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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



D7

DATE: **AUG 10 2012** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 classify 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 California corporation established in 2009, states that it is engaged in the wholesale of scrap metal. It claims to be a subsidiary of Sunny Discovery Sdn. Bhd., located in Malaysia. The petitioner seeks to employ the beneficiary in the position of president and requests that the petition be adjudicated as one involving a "new office," as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F). The petitioner requests a three-year extension of the beneficiary's L-1A status.¹

The director denied the petition on August 6, 2010, concluding that the petitioner submitted a fabricated lease agreement in support of its claims that it secured physical premises for the office. The director further found failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

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 asserts that the director failed to give adequate consideration to evidence the petitioner submitted in response to the director's notice of intent to deny. Counsel asserts that the petitioner provided relevant and credible evidence that refuted the director's initial findings regarding the petitioner's physical premises and lease agreement. Further, counsel contends that the director "failed to analyze the beneficiary's status in light of the fact that the petitioner has only organized in November of 2009" and is a start-up company. Counsel submits a brief and evidence in support of the appeal.

I. THE LAW

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.

¹ The petitioner stated on the L classification supplement to Form I-129 that the beneficiary is coming to the United States to open a new office. On March 2, 2009, approximately 13 months prior to the filing of this petition, USCIS approved a petition granting the beneficiary L-1A status in order to open a new office for Green Earth Metal Corp. (WAC 09 106 50615), a California corporation established in 2008, which the petitioner claims as an affiliate. As discussed herein, the instant petitioner cannot be considered a "new office," as that term is defined at 8 C.F.R. § 214.2(l)(1)(ii)(F).

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)(1)(ii)(F) defines the term "new office" as "an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year." Doing business is defined as "the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii)(H).

Preliminarily, the AAO will address whether the instant petitioner should be considered a "new office." The petitioner indicated on Form I-129 that the beneficiary is coming to the United States to open a new office, notwithstanding the fact that he was previously granted a two-year period in L-1A classification for this purpose, albeit with a different U.S. petitioner. The petitioner that previously filed a new office petition on behalf of the beneficiary, [REDACTED], also claimed to be a subsidiary of [REDACTED], was incorporated in California in November 2008. The beneficiary assumed his position as president of [REDACTED] in March 2009, more than one year prior to the filing of the petition. Therefore, the petitioner is part of an organization which has been doing business in the United States through an affiliate for more than one year and it does not fall within the regulatory definition of a "new office."

The L-1A nonimmigrant visa is not an entrepreneurial visa classification that would allow an alien a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business, or multiple new businesses. The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first 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 low-level 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 that first year. In an accommodation that is more lenient than the strict language of the statute, the "new

office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position. *See generally* 8 C.F.R. § 214.2(l)(3)(v).

By allowing multiple petitions under the more lenient standard, USCIS would in effect allow foreign entities to create under-funded, under-staffed or even inactive companies in the United States, with the expectation that they could receive multiple extensions of their L-1 status without primarily engaging in managerial or executive duties. The only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii). The petitioner cannot circumvent the regulations by incorporating another new U.S. entity during the first year of operations and filing a second "new office" petition.

Therefore, although the instant petitioner is newly incorporated, this petition must be adjudicated pursuant to the regulatory requirements applicable to new individual petitions pursuant to 8 C.F.R. § 214.2(l)(3)(i)-(iv). The petitioner must demonstrate that it is doing business and able to support a managerial or executive position as of the date of filing the petition.

The AAO maintains plenary power to review each appeal on a *de novo* basis. The AAO's *de novo* authority has been long recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

II. PHYSICAL PREMISES

The first issue addressed by the director is whether the petitioner established that it has acquired physical premises to house the U.S. business. The regulations applicable to new offices at 8 C.F.R. § 214.2(l)(3)(v)(A) require the petitioner to submit evidence that it has acquired sufficient physical premises to house the new office in the United States. The AAO observes that the "physical premises" requirement that applies to new offices serves as a safeguard to ensure that a newly established business immediately commence doing business so that it will support a managerial or executive position within one year. *See* 52 FR 5738, 5740 (February 26, 1987). A petitioner is not absolved of the requirement to maintain sufficient physical premises simply because it has been in existence for more than one year, and further it is reasonable to believe that any active company will maintain premises from which to conduct its business. In order to be considered a qualifying organization, a petitioner must be doing business in a regular, systematic and continuous manner. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (H). Inherent to that requirement, the petitioner must possess sufficient physical premises to conduct business.

