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

U.S. Citizenship and Immigration Services

[redacted]

FILE: LIN 03 078 52140 Office: NEBRASKA SERVICE CENTER Date: DEC 1 8 2004

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

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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 employ an executive director 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 Colorado operating as an academic institute that facilitates a student exchange between Nepal and the United States. The petitioner claims to be a branch of [redacted], located in Nepal. Contrary to this claim, the petitioner's statements in the supplement to Form I-129, as well as evidence of the petitioner's incorporation in the United States, suggest that the petitioner and the foreign entity may be affiliates.

The director denied the petition concluding that the petitioner failed to establish that the U.S. and foreign entities have a qualifying relationship or that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel disputes the director's findings and submits an appellate brief in support of her statements.

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 regulations at 8 C.F.R. § 214.2(l)(3) state 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.

The first issue in this proceeding is whether a qualifying relationship exists between the U.S. petitioner and a foreign entity.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

> *Qualifying organization* means 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;
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> (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
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> (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) states:

> *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) states:

> *Branch* means an operation 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) states:

> *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.

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

> *Affiliate* means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
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> (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.

In support of the petition two statements were submitted: one statement dated January 2, 2003 and another statement dated January 6, 2003. Each statement indicates that ownership of the U.S. and foreign entities is identical in that each entity is owned by the same two people, each person owning 50% of each entity. The petitioner also submitted the foreign entity's articles of association of which page three (No. 6) states that the foreign entity issued 1,000 shares, 90% of which are owned by [redacted], while the other 10% of the shares are evenly split between [redacted] The petitioner did not submit any documentation supporting its claim regarding its own ownership and control.

On April 29, 2003 the director issued a request for additional evidence. Although the director's wording in item No. 8 was unclear, it does indicate that the record lacks documentation to support the petitioner's claim, which suggests that the petitioner is equally owned and controlled by [redacted]

The petitioner replied with a statement, dated June 9, 2003, focusing on the confusing wording of No. 8 of the director's request. Counsel clarified that the petitioner in the instant case [redacted] not [redacted] and once again put forth the claim that the petitioner is owned by [redacted] No documentation was submitted to support this claim.

On August 2, 2003 the director denied the petition stating that the U.S. and foreign entities are not similarly owned and controlled since the foreign entity is majority owned and controlled by [redacted] while ownership and control of the U.S. entity is purportedly shared equally by [redacted]

On appeal, counsel once again points out the flawed wording found in No. 8 of the director's request for evidence and reiterates the petitioner's claim that the U.S. and foreign entities are similarly owned and controlled. However, 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). Although the petitioner submitted evidence that establishes ownership of the foreign entity, without evidence establishing ownership of the U.S. entity the AAO cannot determine whether the two entities are similarly owned and controlled.

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 immigrant 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)(in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982)(in nonimmigrant visa proceedings). 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, supra* at 595. In the instant case the petitioner has repeatedly asserted that the U.S. and foreign entities share similar ownership and control. However, the record lacks any evidence documenting the petitioner's ownership, thereby leaving the AAO without any means of determining whether the U.S. and foreign entities are commonly owned and controlled as the petitioner claims. Further confusion was added by the petitioner's submission of a 2001 Form 1120S tax return, which indicates that the petitioner has elected to be an S corporation. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any non-resident alien shareholders. *See* Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a foreign corporation or individual owns it in any part. Accordingly, it appears

that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity or individual. This conflicting information has not been resolved. Thus, the record lacks evidence indicating that the foreign and U.S. entities have a qualifying relationship. For this reason, this petition cannot be approved.

The other issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a 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;
>
> 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
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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.

In support of the petition, the petitioner provided the following description of the beneficiary's job duties:

> [The beneficiary] will be responsible for the management of our entire U.S. operation including; [sic] hiring, firing, supervising and training of all staff; identifying objectives of our organization and ensuring that those objectives are met; developing and implementing programs for study abroad in Nepal; developing and implementing programs for Nepalese students to study in the U.S.; coordinating with governmental agencies, research organizations and universities and colleges to develop and implement new projects; representing the organization in national and international workshops and conferences; and representing and acting as liaison with all U.S. universities who use our program. [The beneficiary] will report directly to the International President and the Board of Directors.

In the request for additional evidence the director provided a lengthy list describing in detail the additional evidence needed in order to make a determination as to the beneficiary's eligibility for classification as an L-1A intracompany transferee. The director instructed the petitioner to submit an organizational chart, including the beneficiary's proposed position, the names, job titles, and job descriptions of all of the petitioner's employees, including the beneficiary. The petitioner was also asked to include the percentage of time each employee, including the beneficiary, would spend on each of their listed duties.

