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FILE: EAC 03 080 53784 Office: VERMONT SERVICE CENTER Date: FEB 18 2005

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

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

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont 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 general manager 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 located in the State of New York and is engaged in the sale of fabrics and clothing imported from the beneficiary's foreign employer. The petitioner claims that it is a branch of the foreign entity, located in Seoul, Korea. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's employment for an additional two years.

The director denied the petition noting that the petitioner did not establish that the beneficiary would be employed under the extended petition in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary would likely be engaged in selling the petitioner's products, as the petitioner did not provide information pertaining to additional lower-level employees who would be responsible for the business' sales.

Counsel for the petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, counsel states that the beneficiary has authority over all operations of the United States business and supervises a university-degreed assistant manager. Counsel claims that in determining whether the beneficiary would be employed in a qualifying capacity, the director erroneously applied the criteria for executive capacity rather than considering the requirements for managerial capacity. Counsel also contends that the director ignored evidence submitted by the petitioner in support of the beneficiary's employment as a manager. Counsel submits a brief and additional evidence 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 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.
- (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)(14)(ii) provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by 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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in this proceeding is whether the beneficiary 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-

- (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) 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
- (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), provides:

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

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the nonimmigrant petition on January 13, 2003. In an attached letter from the petitioner's corporate secretary, dated January 8, 2003, the petitioner provided the following explanation of the beneficiary's employment in the United States:

Upon your approval, [the beneficiary] will continue [in] the managerial position of General Manager. In such capacity, she is responsible for directing the company's marketing activities in the U.S. and accountable to the Board of Directors within the parent corporation in Korea for developing recommendations and implementing marketing strategies consistent with the companies [sic] expansion goals in the U.S. market. She assesses the fashion market by studying fashion and trade journals, traveling to garment centers and fashion houses, attending fashion shows and visiting U.S. manufacturers and merchandise marketers to obtain information on fashion trends, marketing methods, and pricing. Based upon her findings she recommends specific high fashion garment or fabric items she deems necessary to meet existing and future marketing conditions.

She has established short-range business plans and strategies and is constantly making decisions, as appropriate, on establishing cost limits, reallocating financial and human resources within the company, contract negotiations, and import considerations.

[The beneficiary] directs the marketing, sale and import by negotiating contracts with buyers in the U.S. and having subordinates forward orders to our parent company based upon confirmed orders. [The beneficiary] also directs the fathering [sic] of information from periodicals, catalogs, and other sources to keep informed on fashion and price trends and confer with buyers to determine factors that affect prices. More immediately, in this phase of the business, she is actively recruiting key personnel needed by the company to fully accomplish its aims and goals.

In carrying out her duties, she oversees the day-to-day activities of a [REDACTED] hired in the capacity of Assistant Manager, Sales & Customer Relations.

As evidence of the beneficiary's role in customer relations, counsel submitted numerous copies of e-mails between the beneficiary and corporate clients.

The director issued a Notice of Action on February 21, 2003 asking that the petitioner submit the following evidence with regard to the beneficiary's proposed employment in the United States: (1) a comprehensive description of the beneficiary's job duties, demonstrating that the beneficiary functions at a senior level within the petitioning organization and manages a subordinate staff of supervisory, professional or managerial personnel who relieve her from performing functions of the business; (2) a list of the workers employed by the petitioning organization, including each worker's name, position title, a description of the job duties performed by each, and a breakdown of the amount of time spent on each task; (3) the petitioner's organizational chart identifying its managerial hierarchy and staffing levels; (4) Forms I-9, evidencing each worker's eligibility for employment in the United States; and (5) copies of the petitioner's years 2001 and 2002 federal income tax returns, and Forms W-2 and W-3 issued by the petitioner. While the director requested additional evidence, it does not relate directly to the beneficiary's employment in the United States, and therefore will not be repeated herein.

Counsel responded in a letter dated May 15, 2003, providing a lengthy description of the job duties to be performed by the beneficiary. Counsel stated:

Upon your approval, [the beneficiary] will continue in the managerial position of General Manager. [The beneficiary], as the senior manager of [the petitioning organization], oversees and exercises wide discretion over the operations of the subsidiary. She is responsible for planning, directing, and coordinating day-to-day operations of the new branch. She oversees the negotiations of important agreements, as well as the analysis of profitability, revenues, performance against budget, and operating effectiveness. She is responsible for planning long and short-term business objectives in support of the parent company's strategic plans, coordinating functions and operations and for establishing responsibilities and procedures for attaining objectives. She is also responsible for overseeing development and implementation of programs related to quality control, marketing and sales, loss prevention and project management. . . .