In this case, the petitioner's evidence and the results of a site visit to the petitioner's claimed premises led the director to conclude that the petitioner misrepresented to USCIS that it was maintaining physical premises at the time the petition was filed. Specifically, the director found that the submitted lease agreement was created for the sole purpose of meeting the requirements for the beneficiary's visa petition.

A. Facts and Procedural History

The petitioner filed the Petition for a Nonimmigrant Worker (Form I-129) on March 26, 2010. The petitioner stated on Form I-129 that the company is located at [REDACTED] and is engaged in the wholesale of scrap metal. The petitioner was incorporated in December 2009 and did not claim to have any employees at the time of filing.

In support of the petition, the petitioner provided a copy of its commercial lease agreement with [REDACTED], which provides for 500 square feet of office space and 5,000 square feet of warehouse space located at the address stated on the petition. The lease was signed on February 28, 2010 and has a one-year term commencing on March 1, 2010. The terms of the lease require the petitioner to pay monthly rent of \$3,000 in advance on the first day of each month. The lease also provides that the lessee must obtain all utilities in its name and is solely liable for payments of utilities. In addition, the lease requires the petitioner to pay a \$6,000 security deposit.

The petitioner submitted photographs of an office building with the street address [REDACTED] interior photographs of an office, reception area, and warehouse area with what appears to be new and used electronics, with two employees present, and an exterior photograph showing a loading and unloading area.

On June 30, 2010, the director issued a notice of intent to deny the petition. The director advised the petitioner as follows:

On April 8, 2010, USCIS officers conducted a site visit of the petitioner [REDACTED]. The officers entered the business and were greeted by [REDACTED] (the owner of [REDACTED]). [REDACTED] is listed as the lessor on the lease presented as part of the L-1A petition. The officer interviewed [REDACTED] as a result of [the beneficiary] not being present at the time of the visit.

[REDACTED] [sic] claimed to be familiar with [the beneficiary] and had a working relationship since they were both in the business of buying and selling scrap electronic waste. He stated [the beneficiary] does not speak English and never goes anywhere without his interpreter, [REDACTED]. Further, he went on to state that [the beneficiary] and [REDACTED] were currently on a state-to-state trip buying scrap electronic waste. He said they were currently in Texas and provided a cellphone number for the beneficiary. [REDACTED] [sic] stated the beneficiary came to [REDACTED] 6 months ago for the purpose of buying e-waste for shipment to [REDACTED] or Hong Kong. . . .

The investigating officers confirmed [REDACTED] [sic] signed the lease agreement submitted with the petition and asked him to discuss the details of the agreement. He stated the beneficiary would pay \$5,000 per month and in return he would provide warehouse space and small office area there on the premises. The officers were given a tour of the facility and found that there was no available warehouse space. In addition, [REDACTED] [sic] stated he was unsure which office he would let the beneficiary use, and although the officers were shown one vacant office, they were told the situation might change. When asked why the beneficiary would pay \$5,000 dollars per month and not occupy the premises, [REDACTED] [sic] told the officer that he had not actually started charging the beneficiary. This contradicts the submitted lease [which] specifically states that it is an annual lease from March 1, 2010 to February 29, 2011. Further, the agreement states that the cost would be "Thirty-Six Dollars [sic] \$36,000" per year. The inconsistency was brought up to Mr. Qadoura [sic] and the officers asked who drafted the lease. [REDACTED] [sic] said that the beneficiary had written up the lease and he just signed it. It appears the lease agreement was created solely for the purpose of fulfilling the requirements of the L-1A petition. The document cannot be considered valid due to the fact that it was not created by the lessor, the

lessor was not familiar with the terms, and neither the lessee nor the lessor complied with [the] agreement even though it supposedly went into [e]ffect on March 1, 2010.

The director further noted that the investigating officers discovered that all of the photographs submitted with the petition "were related to [REDACTED], not the petitioning entity, including inventory of electronic waste, desks, office supplies and employees." The USCIS officers were able to communicate with the beneficiary through his translator. The beneficiary stated that the petitioning company had been at the Carlsbad location "for a few months," and confirmed that he was out of state visiting companies and buying scrap equipment.

