipment, consumption of computers, Portable PC,

monitors hard disks, and all kind of products related to the objectives of the company. Establish operational procedures for the outgoing shipments.

Secretary: Answers the phone, makes pertinent phone calls, take messages, receives suppliers and announce them, receives mail, billing keeps, [sic] organize the office, review e-mails of the company, keeps client and suppliers information. Make daily appointments. Advise the General Manager about utilities payments and any other office administration issues.

Purchase Representative: In charge of looking for providers and quotations in order to obtain the best price of products of [sic] Direct the exporting and distribution of electronic technology, machinery and equipment, consumption of computers, Portable PC, monitors hard disks, and all kind of products related to the objectives of the company. Manage the purchase of merchandise and equipment for export. Negotiate leases and purchases of equipment and supplies for the company. Negotiates purchases terms conditions, time of delivery and warranty or products.

Warehouse Assistant: In charge of receiving the merchandise; organize the warehouse, takes inventory of same, loading containers in order to export the merchandise to be distributed.

The petitioner indicated that the general manager and purchase representative would work 40 hours per week, the warehouse assistant would work 30 hours per week, and the secretary would work 20 hours per week. The petitioner did not indicate that a college degree would be required for any of the subordinate positions.

The petitioner submitted a letter from its bank indicating that the petitioner has a balance of \$3,122.88 as of October 7, 2008, and has maintained an average balance of \$5,761.67 since it opened its account in January 2008. The petitioner stated that it was submitting copies of wire transfer receipts reflecting an investment of approximately \$200,000 from the foreign entity to be used for purchase of assets, supplies, inventories and lease. The petitioner attached eight wire transfer receipts indicating that a company called '██████████' transferred approximately \$84,000 to the petitioner between the months of February and May 2008.

The petitioner submitted photographs of its business premises, which depict four apparently occupied offices and warehouse space. The petitioner also submitted copies of purchase invoices and shipping documents, which indicate that the petitioner has been engaged in purchasing and exporting computers and computer accessories to various companies in Colombia, including Unitintas Ltda, since February 2008. The petitioner provided reference letters from several U.S. suppliers, and from the freight forwarding company that the U.S. company uses to export cargo.

The director denied the petition on November 7, 2008, concluding that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity. Although the director acknowledged that the petitioner is a new office, he denied the petition, in part, because the petitioner had not shown that the beneficiary currently supervises subordinates. As discussed above, this basis for denial was inappropriate and the director's adverse findings with respect to the petitioner's staffing levels are withdrawn. The director further found that the petitioner's descriptions of the beneficiary's position were insufficient to establish that he would perform primarily managerial or executive duties. The director found that the petitioner merely paraphrased the general definitions of manager and executive and failed to explain the beneficiary's actual daily

activities. Finally, the director noted that the record did not establish who would perform the sales function for the U.S. company, and found that it could not be concluded that the beneficiary would be relieved from this responsibility.

On appeal, the petitioner emphasizes that the U.S. entity is a new office as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F), and is therefore not required to demonstrate that it was staffed at the time of filing the petition. The petitioner states:

As mentioned in the filed petition, one of the most important duty and responsibility [*sic*] to be performed as general manager is to hire qualified personnel (to be supervised) for the different position offered by the petitioner company; such as Cargo and freight agent, bookkeeping clerk, secretary, sales representative and others. These required workers could not be hired since it is needed that they work under the supervision of the general manager. Due to the new corporation necessities is [*sic*] required to implement the position of General Manager, who will be performing the executive and managerial duties.

Upon review, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity within one year of approval of the petition.

For several reasons, the petitioner in this matter has failed to establish that the United States operation 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 failed to sufficiently describe the beneficiary's proposed duties after the petitioner's first year in operation; has failed to sufficiently describe the nature, scope, organizational structure, and financial goals of the new office; and has failed to establish that a sufficient investment has been made in the United States operation. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

First, the petitioner has failed to establish that the beneficiary will be performing primarily "managerial" or "executive" duties after the petitioner's first year in operation. When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed 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 that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.*

In this matter, the petitioner's description of the beneficiary's proposed duties is insufficient to establish that his duties will be primarily managerial or executive in nature. The description submitted with the initial filing was generic and appears to have been taken verbatim from the Department of Labor's Occupational Information Network entry for "General and Operations Managers."¹ The regulations require a description of the actual proposed duties within the scope of the petitioner's business, not a restatement of a general job description for the proposed occupational classification. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. The petitioner failed to provide any detail or explanation

¹ *See* "11-1021.00: Summary Report for General and Operations Managers" <<http://online.onetcenter.org/link/summary/11-1021.00>> (accessed on September 2, 2009)

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).

In the RFE, the director specifically requested a comprehensive description of the beneficiary's duties and a breakdown of the amount of time he would devote to specific duties on a weekly basis. The description provided in response to the RFE offered little insight into the nature of the beneficiary's proposed duties, and failed to include the requested breakdown of job responsibilities. For example, the petitioner stated that the beneficiary will "exercise discretionary authority over the day to day operations," "develop and implement new company strategy," and be involved in "planning, developing and implementing company strategy." 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner further stated that the beneficiary will "direct the relationship with providers, suppliers and clients," but the petitioner did not further explain the beneficiary's specific role in supplier and client relations. As noted by the director, the petitioner did not indicate that any of the beneficiary's subordinates will perform any sales duties. If the beneficiary is the only employee responsible for relations with clients, then it is reasonable to believe that he will be directly involved in selling the computer products that will be exported from the United States. The rest of the beneficiary's duties involve supervising, reviewing and authorizing contracts, invoices and statements, and recruiting and supervising employees, duties which appear to overlap with those of the proposed first-line supervisory position of "general manager."