Counsel outlined the following specific job duties to be performed by the beneficiary and provided an allocation for the amount of time spent on each: (1) directing customer relations operations, 20%; (2) directing sales and marketing operations, 30%; (3) directing marketing research, 20%; (4) performing and monitoring long-range sales and marketing planning, 10%; (5) inventory management, 15%; (6) financial/budget management, 10%; and (7) training and recruiting staff, 5%. Counsel provided an in-depth description of the tasks involved in each of these seven job duties. However, as counsel's letter is part of the record, it will not be repeated herein.

Counsel also explained that the beneficiary would manage the company's additional employee, an assistant manager of sales and customer relations, whose duties would include: (1) conducting and outlining market research; (2) preparing operating budgets and financial statements; (3) assisting the beneficiary in the development of sales operating budgets and ensuring that sales goals are achieved within the budget; (4)

assisting the beneficiary in developing marketing and sales strategies; (5) determining client needs; (6) making presentations to buyers; (7) responding to clients' inquiries on products and services, and resolving customer complaints; (8) assisting the beneficiary in training new staff. Counsel submitted an organizational chart for the petitioning organization identifying the beneficiary and the assistant manager, and reflecting three proposed positions – administrative assistant, documents clerk, and secretary/receptionist.

As additional evidence of the beneficiary's role in maintaining the petitioner's customer relations, counsel provided a letter from the vice-president of manufacturing/operations for Liz Claiborne Inc., in which the company's vice-president stated that the company is in "constant touch" with the beneficiary, "and it is with her consultation and liaison with our organization and [the foreign entity] that has enabled us to increase [clothing] imports." Counsel also provided tax documentation and employee records requested by the director.

In a decision dated June 12, 2003, the director determined that the petitioner did not demonstrate that the beneficiary would be employed under the extended petition in a primarily managerial or executive capacity. The director noted that the petitioner did not submit requested documentation, such as its years 2001 and 2002 U.S. Corporation Income Tax Return, completed Forms 941 for the third and fourth quarters of 2002, a list of the petitioner's employees and each worker's salary, a description of each employee's job duties, or a breakdown of the number of hours spent by the workers on each task. The director stated that "[i]t does not appear you employ any salespersons or others to provide the services of your organization to your customers," and concluded that the beneficiary would be engaged in performing the organization's sales, rather than directing the company. The director further stated that the description of the beneficiary's proposed job duties was vague and resembled portions of the regulations in which managerial and executive capacity are defined. The director determined that, while the beneficiary possessed the title of general manager, the size and nature of the petitioning organization would not support the beneficiary in a primarily managerial or executive capacity. Consequently, the director denied the petition.

In an appeal filed on July 15, 2003, counsel claims that the director failed to consider evidence submitted by the petitioner in support of the beneficiary's employment in a qualifying capacity, and erroneously analyzed the beneficiary's position under the regulatory requirements of an executive rather than a manager. Counsel explains that the beneficiary possesses the authority and responsibility over all business operations, and has aided in the petitioning organization realizing approximately \$25 million in sales during its first year. In a brief submitted with the appeal, counsel addresses the job responsibilities of the beneficiary under the extended petition, which include essentially the same job descriptions as those provided by counsel in his May 15, 2003 response to the director's request for evidence. Counsel again lists the following tasks of the beneficiary as general manager: (1) directing sales and marketing operations; (2) directing customer relations operations; (3) directing marketing research; (4) performing and monitoring long-range sales and marketing planning; (5) inventory management; (6) financial/budget management; and (7) training and recruiting staff. Counsel also outlines the above-mentioned job responsibilities for the beneficiary's subordinate employee, the assistant manager of sales and customer relations, and explains that the assistant manager is also responsible for the recruitment of an administrative assistant, documents clerk, and secretary.

Counsel challenges the director's finding regarding the petitioner's inability to support the beneficiary as a manager or an executive, and rejects both the director's analysis of the beneficiary's proposed employment as an executive rather than a manager, as claimed by the petitioner, and the director's failure to consider requested evidence submitted by the petitioner. Counsel asserts that the petitioning organization has achieved

"a level of business that supports a position of a General Manager in a primarily 'managerial capacity position,'" and states that as the senior manager in the United States organization, the beneficiary's job duties are consistent with the regulatory requirements for managerial capacity.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. 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 support an executive or managerial position. In order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's job duties and the staffing of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity. There is no provision in Citizenship and Immigration Services (CIS) 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.