The director advised the petitioner that, by signing the Form I-129, it assumed legal responsibility for the truth and accuracy of all information submitted in support of the petition. The director determined that the lease agreement is falsified evidence and noted that "USCIS is under no obligation to presume that the lease agreements are the only false documents in the record." The director provided the petitioner 30 days in which to rebut the director's preliminary findings and to submit additional information, evidence or arguments to support the petition.

In response, the petitioner submitted a letter from [REDACTED] Inc., who stated that his company is subleasing 5,000 square foot space and one office to the petitioning company. He confirmed the terms of the lease as stated in the written agreement submitted at the time of filing and stated "the terms and conditions of the standard lease agreement are clearly understood and binding for all signers." [REDACTED] stated that the petitioner leases the space "to provide temporary storage of inventory for recycled material that were purchased from the San Diego area and from other States." He noted that "the nature of the recycling business requires constant traveling and meeting in different states in order to inspect and purchase the recycled materials, it does not require a physical presence for such operation."

[REDACTED] stated that his company "received \$15000 payment from [REDACTED], as rental charges for the first 6-month, including the first free month." With respect to the USCIS site visit, [REDACTED] maintains that "[d]uring the visit some of the facts, answers or questions related to [REDACTED] were accidentally transposed or misunderstood." He states:

During the officers tour of the facility there were no space available in the warehouse, that's because the warehouse is used for short-term temporary inventory storage. The storage of the materials at the warehouse varies from few hours to several days. That means there will be available space at the warehouse in few hours or next few days after the scheduled trucking companies arrive to load-up the recycled material. As for the one vacant office that was shown to the officers, I stated that the situation might change, meaning that we might move [REDACTED] to a bigger office space in the future, since we have seven offices on the premise that we are totally in charge of.

[REDACTED] further stated that he misspoke when he stated that the petitioner pays \$5,000 per month in rent. Rather, he indicates that he meant to state that the petitioner pays \$3,000 per month for 5,000 square feet of space. He notes that the petitioner paid rent for six months in advance shortly after the USCIS officers' visit to the premises, and indicates that the company received its first month's rent free, which is why he told the officers that he has not charged the beneficiary yet. He maintains that the lease is valid, that he is familiar with its terms, and that both parties are in compliance with its terms.

With respect to the photographs of the company premises, [REDACTED] notes that [REDACTED] are located on the same premises. He states that "officers took several pictures of the premises, including inventory for both companies that is slightly difficult to differentiate by someone who is not there at the time of packaging." Finally, [REDACTED] maintains that the premises were undergoing a major office remodeling, and "that's why [REDACTED] did not have a personalized sign or office at the time of the officers visit."

The petitioner's response to the notice of intent to deny included the following documents:

- An invoice (#3168) issued by [REDACTED] on April 16, 2010 to the petitioning company, for \$22,470.32 in scrap electronics, as well as rent for the period March 1 through August 31, 2010 in the amount of \$15,000.
- Copy of check [REDACTED] dated April 16, 2010 for \$15,000 drawn from the petitioner's Citibank account. The check is annotated "Rent (3/1/10 – 8/31/10)."
- Photographs of checks #1024 to 1027 dated April 1, May 1, June 1, and July 1, 2010, respectively. Each check is in the amount of \$3,000 drawn from the petitioner's Citibank account. The checks are annotated "Rents (warehouse)."
- Copies of photographs of the premises, including a small office with one desk, stacks of computers and other electronics stacked in a warehouse space, packed and wrapped stacks of boxes that appear to be newly arrived or ready for shipment, a loading area and truck.
- Copies of the petitioner's seller's permit and certificate of title for an automobile.
- Copies of the petitioner's Citibank bank statements for the period February 2010 through June 2010.
- A Transaction Journal for the petitioner's Citibank account for the period May 25 through July 21, 2010.

In March 2010, the company's checks paid included #3456 (\$3,340), #3457 (\$5,000), #3458 (\$1,389.65) and #3460 (\$2,744.07). In April 2010, the checks paid from the petitioner account were the following: #3459 (\$4,000), #3538 (\$4,000), and #3540 (\$2318.64). In May 2010, the petitioner's checks included #1001 through #1011. None of the checks were issued for \$3,000. Finally, in June 2010, the checks paid from the petitioner's account were #1012 to #1023. Again, none of the checks coincided with the claimed rent payments. The petitioner's Transaction Journal shows a \$15,000 debit for an "inclearing check," on July 21, 2010.

