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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAR 2 1 2013 Office: VERMONT 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:

SELF-REPRESENTED

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,

Ron Rosenberg
Acting 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 extend the beneficiary's status 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 company based in China with a branch office in the United States, offers that it is engaged in the manufacture and sale of certain sanitary products. The beneficiary was previously granted one year in L-1A status as the petitioner's General Manager, then a new office in the United States, and now the petitioner seeks to extend the beneficiary's status for an additional year.

The director denied the petition, concluding that the petitioner failed to establish that it was doing business in a regular, systematic, and continuous fashion, as required by the Act following one year of operation as a "new office." The director pointed to language in the record that expressly states the petitioner is not regularly providing goods and services in the United States, but only performing a marketing survey for the foreign employer. Additionally, the director also found that the record was insufficient to establish that the foreign employer was doing business as necessary to establish it as a qualifying organization due to the lack business operation submitted on the record. Lastly, the director further concluded that the petitioner was not shown to act in a managerial or executive capacity with the petitioner, since the beneficiary's subordinates were not established as managers or professionals consistent with the Act.

On appeal, the petitioner contends that it is doing business by conducting a marketing survey for the foreign employer. Further, the petitioner maintains that the director improperly denied the petition based upon the failure of the petitioner to fully translate certain foreign employer business documentation. Additionally, the petitioner contends that the beneficiary acts as a manager consistent with the Act; reasoning that the director's erred in concluding conclusion that the beneficiary's duties, and his claimed subordinate manager duties, were the same.

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.

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.

Further, the regulation at 8 C.F.R. 214.2(l)(14)(ii) states that a petitioner seeking an extension of a one year "new office" petition accompany their Form I-129 petition with 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.

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.

II. The Issues on Appeal:

A. Foreign Employer Doing Business

The first issue to be addressed is whether the petitioner has established that the foreign employer is doing business, as defined by the Act, necessary to establish it as a qualifying organization consistent with 8 C.F.R. § 214.2(l)(14)(ii)(A). The AAO concurs with the director's decision that the petitioner has not met its burden of proof with respect to this issue; as it has not properly responded to the director's RFE.

In order to be established as a qualifying organization consistent with the Act, a petitioner must submit sufficient evidence to establish that the foreign qualifying organization is doing business, defined as the regular, systematic, and continuous provision of goods or services. *See* 8 C.F.R. § 214.2(l)(14)(ii)(A) and 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining the term "doing business"). Indeed, the director was well aware of this

requirement and requested that the petitioner submit in response to the RFE "additional documentary evidence of the foreign entities' business activities for the past year," since the record was devoid of any information related to the operations of the foreign employer. The director requested that the petitioner submit copies of purchase contracts, purchase orders, invoices, bills of lading, and copies of U.S. Customs documentation, as relevant. The aforementioned evidence of the foreign employer's operations was of particular relevance in this matter since the beneficiary, and his two subordinates, are offered as performing a marketing survey for the foreign employer related to Chinese American use of certain sanitary products in the United States. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). However, the petitioner failed to produce any probative additional documentation relevant to establishing that the foreign employer conducts business in China as defined by the Act beyond claimed order forms that are not translated. Because the petitioner failed to submit certified translations of the aforementioned documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. Further, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

On appeal, the petitioner suggests that the director found that the foreign employer was not doing business based upon certain Chinese words being left upon the provided foreign employer order forms. However, the AAO does not find this argument persuasive since the petitioner's failure to fully translate the provided order forms leaves them with little probative value in determining whether the foreign employer is providing goods and services in a regular, systematic, and continuous fashion. For instance, it cannot be concluded from the provided forms, due to the lack of translation, the nature of the goods sold or the business transacted. Because the petitioner failed to submit complete and certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

As such, the petitioner has not properly responded to the director's RFE requesting sufficient evidence of the foreign employer's business operation, and since there is almost no other evidence submitted on the record to establish that the foreign employer is doing business as defined by the Act, it cannot be found that the foreign employer is a qualifying organization as required by 8 C.F.R. 214.2(l)(14)(ii)(A). For this reason, the appeal must be dismissed.

