U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[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 employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to § 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 engaged in the manufacture and sale of shoes. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Busan, Korea. The petitioner now seeks to employ the beneficiary as its president for one year.

The director denied the petition concluding that the petitioner did not submit sufficient documentation demonstrating that the beneficiary would be employed by the United States entity in a primarily executive capacity.

Counsel subsequently filed a motion to reopen and reconsider. The director declined to treat the appeal as a motion, and forwarded the appeal to the AAO for review. On appeal, counsel asserts that as "a senior level person within the U.S. organization," the beneficiary is performing in an executive capacity. In support of the appeal, counsel submits additional documentation, including a letter written by the beneficiary, in which the beneficiary outlines his job duties in the U.S. entity.

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.

(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 issue in this proceeding is whether the beneficiary would be employed in the U.S. 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-
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> (i) Manages the organization, or a department, subdivision, function, or component of the organization;
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> (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
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> (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-
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> (i) Directs the management of the organization or a major component or function of the organization;
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> (ii) Establishes the goals and policies of the organization, component, or function;
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> (iii) Exercises wide latitude in discretionary decision-making; and
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> (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner failed to provide a description of the beneficiary's proposed U.S. job duties on the petition for a nonimmigrant visa. The director therefore issued a notice for additional evidence, dated March 19, 2002, and requested that the petitioner submit the following: (1) an organizational chart for the U.S. company, describing the position held by each employee; (2) a "complete position description" for the beneficiary, including the beneficiary's proposed job duties and a weekly breakdown of the hours the beneficiary devotes to each; and (3) a list of all U.S. employees.

In a response dated April 23, 2002, the petitioner stated that the beneficiary is the chief executive officer of the U.S. company. The petitioner explained that in this position the beneficiary develops the U.S. business operation, while also traveling between the foreign company in Korea and the manufacturing plant in China. The petitioner further stated that the "[w]hole corporate business future is dependent upon [the beneficiary's] performance."

The petitioner provided an organizational chart for the U.S. company identifying the beneficiary as the president, and an executive secretary and a sales manager as his two subordinate employees. The petitioner explained that the secretary's job responsibilities include checking e-mails, attending staff meetings, checking the status of sales, and sending instructions related to production to the factory. The petitioner stated that the responsibilities of the sales manager include checking and reviewing the status of inventory and sales, making sales calls, visiting clients, and attending meetings for product trends. The organizational chart also reflects the following six positions, which the petitioner anticipated filling: managing director, engineering manager, accounting controller, sales manager, inventory manager, accounting clerk, and warehouse supervisor. The petitioner emphasized its need to fill the position of product development engineer, and stated that the beneficiary is presently performing this function in addition to his role as chief executive officer.

In the decision dated October 21, 2002, the director concluded that the petitioner did not submit sufficient documentation demonstrating that the beneficiary would be employed by the United States entity in a primarily executive capacity. The director stated that the petitioner's failure to submit a job description of the beneficiary's duties prevented Citizenship and Immigration Services (CIS) from determining whether the beneficiary's employment is in a managerial or executive capacity. The director consequently denied the petition.

On appeal, counsel asserts that the beneficiary is clearly performing in an executive capacity. Counsel states that as president of the U.S. entity, the beneficiary would manage the corporation's business development and general administration, including financial management and human resource administration. Counsel further states that the beneficiary is "responsible for directing, organizing, expanding and developing the capabilities of shoe wear manufacturing and distribution and ultimately increasing business activities for [the petitioning organization]."

Counsel also submits a letter from the beneficiary dated November 22, 2002, in which the beneficiary outlines his executive responsibilities in the U.S. entity. As the letter is part of the record, it will not be entirely repeated herein. Specifically, the beneficiary states that his job duties include general administration, and the management of human resources, purchasing, inventory, and finances. The beneficiary also states that thirty percent of his time would be spent pursuing new ventures for the petitioner. The beneficiary further explains that his duties "are not merely the supervision of lower level employees, nor merely the involvement in the operational activities of the company (sales)," but that he is also responsible for the establishment of the business structure for the petitioning organization and the foreign company.

On review, the record does not demonstrate that the beneficiary would be employed in the United States 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.*

Although counsel submitted on appeal a letter detailing the beneficiary's proposed job duties in the U.S. entity, the regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The director provided the petitioner with notice of required evidence, and the petitioner was given a reasonable opportunity to present it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The director correctly concluded that the petitioner did not submit sufficient documentation demonstrating that the beneficiary would be employed by the United States entity in a primarily executive capacity. The director specifically noted that the petitioner had not sufficiently established the beneficiary's employment in a qualifying capacity, and requested that the petitioner provide a detailed description of the beneficiary's job duties, including a breakdown of the amount of time spent on each. In response, the petitioner provided a brief and vague job description, stating that the beneficiary develops the U.S. operation. The petitioner's description clearly fails to define the specific job duties of the beneficiary. It is impossible for the AAO to determine from a one-line job description that the beneficiary would be employed in a primarily managerial or executive capacity. The actual duties themselves reveal the true nature of the beneficiary's employment. *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). The regulation at 8 C.F.R. § 214.2(l)(3)(viii) states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The petitioner's 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).

Although the record contains little documentation regarding the capacity in which the beneficiary would be employed, it demonstrates that the beneficiary would be performing non-managerial and non-executive functions of the petitioning organization. The petitioner indicated in its response to the director's request for evidence that the beneficiary would assume the role of the product development engineer until such position is filled. The petitioner has therefore acknowledged that at least a portion of the beneficiary's time would be spent performing an actual function of the organization, rather than managing or directing the function. The petitioner also identified additional unoccupied positions related to accounting, inventory and warehouse functions, and did not account for the present performance of these tasks. It can only be assumed, and has not been proven otherwise, that the beneficiary is performing these non-qualifying daily functions of the U.S. 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).

Based on the evidence presented, the beneficiary would not be employed in the U.S. entity in a primarily managerial or executive capacity.

Beyond the decision of the director, the record does not demonstrate the existence of a qualifying relationship between the foreign and U.S. entities, as required by 8 C.F.R. § 214.2(l)(3)(i). The petitioner indicated on the petition for a nonimmigrant visa that the U.S. organization is a subsidiary of the foreign company. However, Schedule E of the petitioner's U.S. Corporation Income Tax Return for the year 2001 indicates that the beneficiary is the 100% shareholder of the U.S. organization. Schedule K of the tax return which requests information regarding the ownership of the U.S. entity, contains an additional discrepancy in that the petitioner indicated that the petitioning organization was not a subsidiary, nor was it owned by a foreign

person. 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 petition will be denied.

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.