The director denied the petition on August 6, 2010 concluding that the petitioner failed to submit sufficient rebuttal evidence in response to the notice of intent to deny. The director acknowledged the petitioner's submission of checks totaling \$27,000 issued to Green World Recycling, but emphasized that "no bank statements were provided to show that any of these checks were received and/or deposited." The director also questioned why the petitioner would issue a \$15,000 check for rent for the period March 1, 2010 to August 1, 2010 and also issue monthly rent checks for the months of April through July 2010. The director remarked that USCIS was unable to locate or verify any of the claimed payments to Green World Recycling on the submitted bank statements.

Therefore, the director concluded that "it still appears the lease agreement was created solely for the purpose of fulfilling the requirements of the L-1A petition. The document cannot be considered valid due to the fact that it was not created by the lessor, the lessor was not familiar with the terms, and neither the lessee nor the lessor complied with agreement even though it supposedly went into effect on March 1, 2010."

The director, citing *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988), emphasized that it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and that any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. The director noted that, in the absence of objective evidence to resolve the discrepancies, USCIS will reevaluate the reliability and sufficiency of the remaining evidence in the record. Thus, the director found that USCIS is "under no obligation to presume that the lease agreement is the only false document in the record."

On appeal, counsel asserts that the director failed to adequately consider the evidence submitted in response to the notice of intent to deny. Specifically, counsel asserts that "the letter from the president of the lessor provided relevant, credible information that refuted each of the points made by the Service" and therefore should have been considered. Counsel emphasizes that [REDACTED] acknowledged in his letter that he signed the standard form lease agreement and that he was familiar with the "important clauses." Counsel further states that "the identity of the party who may have actually drafted a lease or any other contract is not relevant to the question of whether it is intended to be a valid, binding document that creates real legally enforceable rights." In addition, counsel asserts that [REDACTED] acknowledged that he misspoke when asked about the monthly rent for the premises during the site visit, and that such explanation is reasonable.

With respect to the director's finding that the petitioner was neither occupying the premises nor making lease payments at the time of the site visit, counsel emphasizes that [REDACTED] explained that the office was undergoing re-modeling, while the warehouse space was merely temporarily unavailable. Counsel further contends that [REDACTED] letter explained the dynamics of the scrap electronics business, established that the lease was being performed in April 2010, and established that the petitioner's scrap inventory was in fact present at the premises at the time of the site visit.

In regard to the lease payments, counsel asserts that the lessor's invoice for \$15,000 in rent payments for a six-month period corroborates [REDACTED] statement that the petitioner's first month of rent was free, and explains why he indicated at the time of the site visit that he was not charging the petitioner yet. Counsel further states:

Additional verification is found in the checks from [REDACTED] in payment of the rent on the lease. While there is some confusion concerning the manner in which the checks have been drafted the Service has been unable to make a finding that the checks are fraudulent. As stated in the decision the Service made a general determination that none of the evidence submitted was valid based on the conclusion that the lease, itself, was fraudulent. However, that conclusion is clearly erroneous. Therefore, the value of [the petitioner's] checks in meeting the petitioner's burden of proof must be considered.

In support of the appeal, the petitioner submits: (1) bank records showing that the petitioner's check #1031 for \$15,000 was debited from the company's account on July 21, 2010; and (2) invoices and bills of lading indicating the petitioner's address as [REDACTED] dating back to January 2010.

B. Analysis

Upon review, counsel's assertions are not persuasive and the AAO will affirm the director's decision. There are unresolved documentary discrepancies in the record which prevent a finding that the petitioner was leasing the claimed physical premises for its business as of the date the petition was filed.

Before turning to the findings of the USCIS site investigation, the AAO notes that the record contains absolutely no persuasive evidence that the petitioner paid any rent for its claimed physical premises prior to the director's issuance of the Notice of Intent to Deny. The terms of the submitted lease agreement required the petitioner to pay a \$6,000 security deposit at the time of signing, as well as a \$3,000 monthly payment. Even if the AAO accepts the claim that the petitioner's first month of rent was free, the petitioner should be able to show that it made a \$6,000 payment on or about March 1, and a \$3,000 payment at the beginning of each subsequent month. Alternatively, if the petitioner had a separate agreement with the lessor to pay \$15,000 in rent for the months of March through August 2010 at the beginning of April 2010, then the petitioner should be able to demonstrate that it did in fact pay this amount at the beginning of April 2010.

