

U.S. Citizenship and Immigration Services  
Department of Homeland Security

U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

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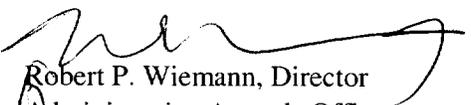
IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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

IN 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

**DISCUSSION:** The Director, Nebraska 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 seeks to employ the beneficiary temporarily in the United States 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 U.S. petitioner is a limited liability company organized in the State of Illinois that is engaged in the trading of home accessories and stationery. The petitioner claims that it is the affiliate of Snow White Trading Company, located in Hebron, West Bank, Palestine, and seeks to employ the beneficiary as its president.

The director denied the petition concluding that (1) the petitioner did not demonstrate that a qualifying relationship exists between the U.S. and the foreign entity, and (2) the petitioner did not 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 for the petitioner asserts that the director's findings were erroneous, and urges the AAO to reconsider the director's findings. In support of this assertion, the petitioner submits additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The first issue in the present matter is whether a qualifying relationship exists between the U.S. and foreign entities. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G) defines the term *qualifying organization* as a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulation at 8 C.F.R. §214.2(l)(1)(ii)(I) provides that the term *parent* means a firm, corporation, or other legal entity which has subsidiaries.

The regulation at 8 C.F.R. §214.2(l)(1)(ii)(J) provides that the term *branch* means an operating division or office of the same organization housed in a different location.

The regulation at 8 C.F.R. §214.2(l)(1)(ii)(K) provides that the term *subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

Finally, the regulation at 8 C.F.R. §214.2(l)(1)(ii)(L) provides that the term *affiliate* means:

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, or
- (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting

services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

The petitioner alleged that the U.S. entity is the affiliate of the foreign entity. Specifically, the initial petition included evidence that the foreign entity was owned as follows:

Beneficiary:	50%
██████████	50%

With respect to the U.S. entity, the petitioner provided evidence confirming the following breakdown of ownership:

Beneficiary:	50%
██████████	30%
██████████	20%

The director found this evidence insufficient to establish that the two entities were affiliates as contemplated by the regulatory definition at 8 C.F.R §214.2(l)(1)(ii)(L). As a result, a request for evidence was issued on September 17, 2002, which requested additional documentation clarifying the ownership of the two entities. Specifically, the director requested “evidence that the same ownership and control exists between the U.S. and the foreign entity.”

In a response dated September 23, 2002, the petitioner, through counsel, stated that the beneficiary is the president of the U.S. entity, and Omar Alasaly is the general manager of the U.S. entity. Consequently, counsel concluded that these positions of control coupled with their combined ownership of eighty percent of the U.S. entity established that the two entities were in fact affiliates.

The director found this assertion to be unpersuasive, and subsequently denied the petition on October 3, 2002. In his decision, the director stated that an affiliate relationship was not established, because there were different proportions of ownership within each entity. The director focused on the voting aspects of each entity. Specifically, he noted that because the foreign entity had two owners with a 50-50 interest, the foreign entity could have a split but even vote. However, as the U.S. entity had three individual owners, it could have an even or non-even split of voting. Although the director acknowledged that the owners of the foreign entity owned a majority interest in the U.S. entity, he concluded that there was no evidence to suggest that these owners also possessed the crucial element of control as required by the regulations.

On appeal, counsel for the petitioner submits a voting agreement and an amended and restated operating agreement for the U.S. entity, demonstrating that the official managers of the U.S. entity are now the beneficiary and Omar Alasaly, respectively. Both of these documents were dated October 29, 2002. Counsel urges the AAO to accept these documents as evidence that these parties both own and control the U.S. entity. The AAO, however, is not persuaded.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, Citizenship and immigration Services (CIS) is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As control is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which control was acquired. In this case, the director found the initial evidence provided to be insufficient to establish that the entities maintained an affiliate relationship, and requested that the petitioner provide additional evidence that the same ownership and control exists between the U.S. and the foreign entity. In response to this request, counsel for the petitioner merely responded with a statement that the beneficiary was the president of the U.S. entity and that Omar Alasaly was the general manager. These positions, counsel asserted, coupled with a combined majority ownership interest in the U.S. entity, were sufficient to establish an affiliation with the foreign entity.