B. Petitioner Doing Business

As noted, the director also denied the petition finding that the petitioner had failed to establish that the petitioner had been doing business as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). Upon review of the

petition and the evidence, and for the reasons discussed herein, the AAO concurs that the petitioner has not established that the petitioner has been doing business according to the Act during the previous year.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) require the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations 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). There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

The record includes various references to the fact that the petitioner, has not, and will not conduct business in the United States as defined by the Act at any time in the near future. For instance, in the letter dated November 11, 2012 submitted in response to the director's RFE, the petitioner states:

> Due to [the petitioner] is [sic] not going to sell any products in the U.S.A, we think that our products will not be good for sale in American markets. Therefore, [the foreign employer] in the U.S.A. does not have any plan and budget to run advertisements in the U.S.A. markets. [The foreign employer] thinks that Chinese American demand of diapers will represent tendency [sic] of next generation's people demands of diapers in China, because American consumption styles always influence other countries' consumption styles in the world. Identifying Chinese American consumption styles of diaper will help [the foreign employer] to develop next generation products in China, meanwhile which will be good for us to create conditions for becoming qualified American diaper companies' [redacted] This is important strategic objective of [the foreign employer] and the part of the business plan of [the foreign employer] in the U.S.A. Therefore, the main business of [the foreign employer] in the U.S.A. is to do new products researching and Chinese American diapers market survey.

Later in the same letter, the petitioner further elaborates on its U.S. operations and adds the following:

> [The foreign employer] in the U.S. does not pursue to any business in U.S. markets. Our main tasks and jobs are to do market survey of Chinese American women menstruation sanitary belts and elder pads and research American diapers for becoming qualified American diaper companies' [redacted] [The foreign employer] is extending diapers production lines and others facility. We hope we can

As referenced, the petitioner has admitted directly on the record that it does not conduct any business in the United States as defined by the Act. Again, 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). However, the petitioner has not shown that it has any intention of providing any goods or services for revenue within the next several years. Indeed, the petitioner directly states that such a prospect could be as far out as five years. On appeal, the petitioner argues that conducting a marketing study represents doing business as defined by the Act. The AAO does not find this argument persuasive; as a marketing study is not the provision of goods or services to a third party customer for the purpose of consideration, but only an exploratory event conducting to assess whether the regular provision of certain goods and services would be profitable in a specific marketplace. Indeed, it is a major inconsistency on the record that the petitioner even claims to have earned $36,881 in revenue in 2009 despite admitting to no revenue generating activities. Further, the record provides no explanation as to what the petitioner earned in revenue in 2010 or the first 6 months of 2011, or how any revenue would be earned necessary to support it operations; such as rent payments of $24,000 per year and salary obligations of $25,200 per year for three claimed employees. 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. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The petitioner must show that it is a viable business garnering regular revenue necessary to support its operations and continue the regular, systematic, and continuous provision of goods and/or services. However, the petitioner has provided almost no evidence on the record to justify concluding that such operations are occurring, or are likely to occur. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). In fact, the preponderance of the evidence clearly establishes that the petitioner is merely acting a wholly supported agent of the foreign company that is conducting a marketing survey without immediate intention of providing goods or services in the U.S. marketplace in the near future. To find that such an arrangement constitutes "doing business" according to the Act would completely undermine the intention of the Act at 8 C.F.R. § 214.2(l)(3)(v)(C), which is intended to compel a "new office" to establish that it is sufficiently operational after one year. Otherwise, any "new office" seeking an extension could easily fulfill the "doing business" requirement by sending agents on fact finding missions to the United States. Indeed, the Act directly references this type of activity by explicitly stating that "doing business" does not include the mere presence of an agent or office.

Therefore, since the petitioner has not established that it is doing business as required by 8 C.F.R. § 214.2(l)(14)(ii)(B), the appeal must be dismissed.