Instead, the petitioner attempted to establish in response to the notice of intent to deny that it paid *both* the monthly rent on the first of each month between April and July 2010, and a one-time \$15,000 rent payment for the months of March through August. Notwithstanding the dates written on the petitioner's checks #1024 through 1027 and #1031, the record shows that all five checks were actually written in July 2010, after the director issued his notice of intent to deny the petition. As noted above, the petitioner's bank records indicate that the last check the company issued in June 2010 was #1023. Further, the record remains devoid of any evidence that the monthly rent checks (#1024 through #1027) were ever deposited.

While the petitioner has submitted evidence on appeal that check #1031, ostensibly dated April 16, 2010, for \$15,000 in rent payments eventually cleared on July 21, 2010, the AAO has no reason to believe that this check was actually issued in April 2010. In this regard, the AAO notes another irregularity in the record. As noted above, the petitioner's response to the notice of intent to deny included an invoice (#3168) issued by Green World Recycling on April 16, 2010 in the amount of \$37,470.32, which included \$22,470.32 in scrap electronics, as well as rent for the period March 1 through August 31, 2010 in the amount of \$15,000.

On appeal, the petitioner submits a different version of invoice #3168 from [REDACTED]. This invoice requests payment of \$22,470.32 for the same scrap electronics but does not include the \$15,000 rent fee. This discrepancy raises question as to whether the previously submitted invoice #3168 was created for the sole purpose of attempting to corroborate the petitioner's claim that it paid \$15,000 in rent in April 2010.

Counsel dismisses these discrepancies and relies on the rent checks as verification that the petitioner has in fact been paying rent pursuant to the terms of the written lease. Specifically, counsel simply remarks that "there is some confusion concerning the manner in which the checks have been drafted." As discussed above, all rent checks issued by the petitioner appear to have been issued only after the director specifically requested evidence that the petitioner has been complying with the terms of the submitted lease agreement. The director's decision did not convey "confusion," but rather raised legitimate questions regarding the reliability of the evidence submitted to establish that the petitioner has been paying rent in accordance with the terms of its lease.

The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Counsel's assertion that "there is some confusion concerning the manner in which the checks have been drafted," does not qualify as independent and objective 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'r 1998). Furthermore, evidence that the petitioner creates after USCIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven

and existent at the time of the director's notice. The petitioner has not provided evidence that it paid any rent prior to the issuance of the director's notice of intent to deny, but rather has attempted to backdate checks and create a fictitious invoice to show that it was in compliance with the lease as of the date of filing. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591 (BIA 1988).

These unresolved discrepancies provide sufficient grounds for the denial of the petition and dismissal of the appeal.

Turning to the USCIS officers' interview with [REDACTED] it is evident based on that interview and other evidence in the record that the petitioner and its claimed landlord at least have a business relationship, and it appears that the petitioner purchases electronic scrap material from [REDACTED] for shipment overseas. Based on this buyer-seller relationship, the AAO does not discount the possibility that some of the material on the premises at the time of the site visit was purchased and owned by the petitioner. The evidence of record does not corroborate the claim that the petitioner leased and occupied a designated suite consisting of a 500 square foot office and 5,000 square feet of warehouse space. There is nothing in the lease to indicate that the petitioner agreed to share the same premises with its landlord as space becomes temporarily available. Counsel acknowledges that "warehouse space was not available" at the time of the site visit.

The AAO cannot overlook the fact that the petitioner submitted photographs at the time of filing the petition that were represented as showing the petitioner's premises and business operations. These photographs depicted employees, desks, office supplies and inventory that have not been shown to belong to the petitioning company, such that they could not be considered misleading. Even if some of the inventory did in fact belong to the petitioning company, the record does not establish that the company was actively occupying and doing business from the claimed leased premises at the time of filing the petition.