Based on the current record, the AAO is unable to determine whether the claimed managerial duties would constitute the majority of the beneficiary's duties, or whether the beneficiary would primarily perform non-managerial administrative or operational duties, such as sales of computer products to Latin American customers. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). 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).

Second, the record is not persuasive in establishing that the beneficiary will be, after the first year in operation, relieved of the need to perform the non-qualifying tasks inherent to his duties and to the operation of the business in general. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C)(1) requires the petitioner to provide evidence regarding the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals. While the petitioner provided a proposed organizational chart for the U.S. company and job descriptions for proposed positions, the petitioner must also establish that there is a realistic expectation that sufficient staff will be hired within one year to relieve the beneficiary from performing the non-qualifying duties associated with operating the petitioner's proposed export business. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the

petition. See 8 C.F.R. § 214.2(l)(3)(v)(C). The petitioner has not submitted a business plan or other documentation addressing the company's proposed hiring plan or intended staffing, and the record contains no evidence of the petitioner's financial projections or goals for the first year of operation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, there are inconsistencies in the record with respect to the type of business to be operated, the beneficiary's job title, and the subordinate staff to be hired. At the time of filing, the petitioner indicated simply that it will engage in "trade." In a letter accompanying the petition, counsel stated that the petitioner "is providing high quality artistic graphic design services for top commercial companies." The evidence submitted in response to the RFE established that the petitioner purchases computers and accessories from U.S. companies and exports these items for wholesale in Colombia. However, as there is no business plan in the record, the AAO cannot conclude that the petitioner does not intend to also provide graphic design services within the next year. If this is the case, the petitioner has not indicated that it will hire subordinate personnel who would relieve the beneficiary from providing such services. The petitioner has emphasized that the beneficiary's educational and professional background is in the graphic arts.

In addition, the petitioner indicated prior to the adjudication of the petition that the beneficiary will serve in the position of president and CEO, and that his subordinate staff will include a general manager. On appeal, the petitioner indicates that the beneficiary's proposed position is "General Manager." If the beneficiary will hold both roles concurrently, then it is more likely than not that he will perform a number of first-line supervisory and operational tasks that do not fall under the statutory definitions of managerial and executive capacity.

Finally, the petitioner initially stated that it intends to hire a general manager, a warehouse assistant and a secretary. On appeal, the petitioner states that the beneficiary will hire "a cargo and freight agent, bookkeeping clerk, secretary, sales representative, and others," yet provided no explanation for the changes in the proposed staffing. 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). Given the fact that the record shows that the petitioner had already been operating in the United States for approximately 8 months by the time it responded to the RFE, and the petitioner submitted photographs which strongly suggest that the company is already staffed, the AAO finds it questionable that the petitioner has not yet determined its personnel requirements.

Overall, the above-referenced inconsistencies and the lack of a business plan undermine the petitioner's claim that the petitioner will hire sufficient staff within the first year of operations to relieve the beneficiary from performing primarily non-managerial and non-executive duties.

Third, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because it failed to establish that a sufficient investment was made in the enterprise. 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The petitioner claims that the foreign entity has provided the petitioner with \$200,000 for the U.S. company's start-up expenses. However, there is no evidence that there

was an investment in a U.S. entity at the time of filing, nor is there any evidence of the anticipated start-up costs associated with the new office in the United States. As noted above, the wire transfer receipts submitted indicate that the petitioner received payments from "Unitintas Ltd," a client of the U.S. company, and not from the claimed foreign affiliate. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on the foregoing discussion, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C), and the petition may not be approved for this reason.

The second issue to be address is whether the petitioner established that it has secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

At the time of filing, the petitioner stated that the beneficiary would be working at [REDACTED] in Weston, Florida. Although the petitioner stated that it was submitting a commercial lease for this premises, the lease, which was valid from June 3, 2008, indicates that "the premises shall be used for residential purposes only, not for business." The petitioner's name appears on the lease, but the beneficiary and his immediate family are the only persons permitted to occupy the premises.

In the RFE, the director requested that the petitioner submit photographs of the interior and exterior of all premises secured for the U.S. entity. In response, the petitioner submitted a new lease agreement for the premises located at [REDACTED], and the requested photographs. The lease was executed on July 1, 2008.

In denying the petition, the director found that the photographs show "a generic warehouse location." The director noted that it was not clear if the office and warehouse photographs submitted were taken in the same building. The director noted that no employees or customers were shown.

On appeal, the petitioner resubmits a copy of the commercial lease submitted in response to the RFE and states that it has sufficient premises to house the business.

Upon review, the petitioner has not established that it had secured sufficient physical premises to house the office as of the date of filing. The petition was filed on June 18, 2008. At that time, based on the evidence of record, petitioner had a residential lease that expressly prohibited the operation of the petitioner's business. The petitioner has not provided evidence that it secured a commercial lease agreement prior to July 1, 2008.

The AAO is persuaded that the petitioner was occupying the premises at [REDACTED] in Miami at the time it responded to the RFE in October 2008, and that such premises are sufficient to house the business; however, 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). For this additional reason, the petition may not be approved.

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.