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). Counsel correctly observed that the director failed to consider evidence submitted by the petitioner detailing the job duties to be performed by the beneficiary. However, while the record contains an in-depth description of the beneficiary's responsibilities, it does not support the petitioner's claim that the beneficiary's job duties would be primarily managerial in nature.<sup>1</sup>

Based on the petitioner's job descriptions, the beneficiary, although employed as the general manager, would likely be responsible for performing functions of the business that are not typically considered managerial. Such non-qualifying job duties would include developing the company's sales and marketing plans, communicating with clients to determine their needs, reviewing financial statements and sales records to determine required sales promotions, performing market research, including analyzing trends and the products offered by the petitioner's competitors, monitoring inventory, production and shipping, and establishing budgets. Although counsel addresses many of these job duties as responsibilities over which the beneficiary would "direct," thereby implying that the beneficiary, herself, would not actually perform them, the record clearly demonstrates a contrary finding.

The petitioner does not account for the employment of other workers who would relieve the beneficiary from performing the above-named business functions, allowing for her employment in a primarily managerial capacity. A review of the job duties to be performed by the petitioner's assistant manager, the sole employee subordinate to the beneficiary, reveals that the beneficiary would be relieved from performing, at most, a portion of the company's market research, determining customer needs, and developing sales operating

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<sup>1</sup> Counsel specifically notes on appeal that the beneficiary would be employed in a managerial capacity only, and challenges the director's analysis of the beneficiary's employment as an executive. Therefore, the AAO will consider section 101(a)(44)(A) of the Act only, in which the requirements for managerial capacity are outlined.

budgets. However, as the assistant manager is responsible for merely assisting the beneficiary with these tasks, it is reasonable to conclude that the beneficiary would continue to spend approximately 85% of her time performing these non-managerial functions of the business. 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). The petitioner has failed to prove that the beneficiary *primarily* performs the high-level responsibilities specified in the definition of managerial capacity and does not spend a majority of his or her time on day-to-day functions. See *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Additionally, the numerous e-mails submitted by the petitioner between the beneficiary and the petitioner's clients further supports a finding that the beneficiary is personally responsible for performing non-qualifying business operations. The AAO recognizes that customer and public relations may be activities common to a managerial position. 9 FAM 41.54 N.8.2-1. As noted by counsel in his May 15, 2003 letter, as the "face" of the petitioning organization, the beneficiary is responsible for meeting with current and prospective clients. However, the contents of the beneficiary's e-mails demonstrates that the beneficiary is directly involved in taking and confirming orders and shipments of merchandise, answering questions pertaining to the petitioner's products, and verifying inventory with the foreign company. These routine tasks do not fall under the managerial responsibility of maintaining customer and public relations. The beneficiary is clearly performing the tasks necessary to produce a product or to provide services, and therefore, may not be considered a manager. See *Matter of Church Scientology International*, 19 I&N Dec. at 604.

An additional question remains as to who is presently responsible for the non-qualifying administrative functions of the business anticipated by the petitioner to be performed by the administrative assistant, secretary and documents clerk. As these three employees have not yet been hired, it is reasonable to presume that either the beneficiary or the assistant manager is performing the job duties of these unfilled positions. Counsel has not offered any explanation as to the performance of these tasks. Again, if the beneficiary herself is responsible for the non-qualifying administrative functions of the company, she may not be deemed to be employed in a primarily managerial capacity. *Id.*

Based on the above discussion, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the record contains inconsistencies regarding the petitioner's business in the United States. While the petitioner submitted purchase orders, commercial invoices, and e-mails as evidence of its operations in the United States, other documentation in the record indicates that the petitioner is not doing business. Specifically, the petitioner's profit and loss statements for 2002 indicate that no sales have been made during this time period and reflect a net loss for each month. Also, the petitioner's IRS Form 1120-F, U.S. Income Tax Return of a Foreign Corporation, for the years 2001 and 2002 indicate that the corporation was not engaged in a trade or business in the United States during these time periods. Additionally, neither reflects a balance for gross income or sales, salaries or wages, or cost of goods sold. Furthermore, IRS Form 8833, Treaty-Based Position Disclosure Under Section 6114 or 7701(b) filed by the petitioner states that the petitioner's "sole activity in the United States involves market research and assisting in travel accommodations for visiting officials for the company." This is inconsistent with the petitioner's claim and evidence that the petitioning organization is engaged in the sale of the foreign entity's fabrics and

clothing in the United States. 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). 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).

Finally, it is noted that the record reflects that the petitioner did not file the petition for an extension within the required time frame. The regulation at 8 C.F.R. § 214.2 (l)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the beneficiary's original petition expired on January 11, 2003. However, the petition for an extension of the beneficiary's L-1A status was filed on January 13, 2003, two days following the valid status of the beneficiary.

Further, pursuant to 8 C.F.R. § 214.1 (c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. As the beneficiary's status expired on January 11, 2003, and the extension petition was not filed until January 13, 2003, the beneficiary is ineligible for an extension of stay in the United States.

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.