The AAO acknowledges that the petitioner appears to be doing business and appears to use the address for the claimed leased premises as its business address. However, based on the foregoing discussion, the AAO affirms the director's finding that certain evidence submitted to establish that the petitioner has acquired and maintains the physical premises was created for the purpose of obtaining the requested immigration benefit. A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). Whenever a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after USCIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The unresolved discrepancies catalogued above, particularly with respect to the petitioner's rent payments, lead the AAO to conclude that the evidence of the beneficiary's eligibility is not credible. Accordingly, the petitioner has not established the beneficiary's eligibility for the requested nonimmigrant visa classification, and the appeal will be dismissed.

III. MANAGERIAL OR EXECUTIVE CAPACITY

The remaining issue addressed by the director is whether the petitioner established that it will employ the beneficiary 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.

A. Facts and Procedural History

In an attachment to the Form I-129, the petitioner provided the following description of the beneficiary's proposed duties as president of the U.S. company:

A. MANAGEMENT AND ADMINISTRATION (50%)

1. Establishing procedure of working system and company policy.
2. Employ qualified staffs for each position and train them with correct concept.
3. Strengthen the efficiency of performance of working team.
4. Meet with staff individually regularly to understand their working situation for adjusting jobs and procedure to get better efficiency.

5. Provide with update information and training which are able to raise working capacity and functions of each department.
6. Keep updating computerized working programs for high performance.
7. Strengthen the linking between each department for better tracking and results.
8. Understand the problems and difficulties of every staff and provide helps or assistances that enable them to work comfortably and safely in our company.
9. Review the working capacity and ability of each staff for the reference of promotion.
10. Introducing team members to vendors/customers and training them to be able working with vendors/customers directly and independently.
11. Supervising team members e-mail communication skill to customers/vendors.

B. PLAN AND EXECUTE FOR COMPANY DEVELOPMENT (50%)

1. Check with current performance and the conclusion of past periods to make and adjust company developing direction and executed steps.
2. Searching for economic and scrap metal market trends to adjust the plan and goal for company development for short term and long term.
3. Discuss with business consultant and relevant persons in similar field to see how we can do with wider range or area of business for future expansion.
4. Search and look for more sources of import and export for planning future development.
5. Consider the possibility of establishing more working or sales offices to expand business.
6. Consider to expand business field to retail area.
7. Searching for investment chance in U.S.

The petitioner indicated on the Form I-129 that the U.S. company is newly established and did not claim to have any employees.

In the Notice of Intent to Deny issued on June 30, 2010, the director advised the petitioner as follows:

According to the information gathered during the site visit and phone interview conducted, it appears the beneficiary's duties are not duties that are typical of a managerial or executive [capacity] as defined by the statute. The duties described are more indicative of an employee who is performing the necessary tasks to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in an executive capacity.

The director noted that the beneficiary's actual duties appeared to consist of visiting companies to purchase scrap electronic equipment.

The petitioner's response to the Notice of Intent to Deny did not acknowledge or directly address the director's preliminary findings regarding the beneficiary's job duties. [REDACTED] noted in his letter that "the nature of the recycling business requires constant traveling and meeting in different states in order to inspect and purchase the recycled materials."

In denying the petition, the director once again emphasized that the information gathered during the site visit and telephone interview with the beneficiary reflected that his duties are not duties that are typical of a managerial or executive employee. The director acknowledged the evidence submitted in response to the Notice of Intent to Deny, none of which addressed the issue of the beneficiary's employment capacity.

On appeal, counsel asserts that the director "ignores the very brief period of time that the petitioner has been in operation." Counsel contends that, pursuant to section 101(a)(44)(C) of the Act, "the Service is required to consider the petitioner's stage of development when determining whether an individual is acting in a managerial or executive capacity." Counsel emphasizes that "if the beneficiary has been engaged in a variety of different duties it is because this is temporarily necessary to develop the business and take it to the next, more mature, stage of operation."

Counsel states that "while the beneficiary is making business trips to obtain product for sale, he is also establishing the foundation for the expansion of the business" and is "acting in an executive capacity." Counsel further asserts:

The beneficiary is in the process of establishing the goals and policies of the petitioner. He is clearly in possession of very extensive discretionary authority as he develops a customer base and a distribution network. These are the fundamental indicia of an executive as found in INA § 101(a)(44)(B).

The beneficiary's duties in this interim period of new office development may also be characterized as those of a function or component manager pursuant to INA 101(a)(44)(A). Again, he is exercising wide-ranging discretion over the acquisition and distribution of materials for the petitioner. The fact that he is engaged in some hands on activities does not detract from this status since supervision of employees is not a prerequisite.

