U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 220 50513 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

UG 1 0 2004

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.

Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its vice-president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Delaware that offers "product and company naming . . . services." The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Osaka, Japan. The petitioner now seeks to extend the beneficiary's stay for two years.

The director denied the petition concluding that the beneficiary has not been and would not be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel asserts that the beneficiary is and would be employed in a primarily managerial or executive capacity, and submits a letter in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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.
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> (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.
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> (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.
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> (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 issue is whether the beneficiary has been and would be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

(1) Manages the organization, or a department, subdivision, function, or component of the organization;

(2) 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;

(3) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(4) 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), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

(1) Directs the management of the organization or a major component or function of the organization;

(2) Establishes the goals and policies of the organization, component, or function;

(3) Exercises wide latitude in discretionary decision-making; and

(4) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter dated June 24, 2002, which was appended to the petition, the petitioner explained that the majority of the beneficiary's managerial or executive functions include planning and developing the petitioner's marketing policies and programs. The petitioner further provided the following explanation regarding the beneficiary's responsibilities as vice-president:

[The beneficiary's] management duties and responsibilities have included making decisions and implementing policies regarding [the petitioner's] marketing policies and programs in the U.S. market. In this capacity, she has been charged with developing and implementing the company's intermediate and long-term plans and objectives for the company's business expansion projects in the United States. In essence, [the beneficiary] exercises discretion over day-to-day activities of the company, which encompasses the direct responsibility of developing

> and managing the [s]ubsidiary, including directing activities, gathering and analyzing market information regarding [the] current U.S. music scene and musical groups in the United States. [The beneficiary] will continue to exercise substantial discretion in making business decisions and will continue to be the final authority on policy matters regarding our company's United States operations. She will continue to direct and manage decisions as to our operations and development. She is also expected to hire additional personnel as necessary to facilitate her performance and implementation of her responsibilities and goals.
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> * * *
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> Planning and supervising marketing: [The beneficiary] spends approximately thirty percent of her time planning and supervising marketing of [the petitioning organization]. Since April 2, 200[redacted] assists [the beneficiary] is [sic] promoting and marketing the company in the United States and Japan. [The beneficiary] works with various advertisement agencies to create ads, brochure[s], and [the petitioner's] website. [The beneficiary] makes the final decision and authorizes all marketing plans and promotions for the company in the U.S.
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> Supervising financial matters: [The beneficiary] oversees and directs all financial affairs of the company and its businesses in the United States, utilizing approximately twenty percent of her time.

The petitioner also stated that the beneficiary directs the petitioner's legal affairs, which are conducted by outside attorneys, and retains an accountant for the preparation and filing of federal and state corporate income tax returns.

The petitioner submitted Internal Revenue Service Form 941, Employer's Quarterly Federal Tax Return, and the State of California Form DE-6, Quarterly Wage and Withholding Report, for the quarter ending March 2002, each of which identified three employees, the beneficiary, and two account executives/salespersons.

In a request for evidence dated August 7, 2002, the director asked that the petitioner submit an organizational chart of the U.S. company describing its managerial hierarchy and staffing levels, including all employees subordinate to the beneficiary, and a description of their job duties, educational levels, annual salaries, and immigration status. In a response dated October 28, 2002, counsel stated that the beneficiary's two subordinates are sales account executives, who perform the following job duties: obtain new clients and retain existing clients; assist clients with marketing and research; negotiate the purchase of U.S. products; negotiate contracts with Japanese sales and distribution centers to establish outlets; aid in shipping, export licenses, customs declarations, packing, and routing of products; and assist in preparing Japanese sales products. The petitioner also stated that one sales account executive has an associate degree in business administration, while the other has a vocational degree in business.

In a decision dated February 20, 2003, the director stated that the record "fails to establish that the U.S. entity has a subordinate staff of professional, managerial or supervisory personnel who will relieve the beneficiary from performing nonqualifying duties." The director concluded that the beneficiary has not and would not be functioning at a senior level within the petitioning organization, and would not be managing the organization,

or managing a department, subdivision, function, or component of the company. Accordingly, the director denied the petition.

