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: NEBRASKA SERVICE CENTER Date: [illegible] 2014

IN RE: Petitioner:
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 nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence, the U.S. entity was established in 2000. The petitioner claims to be a branch office of Indus Overseas Corp., located in New Delhi, India. The petitioner claims to be engaged in the import and export of cell phones, boxing gloves and other sports equipment, and textiles. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president and general manager. The director determined that the evidence failed to establish that the beneficiary has been or would continue to be employed by the U.S. entity in an executive or managerial capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will continue to be managerial and executive in nature.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

> *Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

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 (1)(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 with 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 serves

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) states that a visa petition under section 101(a)(15)(L) 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 (1)(1)(ii)(G) of this section;

B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);

C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

E) Evidence of the financial status of the United States operation.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary's employment with the U.S. entity has been and will continue to be primarily managerial or executive in nature.

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) 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), 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;
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> (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 a letter of support dated December 9, 2002, the petitioner stated that the beneficiary was the sole owner of both the U.S. and foreign entities. The petitioner further stated that as president and chief operations officer, the beneficiary would be in charge of operations and business development. The petitioner also stated that the beneficiary would be responsible for developing a customer base in the United States and abroad.

In response to the director's request for additional evidence on the subject, the petitioner stated that the beneficiary has determined the company's product mix and marketing plan; hired an employee; and negotiated sales contracts with local and international buyers. The petitioner stated that the beneficiary's proposed duties consist of expanding the company's customer base and product line, and evaluating market conditions. With reference to staffing, the petitioner stated that the U.S. entity currently employed two employees; the beneficiary as president and general manager and a person who performs delivery services and outside correspondence.

The director determined that based upon the beneficiary's duty descriptions and other evidence submitted it did not appear from the record that the beneficiary has been or would be employed primarily in a managerial or executive capacity. The director noted that there had been no evidence submitted to demonstrate that the other employee qualified as professional, managerial, or supervisory personnel who would relieve the beneficiary from performing non-qualifying duties.

On appeal, counsel disagrees with the director's decision and asserts that the beneficiary manages the entire organization and its direction. Counsel further asserts that the beneficiary is responsible for and has successfully negotiated contracts, engages in business development and management of the overall organization, hiring and firing of employees, and in marketing the petitioner's products. Counsel states that the number of employees of the U.S. entity should not be the determining factor in deciding the beneficiary's eligibility.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been or would be employed in a managerial or executive capacity. In review of the record, the evidence shows that

the petitioner has been conducting business in the United States since 2000. Although the petitioner indicates that the petitioning entity is still in its developmental stages, the evidence demonstrates that the company had been doing business for more than one year at the time the instant petition was filed. Therefore, the petitioner does not qualify as a "new office" pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(F) which allows the petitioning business one year to become sufficiently operational. There is no provision for an extension of that one-year period. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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 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.

The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include being in charge of operations and business development, directing management, continued growth of the company, and establishing goals and policies for the company. The petitioner did not quantify the amount of time spent by the beneficiary on these duties. 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). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the petitioner describes the beneficiary as being responsible for marketing, sales, and customer service. Since the beneficiary actually performs marketing, sales, and customer service duties, he is performing tasks necessary to provide a service or product. 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 fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. In response to the director's request for additional evidence, the petitioner stated that the beneficiary's duties consist of managing and directing the business operations and hiring and firing personnel. Although the petitioner lists the beneficiary's duties as managerial or executive, it fails to quantify the time the beneficiary spends performing such duties. This failure of documentation is important because several of the beneficiary's daily tasks, such as selling the company's product, negotiating the contracts, and marketing the petitioner's product, are not executive or managerial duties as defined in the statute.

Although the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. In the instant matter, the petitioner describes the only other employee as

a person engaged in delivery services and outside correspondence. A first-line supervisor is not acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. In review, the evidence of record does not establish that the beneficiary has been or will be employed primarily in a managerial or executive capacity. Therefore, this petition may not be approved.

Beyond the decision of the director, the remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioning entity and a foreign entity as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner has not demonstrated that a qualifying relationship still exists with a foreign entity and has not persuasively demonstrated that the foreign entity will continue doing business during the alien's stay in the United States. The evidence demonstrates that the beneficiary is the sole proprietor of both entities. The petitioner stated that the beneficiary and his father operated the foreign entity until such time as the father died. There is no evidence to show that anyone was hired to replace the beneficiary's father upon his death. Furthermore, there has been no evidence submitted to establish that the operations of the foreign entity will continue in the absence of the beneficiary. For this additional reason, the petition may not be approved.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.