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

U.S. Citizenship and Immigration Services

D7

[redacted]

File: [redacted] Office: NEBRASKA 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)

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 filed this nonimmigrant petition seeking to extend the employment of its President and Chief Executive Officer (CEO) 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 Washington that is engaged in the development and distribution of data encryption products. The petitioner claims that it is the subsidiary of WIBU-Systems AG, located in Karlsruhe, Germany. 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 stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will 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 Citizenship and Immigration Services (CIS) erroneously concluded that the beneficiary is not primarily employed in an executive or managerial capacity, in part based on an inaccurate assessment of the number of individuals that the beneficiary manages and supervises, and in part based on an assumption that, as the sole employee, the beneficiary performs the day-to-day functions of the petitioner. In support of the appeal, counsel submits a brief and five unpublished AAO decisions.

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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also 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 first issue in the present matter is whether the beneficiary will 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), 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:

> In his position as President and CEO of [the petitioner], [the beneficiary] will continue to be responsible for directing the expansion of the company's U.S. subsidiary office. He will formulate and implement all aspects of the company's operational plan. He will perform market analysis to assess product competition; establish strategic alliances; and serve as a liaison with important customers to formulate goals for refining current products. He will also create and implement plans for new product development; and will hire and supervise product designers and technical support personnel as the company expands. The company anticipates hiring two employees in 2003 to fill marketing and administrative positions, and [the beneficiary] will be responsible for hiring and supervising them. [The beneficiary] will continue to have sole responsibility for discretionary decision-making for the U.S. company.

On February 27, 2003, the director requested additional evidence. Specifically, the director requested: (1) evidence that the petitioner and the foreign parent continue to be qualifying corporate organizations; (2) evidence that the petitioner has been doing business for the previous year, and; (3) a statement of duties the beneficiary will perform under the extended petition.

In response, the petitioner submitted: (1) a letter from the petitioner's corporate counsel attesting to the fact that the petitioner is a wholly-owned subsidiary of the beneficiary's foreign employer; (2) copies of the petitioner's monthly bank statements from January to December 2002; (3) copies of the petitioner's invoices to its distributor, Griffin Technologies, from January 2002 to February 2003; (4) copies of the petitioner's corporate tax returns for 2001 and 2002; (5) a copy of an unaudited 2002 profit and loss statement and balance sheet for the petitioner; (6) copies of the petitioner's 2001 and 2002 excise tax returns; (7) a copy of the petitioner's 2002 Seattle business license tax return; (8) copies of the petitioner's Internal Revenue Service (IRS) Forms 941, Employer's Quarterly Federal Tax Return, for the second, third, and fourth quarters of 2002;

(9) a copy of the petitioner's 2002 Form 940, Unemployment (FUTA) Tax Return, and; (9) an expanded description of the beneficiary's duties, provided below.

Counsel submitted the following description of the beneficiary's duties to support the assertion that he has been employed in a primarily managerial and executive capacity:

> In his position as President and CEO of [the petitioner] during the past year, [the beneficiary] managed and supervised the relationship with the company's U.S. distributor, Griffin Technologies, including management of their training on [the petitioner's] products. Griffin Technologies currently employs approximately five employees, all of whom are primarily or exclusively engaged in the sale, distribution, and support of [the petitioner's] products. During the past year, [the beneficiary] was responsible for managing all aspects of this relationship and ensuring that the Griffin employees had the necessary information and support to perform their duties. He also managed [the petitioner's] design and development team. In addition, [the beneficiary] managed client/company relationships, including the company's partnership with Microsoft Corporation . . . . [The beneficiary] also was responsible for directing the development and marketing of [the petitioner's] products in the U.S. and Canada, as well as conducting market analysis to enable the launch of [the petitioner's] future [] products. He managed the preparation of all tax documentation and financial reports for the U.S. company. He also managed [the petitioner's] professional affiliations in the U.S., including its membership in the Software & Information Industry Association, as part of his oversight of U.S. sales and marketing opportunities.