In a timely appeal dated March 19, 2003, counsel asserts that the beneficiary has been and would be employed in a primarily managerial or executive capacity, and submits a letter explaining the job duties outlined in the petitioner's June 24, 2002 letter. Counsel also provided the following additional explanation of the beneficiary's job responsibilities:

> [The beneficiary] establishes and promotes sales campaigns to accommodate goals of [the] company. She does so by performing a Market Analysis Review with her sales staff. She determines customer needs, volume potential, price schedules, and discount rates in developing sales campaigns. She coordinates liaison between the Southern California office and the Headquarters in Japan. She establishes and promotes the standardization of sales support and service based upon the Parent's corporate model. [The beneficiary] represents the unique concerns and requirements of the United States operations to Headquarters and provides significant contributions in the formulation of strategic product plans to ensure that the business and strategic policies are effectively incorporated into the international business activities. She also meets regularly with her staff to review current policies and procedures and develop appropriate plans necessary to increase sales in the United States and to ensure consistency of operational practice in accordance with corporate standards.

Counsel further states that the beneficiary has authority over personnel, including hiring, firing, training and delegating projects, and has autonomous control over establishing the petitioner's courses of action for the successful management of the petitioning entity.

On review, the record does not conclusively demonstrate that the beneficiary has been or would be employed by the U.S. entity 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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

The petitioner does not clarify whether the beneficiary has been and would be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim to employ a beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If a petitioner is representing the beneficiary as both an executive and a manager, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. In the present matter, the petitioner stated in its June 24, 2002 letter that the beneficiary "has been undertaking numerous managerial and executive functions." Yet, the petitioner fails to specifically demonstrate that the beneficiary has been and would be employed in both capacities. The record does not clearly describe the duties to be performed by the beneficiary and it does not indicate whether such duties satisfy employment in an executive or managerial capacity, or both. *See* 8 C.F.R. § 214.2(l)(3)(ii). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Although counsel claimed that the beneficiary spends the majority of her time planning the petitioner's objectives and policies, the record demonstrates that the beneficiary has been and would be performing non-managerial and non-executive duties of the petitioning organization. Counsel states on appeal that the beneficiary "establishes and promotes sales campaigns," performs market analyses, and works with advertisement agencies to develop the petitioner's advertisements, brochures, and its website. The beneficiary is clearly performing the marketing functions of the business rather than supervising subordinate employees responsible for this function. In fact, counsel acknowledges on appeal that one of the beneficiary's subordinates "assists" her in promoting and marketing the U.S. company. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Additionally, the record does not support counsel's assertion on appeal that the petitioner retains outside services to assist the beneficiary. Counsel states that the beneficiary spends twenty percent of her time directing the financial affairs of the business, and refers to an accountant who handles the corporate tax returns. There is no evidence, however, of the petitioner's business relationship with an accountant. Counsel's mere assertion that the beneficiary directs an outside account is not sufficient. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (the assertions of counsel do not constitute evidence). Moreover, the petitioner's annual profit and loss statement ending in December 2001 indicates an expense of only $450.00 for contract labor. It is difficult to believe that an accountant would perform all functions related to the petitioner's finances for an annual fee of $450.00. As the petitioner has not conclusively demonstrated the use of an outside accountant or the employment of any individuals who would be responsible for the company's finances, it is reasonable to assume that the beneficiary is actually performing the financial functions of the business, including maintaining payroll records and financial accounts. Again, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604. As the record establishes that the beneficiary is performing non-qualifying functions of the business, the AAO cannot conclude that the beneficiary is primarily performing in a managerial or executive capacity.

Furthermore, counsel's statement on appeal that the beneficiary will "hire additional personnel as necessary" is not relevant. 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).

Based on the foregoing analysis, the AAO concludes that the beneficiary has not been and would not be employed by the U.S. organization in a primarily managerial or executive capacity. For this reason, the appeal is dismissed.

Beyond the decision of the director, the record contains an inconsistency pertaining to the qualifying relationship between the foreign and U.S. entities as required in the regulation at 8 C.F.R. § 214.2(l)(3)(i). The petitioner stated in its letter submitted with the petition that the petitioning organization is a subsidiary of the beneficiary's foreign employer. The petitioner explained that the foreign company purchased the petitioner's six hundred shares of issued stock for $120,000.00, and presented a stock certificate indicating such ownership. The petitioner's balance sheet however reflects capital stock in the amount of $10,000.00. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective

evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has failed to conclusively establish a qualifying relationship between the two entities. For this additional reason, the appeal will be dismissed.

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

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.