In response, the petitioner submitted a letter from counsel, dated June 9, 2003, listing each of the beneficiary's proposed duties and the percentage of time spent performing each duty. As this list of duties has been incorporated in the record in the director's decision, it will not be repeated in this decision. The petitioner also submitted an organizational chart listing the president as the beneficiary's immediate supervisor, and an accountant and secretary as the beneficiary's two immediate subordinates. Counsel explained that the beneficiary's knowledge of the foreign entity, its faculty, and its students is necessary in order to encourage students from the United States to participate in the student exchange program with the foreign entity. In a separate letter, dated June 3, 2003, [redacted] he petitioner's president, stated that in addition to supervising the petitioner's employees the beneficiary would also continue to supervise the foreign entity's employees. [redacted] stated that the U.S. entity's primary objective is to promote its study abroad programs among students in the United States and claimed that his intention is to expand the enterprise. He also noted the international programs division listed in the organizational chart and stated that staff will be added to that department, an idea that was also conveyed in the organizational chart. Neither [redacted] nor the organizational suggested that the department currently has any employees. Furthermore, the pefitioner provided job descriptions for its accountant and its secretary, suggesting that those two employees would initially be the beneficiary's only subordinates. Therefore, there is no indication that the petitioner currently employs anyone in its international programs division.

On August 2, 2003, the director denied the petition noting that the beneficiary did not specifically identify the duties involved in managing the U.S. operation, a task that would consume 45% of the beneficiary's time. The director also concluded that the various other duties attributed to the beneficiary cannot be deemed managerial or executive.

On appeal, counsel states that the beneficiary's proposed duties fall under the definitions of managerial and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B). Counsel restates each of the first three prongs in the definition of executive capacity and places great emphasis on the beneficiary's proposed position within the organizational hierarchy as well as his position title stating: "If the Executive Director is not managerial or executive, I don't know what is."

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 fact that the beneficiary would have a managerial or executive position title does not inherently mean that the duties he would perform would be primarily those of a qualifying nature. The petitioner must discuss the beneficiary's specific tasks in order to allow CIS to determine whether the 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 the instant case, even though the petitioner assigned a specific percentage of time to each of the listed duties, the descriptions that the petitioner provided lacked the necessary specificity to actually convey an understanding of what the beneficiary would be doing on a daily basis. Counsel focuses on the 45% of the beneficiary's time that would be spent "managing the entire U.S. operation." However, merely specifying the amount of time without specifying duties involved in "managing the entire U.S. operation" provides the AAO with no information about the beneficiary's actual tasks. The actual duties themselves reveal the true nature of the employment. *Id.* While counsel's claim regarding the beneficiary's high degree of discretionary authority is credible, there is no evidence that merely by having such authority one is automatically precluded from having to perform the daily operational tasks of a given entity.

In an effort to establish that the beneficiary's proposed position falls under the definition of managerial capacity, counsel states that the beneficiary will manage a staff of supervisory, professional, and managerial employees in Nepal. However, the petitioner provided no clear guidelines or a realistic plan to explain how the beneficiary would manage several dozen employees who would actually perform the work thousands of miles away from where the beneficiary would be located.

On review, the record as presently constituted does not establish that a majority of the beneficiary's duties will be primarily directing the management of the organization. A large portion of the beneficiary's listed duties is vague, and provides no clarity as to what the beneficiary would actually be doing. On the other hand, duties such as developing and implementing student programs, and representing the U.S. organization at various workshops and universities, which cumulatively comprise 30% of the beneficiary's day, suggest that the beneficiary would be directly providing the services of the business. It is noted that 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*, *supra* at 604. Furthermore, contrary to counsel's claim, the petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. 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). Nor is there any evidence that the beneficiary would otherwise be relieved from performing non-qualifying duties. Based on the organizational chart, the petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Although the organizational chart lists a secretary and an accountant, neither employee's job duties include promoting studies abroad, which is the essence of the petitioning organization. Counsel is correct in noting that the director erred in concluding that the beneficiary's proposed salary is not commensurate with a position that is of a managerial or executive capacity. However, based on the evidence furnished regarding the beneficiary's job duties and the petitioner's overall organizational hierarchy, it cannot

be found that the beneficiary has been or will be employed primarily in a qualifying capacity. For this additional reason, this 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.