Upon review of the record, the AAO concurs with the director's findings that a qualifying relationship was not established. With regard to the issue of ownership, the petitioner provided evidence that two individuals, namely, the beneficiary and Omar Alasaly, owned the foreign entity equally. The ownership of the U.S. entity, however, was distributed among three individuals, with the beneficiary owning fifty percent, Omar Alasaly owning thirty percent, and Ismail Aj owning twenty percent. This disproportionate ownership did not establish an affiliation between the two companies as contemplated by the regulations. Recognizing this deficiency, the director requested additional evidence to establish an affiliate relationship by focusing on a combination of ownership and control.

If two legal entities are owned *and* controlled by the same group of individuals, with each individual owning and controlling approximately the same share or proportion of each entity, then the two are considered affiliates. *See* 8 C.F.R. §214.2(l)(1)(ii)(L)(2). (Emphasis added). The elements of ownership and control, therefore, are not

mutually exclusive. Although the owners of the foreign entity owned a majority interest in the U.S. entity, there was no evidence in the record that established its voting structure or management hierarchy. Although specifically requested by the director in the request for evidence, no concrete evidence of the control of the U.S. entity was submitted. Instead, counsel merely relied on her own statement that the beneficiary and [REDACTED] had assumed the positions of president and general manager, and that they consequently controlled the company. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Additionally, although not discussed by the director in his denial, the Memorandum of Action of Members dated December 18, 2001 clearly states that the managers of the U.S. entity were the beneficiary and *Ismail Aj*, not Omar Alasaly as alleged by counsel. The director's denial, therefore, was correct, since there was no independent documentary evidence to establish that the beneficiary and Mr. Alasaly were managing the company, as asserted by counsel.<sup>1</sup>

On appeal, counsel submits a voting agreement and an amended and restated operating agreement for the U.S. entity. Both documents indicate that the newly-appointed managers of the U.S. entity, as agreed upon by all members on October 29, 2002, are the beneficiary and [REDACTED]. Counsel alleges that this newly-submitted documentation, which was enacted only *after* the denial of the petition, establishes that the U.S. entity is now owned and controlled by the same individuals who own and control the foreign entity, thus establishing an affiliate relationship. The AAO disagrees.

Although the director requested evidence establishing ownership and control in the request for evidence, the petitioner failed to submit acceptable documentation in response thereto. 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). 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Moreover, on

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<sup>1</sup> According to Article XV, 15.1, of the Operating Agreement of the U.S. entity, the managers of the U.S. entity "shall have exclusive authority to manage the operations and affairs of the Company and to make all decisions regarding the business of the Company . . ." Clearly, the appointed managers are the persons in charge of controlling the entity, and although counsel alleged that the beneficiary and Omar Alasaly "managed" the affairs of the entity, the record clearly states that Mr. Aj, and not Mr. Alasaly, was an appointed manager at the time of the filing of the petition and at the time of adjudication by the director.

appeal, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Consequently, the appeal will be dismissed.

The second issue in these proceedings is whether the beneficiary will be employed in the United States 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.

In the initial petition, the petitioner described the beneficiary's job duties as follows:

- Direct the management of the operations at, and establish the goals and policies of the [U.S.] office;
- Introduce a potential customer base in the United States to the capabilities of [the U.S. entity] through multifaceted marketing efforts to include making telephone calls, sending targeted mailings, attending and exhibiting our home accessories and stationary at trade shows and visiting the offices of possible clients to showcase samples of our home accessories and stationary;
- Achieve aggressive sales goals for the U.S. under a five-year expansion plan to develop the sales territory to maximize orders for home accessories and stationary;
- Oversee the training and supervision of a team of merchandisers at the [U.S.] office who will process orders received from customers and relay manufacturing specifications and quantities to the supervisory offices and production centers located [abroad];
- Serve as a principal liaison between customers based in the United States and the management team headquartered [abroad], with primary responsibility for coordinating the fulfillment of orders originating in the United States; and
- Troubleshoot U.S. customer complaints by immediately remedying problems through personal attention to the concerns of customers.

The director found these duties alone insufficient to establish that the beneficiary was employed in a primarily managerial or executive capacity. Consequently, on September 17, 2002, the director requested additional evidence. Specifically, the director requested the organizational chart for the U.S. entity, a description of the positions of all intended employees, and the percentage of time each employee would spend on each of their various duties.