C. Employment in the United States in a managerial or executive capacity

C. Employment in the United States in a managerial or executive capacity

As previously noted, the director also denied the petition finding that the petitioner failed to establish that it would employ the beneficiary in a qualifying executive or managerial capacity. Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). In response to the director's RFE, the petitioner submitted the following duties performed by the beneficiary as General Manager:

> The General Manager's duty [with the petitioner] is in charge of all managerial tasks, which include selecting new office place and related office equipment to purchase, hiring employees; being responsible for China's main company, filing reports of business and finance to China's main company; adheres to China's company's strategy to establishing American branch strategic objectives and implementing the plan; accepting China's company's new jobs, instructing subordinate managers to accomplish these jobs and strategic objectives.

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has provided no specifics as to how the beneficiary will carry out the general tasks and goals listed above as a part of his daily duties. In fact, portions of the duty description are so overly vague that they provide little or no probative value as to the beneficiary's day-to-day activities, particularly when compared the petitioner's stated main purpose in the United States of conducting a marketing survey related to sanitary products.

For example, duties such as "being responsible for China's main company," "adheres to China's company's strategy to establishing American branch strategic objectives and implementing the plan," accepting China's company's new jobs, and instructing subordinate managers to accomplish these jobs and strategic objectives; provide little insight into what the beneficiary actually does on a day-to-day basis. With respect to each of the aforementioned vague tasks, the petitioner has not provided detail or supporting evidence to establish that the beneficiary actually performs these duties, such as examples of duties performed for the foreign company while in the United States; the specifics of the foreign employer's strategic objectives or business plan; or examples of new jobs assigned by the foreign employer. 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. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). 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. *Id.*

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). Beyond the required description of the job duties, 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.

However, the beneficiary's duties include many inherent inconsistencies when compared to the petitioner's stated operations. For instance, whether the foreign employer has concrete plans to develop a branch in the United States in the near future is left questionable due to the petitioner's current lack of operations and the stated exploratory marketing assignment of the beneficiary in the United States. As noted, the petitioner has explicitly stated that the actual provision of goods and services in the United States is not foreseeable in the near future. As such, the beneficiary's duties being primarily devoted to adherence to a foreign employer strategic vision is doubtful; since any such a plan, if it exists at all, is at best still in its infancy, casting doubt on the viability of the beneficiary's stated duties. The petitioner's duties are further called into question in that they mention nothing of the supposed marketing survey the petitioner offers as the full extent of the petitioner's operations in the United States. Additionally, another primary duty of the beneficiary is selecting new office space and related office equipment to purchase. According to the record, the beneficiary appears to have already accomplished these tasks through a lease agreement and operating office with two employees, as noted in provided pictures, leaving it doubtful that such duties will consist of a substantial portion of the beneficiary's time in the future. Lastly, another major duty of the beneficiary is hiring new employees. But, the petitioner only has two employees besides the beneficiary, and no immediate plans to hire any additional employees to support the U.S. operation, casting additional doubt on the assertion that the hiring of new employees would be a major duty of the beneficiary. 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. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In sum, the almost total lack of operations of the petitioner, and the petitioner's wholly inconsistent duties when compared to such operations, casts serious doubt on whether the beneficiary primarily performs executive or managerial tasks; and suggests that the beneficiary is primarily performing day-to-day operational tasks.

In sum, taking into account the totality of the circumstances, the petitioner has not established that the beneficiary is acting primarily in a managerial or executive capacity due to the vague nature of the beneficiary's duties, the various discrepancies related to the petitioner's claimed duties, and the petitioner's operations being insufficient to support a managerial or executive role. For this reason this additional reason, the appeal must be dismissed.

D. Financial Status of the United States Operation

Beyond the decision of the director, the petitioner has not provided sufficient evidence of the financial status of the United States operation necessary for the extension of a "new office" petition, as required by 8 C.F.R. § 214.2(l)(14)(ii)(E). In fact, the petitioner has provided almost no information on the financial status of the petitioner beyond an IRS Form 1120 Corporate Income Tax Return from 2009 showing gross receipts of $36,881. No further information is provided regarding revenues in subsequent years, including the critical first year of operation. Also, the petitioner has provided no statement on any financial assistance the petitioner may be receiving from the foreign employer to support its operations, despite being specifically requested by the director to provide this information in the RFE. 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). For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

III. Conclusion

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.