Counsel submitted the following description of the beneficiary's prospective duties to support the assertion that he will continue to be employed in a primarily managerial and executive capacity during the period of employment requested in the petition:

> [The beneficiary] will continue to perform the duties listed above and will direct the expansion of the company's U.S. subsidiary office. [The petitioner] plans to develop several new products, perform marketing, and further expand its customer support in 2003. [The beneficiary] will direct these activities, and he will be responsible for hiring and managing the necessary personnel and independent contractors. He will hire and supervise product designers and technical support personnel as the company expands, as well as hiring and supervising two employees in 2003 to fill marketing and administrative positions. He will formulate and implement all aspects of the company's operational plan. He will perform market analysis to assess product competition; establish strategic alliances; and serve as a liaison with important customers to formulate goals for refining current products. He also will create and implement plans for new product development. He will continue to have sole responsibility for discretionary decision-making for the U.S. company.

On April 15, 2003, the director denied the petition, concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director found that the petitioner did not show that the beneficiary functions at a senior level within an organizational hierarchy, and that he has been or will be managing or directing the management of a

department, subdivision, function, or component of the organization. The director further found that the petitioner did not establish that conducting market analysis, managing the preparation of tax documentation and financial reports, and the oversight of U.S. sales and marketing opportunities are primarily managerial or executive duties. The director referenced counsel's statement that the beneficiary manages the petitioner's design and development team. The director concluded that, in light of the fact that the beneficiary is the sole employee of the petitioner, the design and development team must consist of only the beneficiary.

On appeal, counsel for the petitioner asserts that CIS erroneously concluded that the beneficiary is not primarily employed in an executive or managerial capacity. Counsel contends that, despite the fact that the beneficiary is the sole employee of the petitioner, the beneficiary does not perform the day-to-day tasks necessary to the petitioner's operation. Counsel provides that day-to-day tasks are performed by outside contractors and employees at the parent company in Germany, under the management of the beneficiary. Counsel highlights that the beneficiary manages the five employees of the petitioner's contracted distributor, including individuals responsible for the sale, distribution, and support of the petitioner's products. Additionally, counsel rebuts the director's conclusion that the design and development team that the beneficiary manages consists of only the beneficiary. Counsel indicates that this team is based at the parent company in Germany, and the beneficiary manages and supervises their work both from the United States and during his frequent trips to Germany. Counsel further states that the beneficiary manages and supervises the provision of tax documents and financial reports for the petitioner. Counsel maintains that the beneficiary functions at the most senior level within the petitioning organization, as he exercises managerial control and authority over all of the company's operations. As additional indicia of the beneficiary's managerial and executive capacity, counsel reiterates that the beneficiary meets with the petitioner's customer base, he performs market analysis, and he serves as a volunteer Regional Director to coordinate the petitioner's efforts with Microsoft Corporation. Counsel submits a brief that cites five unpublished AAO decisions to support that the sole employee of a petitioner may be classified as a manager or executive.

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.

In the instant case, the petitioner asserts that the beneficiary is primarily engaged in both managerial duties and executive duties. Therefore, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act.

Counsel states that the beneficiary exercises direct management authority over individuals that perform the day-to-day tasks of the petitioner. Counsel explains that the beneficiary manages the five employees of the petitioner's contracted distributor. Counsel refers to five unpublished AAO decisions, including a decision involving an employee of the Irish Dairy Board, to support the proposition that a petitioner's use of outside

contractors satisfies the requirement that a beneficiary must work through other employees. These decisions have no precedential value in this proceeding. The AAO notes that, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

In the decision involving the Irish Dairy Board, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee, in part due to the fact that he managed outside contractors. The AAO analyzed the actual work performed by the petitioner's outside contractors to determine if the beneficiary was managing *professional* employees as required by section 101(a)(44)(A)(ii) of the Act. The AAO found that, were the outside contractors in-house employees, the beneficiary would be classifiable as an executive, and thus the beneficiary qualified for L-1 classification.