In response, counsel for the petitioner submitted a letter from the petitioner's marketing manager dated September 20, 2002, which stated that he was the only employee currently working for the U.S. entity. He described his duties as managing the communications between the company and its clients, handling warehouse and shipment operations, developing and maintaining sales policies and promotions, and supervising and handling the company's participation in trade shows. With regard to the beneficiary's duties, the marketing manager stated that the beneficiary would spend thirty percent of his time developing and directing the company's policies, twenty percent of his time traveling abroad to finalize business agreements, twenty percent of his time planning and managing the company's operations, and thirty percent of his time building business relations with other trading companies. Finally, he described the position of executive vice president, and stated that her duties would include supervising and managing the daily administrative functions of the company, directing, establishing, and handling communications between the company and other companies and clients, and troubleshooting client complaints and helping in directing distributors and sales persons upon her arrival at the U.S. entity on October 20, 2002.

On October 3, 2002, the director denied the petition. The director determined that the evidence submitted did not establish that the beneficiary would be performing any managerial or executive functions. Rather, he found that the list of duties provided affirmed that the beneficiary would be, among other things, contacting clients, handling mailings, attending trade shows, and traveling abroad. The director concluded that the

beneficiary would be functioning merely as a first line supervisor, and thus not acting in a capacity that was primarily managerial or executive in nature.

On appeal, counsel for the petitioner asserts that the beneficiary will in fact be acting in a primarily executive capacity, and the other two employees of the company will be functioning in a managerial capacity. In support of this contention, counsel submits a five-page certification dated October 29, 2002 which outlines the duties of all three employees, with newly-added tasks and revised percentages of time spent devoted to each group of tasks.

Upon review, counsel's assertions are not persuasive. 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's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Prior to adjudication, counsel for the petitioner repeated alleged that the beneficiary would be performing both managerial *and* executive duties. As discussed in the previous paragraph, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. The petitioner did not clarify that the beneficiary was claiming to be primarily engaged in executive duties under section 101(a)(44)(B) of the Act until the appeal.

Consequently, the AAO first will examine the evidence submitted prior to appeal. The petitioner alleged that the beneficiary would be one of three "executives" and would be performing both managerial and executive duties. The petitioner acknowledged, however, that only one other employee was currently employed by the U.S. entity, and that the beneficiary's duties would include many non-managerial and non-executive tasks, such as traveling abroad, overseeing training, and performing marketing functions. 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). In this case, although the petitioner alleges that the beneficiary will be employed in a primarily managerial or executive capacity, the list of duties provided clearly includes day-to-day tasks that are crucial for the operation of the company, and furthermore, such tasks significantly outweigh the alleged supervisory functions of the beneficiary as claimed in the marketing manager's letter.

Secondly, the evidence is not persuasive that the beneficiary will be absolved from performing non-managerial or non-executive tasks if he begins working as president of the U.S. entity. At the time of filing, the petitioner was a trading company that was less than one year old. The firm employed one employee, a marketing manager, who was referred to by the petitioner as an executive until the appeal referred to him as a manager. The petitioner alleged that it also intended to employ an executive vice president. When

considering the beneficiary as the potential president of the U.S. entity, the AAO notes that all of the potential employees have managerial or executive titles. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and two managerial employees. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

On appeal, counsel submits a new list of duties prepared by the "manager" of the U.S. entity in the certification from the U.S. entity dated October 29, 2002. Specifically, this updated list of duties merely reiterates the four criteria composing the definition of executive capacity, and supplements each heading with a more detailed list of "executive" duties coupled with an updated percentage of time spent devoted to each element. This evidence is insufficient for two reasons.

First, merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). Although the petitioner supplements each criteria with previously listed duties, the petitioner's main assertion is that the duties, as provided in the definition, are the primary tasks to be performed by the beneficiary. Second, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities on appeal. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The petitioner, for the first time on appeal, alleges that the beneficiary's position is solely executive in nature, while previously maintaining throughout the proceedings that the beneficiary was both managerial and executive. For example, the certification letter alleges for the first time that the beneficiary will "generally direct" the marketing manager and the executive vice president. Prior to appeal, no assertion was made that the beneficiary would supervise or oversee subordinate employees. The petitioner, in paraphrasing the statute and providing new proportions of time spent devoted to each task, has materially altered the beneficiary's originally stated duties in an alleged effort to comply with the CIS requirements.

Finally, the petitioner indicates that it plans to hire additional employees in the future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Therefore, the record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

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.