B. Analysis

Upon review, the AAO affirms the director's determination that the petitioner failed to establish that it will employ the beneficiary in a primarily managerial or executive capacity.

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 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 petitioning company indicates that it is engaged in the sourcing, purchase, sale and export of scrap electronic materials. The petitioner indicated that it has no employees and counsel confirms on appeal that the beneficiary himself is responsible for obtaining items for sale. While the petitioner submitted a lengthy description of the beneficiary's proposed duties at the time of filing, it is evident that many of the duties are speculative and dependent upon the hiring of additional personnel. 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'r 1978). Further, the position description submitted fails to include the beneficiary's acknowledged responsibility for purchasing goods for sale, and therefore must be considered incomplete.

The petitioner indicated that the beneficiary will allocate half of his time to "management and administration" duties which include recruiting, hiring and training staff, meeting with staff, strengthening the efficiency of staff, evaluating the performance of staff, supervising staff communications with customers and vendors, and resolving staff problems. While the AAO acknowledges that the beneficiary has the authority to hire and fire employees, it is evident that he would not initially devote half of his time to the claimed supervisory duties as the sole employee of the company. The only other duties included among the beneficiary's "management and administration" functions were "establishing procedure of working system and company policy," and "keep updating computerized working programs for high performance."

The petitioner indicating that the beneficiary will allocate the remainder of his time to planning and executing "company development," a responsibility that entails making adjustments to the direction of the company's development based on performance, researching markets to adjust company plans and goals, working with consultants to determine areas for expansion, researching sources of import and export, consideration of expansion opportunities, and searching for investment opportunities in the U.S. market. While these responsibilities indicate that the beneficiary will have decision-making authority with respect to the direction of the U.S. company, it appears that the beneficiary would also be responsible for a number of research-related duties that do not fall under the definitions of managerial or executive capacity.

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

As noted above, the petitioner does not claim to have any employees but acknowledges that the beneficiary has already begun to operate the U.S. business. Therefore, to the extent that the petitioner is engaged in the sourcing, purchasing, sale and export of scrap electronic materials, it is more likely than not that the beneficiary is directly performing such activities. The petitioner does not deny that the beneficiary is personally responsible for sourcing and purchasing goods for re-sale to its customers. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirement that the beneficiary perform primarily qualifying duties. As discussed above, the petitioning employer does not meet the definition of a "new office," and therefore must establish that the beneficiary will immediately assume a position that requires him to perform duties that are primarily in a managerial or executive capacity.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. The petitioner has not met this burden. Based on the petitioner's speculative description of the beneficiary's duties, and counsel's acknowledgement that the beneficiary is currently running the company singlehandedly, it is reasonable to conclude that the beneficiary is primarily performing the petitioner's sourcing, sales, marketing, market research and exporting functions, and is thus precluded from performing primarily qualifying duties.

The beneficiary's position is president of a company of which he is the only staff member. The petitioner has not demonstrated that the beneficiary, as a personnel manager, will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. See section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial or executive duties. The fact that the beneficiary manages a business as its sole employee 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, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive"). 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 prove 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).

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). 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 clearly describe 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 duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. As discussed, a review of the totality of the evidence submitted reflects that the beneficiary is primarily responsible for performing most of the company's essential functions, including non-qualifying duties associated with these functions, and as such, the petitioner has not established that his duties are primarily managerial or executive in nature.

Finally, the petitioner has not supported its claim that the beneficiary is employed primarily 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, 8 U.S.C. § 1101(a)(44)(B). 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 managerial 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.* While the AAO does not doubt that the beneficiary is responsible for establishing company goals and policies, the record does not establish that he, as the sole employee, is primarily engaged in such duties. Rather, he is required to perform the day-to-day operations of sourcing, purchasing and selling products, performing market research, seeking business opportunities and establishing distribution channels.

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, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, it is appropriate for USCIS 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. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The AAO has long interpreted the statute to prohibit discrimination against small or medium-size businesses. However, the AAO has also consistently 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. Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir., 2008).

The AAO acknowledges the petitioner's assertion that the beneficiary will be responsible for staffing the U.S. company. 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'r 1978).

Based on the foregoing, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive. Accordingly, the appeal will be dismissed.

IV. Conclusion

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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.