If it is claimed that a beneficiary's duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Though counsel contends that the beneficiary manages the five employees of the petitioner's distributor, the petitioner has not submitted evidence to establish that the beneficiary has the authority to supervise and control the work of its distributor's employees. As opposed to the outside contract employees that were employed by the petitioner in the non-precedent decision cited by counsel, the sales people in the present matter are clearly employed by a separate corporation that has the contractual right to sell and distribute the petitioner's product. Furthermore, the petitioner has not provided their job titles or the level of education and experience required to perform their tasks. The petitioner has only indicated that these contract employees are responsible for the sale, distribution, and support of the petitioner's products – responsibilities that can likely be performed by non-professional staff. 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). Therefore, the AAO cannot determine whether these individuals are professional employees, such that the beneficiary is managing supervisory, professional, or managerial subordinates as required by section 101(a)(44)(A)(ii) of the Act.

Counsel further asserts that the beneficiary manages a design and development team based at the parent company in Germany. The petitioner has submitted no evidence that the members of this team are employees or contractors of the petitioner. Further, the petitioner has not specified the number of individuals on the team, their job titles and specific duties, or the level of education and experience required to perform their tasks.

Again, 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. at 190.

Counsel states that the beneficiary also manages and supervises the provision of tax documents and financial reports for the petitioner. The petitioner has submitted no evidence to show who performs the preparation of the referenced tax documents and financial reports. Thus, the AAO cannot determine whether the beneficiary is managing and supervising this task, or actually performing it. 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). The description of the beneficiary's position includes duties that are non-managerial or non-executive in nature, such as "market analysis" and "new product development." 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 current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional employees and expand operations 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). Furthermore, 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. There is no provision in 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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

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. section 214.2(l)(3)(i). The petitioner indicated on its petition for a nonimmigrant worker that it is a wholly-owned subsidiary of the beneficiary's foreign employer. To assess a petitioner's claimed qualifying relationship, the AAO must examine evidence to determine the total number of stock shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Such evidence includes stock certificates, corporate stock certificate ledgers, stock certificate registries, corporate bylaws, and the minutes of relevant annual shareholder meetings. 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. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, the AAO is unable to determine the elements of ownership and control.

In the instant case, as evidence of the claimed qualifying corporate relationship, the petitioner submitted a letter from its corporate counsel, dated March 10, 2003, in which attests that the petitioner is a wholly-owned subsidiary of the beneficiary's foreign employer. 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). The petitioner's Articles of Incorporation indicate that it is authorized to issue 50,000 shares of Common Stock and 50,000 shares of Preferred Stock, each at no par value. Yet, petitioner has not submitted sufficient evidence to show how many shares have in fact been issued, and who owns the issued shares. The petitioner's Forms 1120-A, U.S Corporation Short-Form Income Tax Return, for 2001 and 2002 both indicate that, at the end of the respective tax year, an individual, partnership, estate, or trust owned 50 percent or more of the corporation's voting stock. Yet, the petitioner did not include a schedule showing the name of the owner, as required by the form. Thus, these forms do not serve as evidence of who owns shares of the petitioning corporation. The petitioner's unaudited 2002 balance sheet reflects that the beneficiary's foreign employer owns outstanding stock in the petitioner valued at $10,000, yet this document, by itself, does not meet the petitioner's burden of proof in these proceedings. *See Matter of Siemens Medical Systems, Inc., supra*. 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. at 190. Thus, the AAO is unable to determine whether a qualifying relationship exists between the petitioner and the beneficiary's foreign employer. For this additional reason, the appeal will be dismissed.

The AAO further notes that the petitioner submitted foreign language documents without complete translations, including the Articles of Incorporation and Certificate of Incorporation for the beneficiary's foreign employer. Because the petitioner failed to submit certified translations of these documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and has not been accorded any weight in this proceeding.

In visa 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.