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: SRC 02 130 50237 Office: TEXAS SERVICE CENTER Date: JUN 23 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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The Director, Texas 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 claims to be a subsidiary of Kiby's Ltda., located in Colombia, and states that it is a wholesaler of women's intimate apparel. It seeks to employ the beneficiary temporarily in the United States as its sales manager for an initial period of one year at a salary of $30,000 per year. The director determined that the petitioner failed to establish the following factors: 1) that the U.S. and foreign entities have a qualifying relationship; 2) that the U.S. company has sufficient premises from which to operate its business; 3) that the beneficiary's proposed employment in the United States and her employment overseas is primarily managerial or executive; and 4) that the documentation submitted by the petitioner is credible and reliable. On appeal, counsel disputes the director's findings and submits a brief in support of her assertions.

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 the petitioner has established that the U.S. entity has a qualifying relationship with 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;

(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

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

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

Parent means a firm, corporation, or other legal entity which has subsidiaries.

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

Branch means an operation division or office of the same organization housed in a different location.

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

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 regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L) state, in pertinent part:

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

(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.

The record indicates that on the petition the petitioner indicated that the U.S. entity is wholly owned by the foreign entity. In support of this claim the petitioner submitted the U.S. entity's Articles of Incorporation and its stock certificates, which indicate that the foreign entity owns 500 shares of its stock.

On June 5, 2002 the director issued a request for additional evidence (RFE) instructing the petitioner to submit the U.S. entity's annual tax return for the years 2000 and 2001, among other documents.

The petitioner submitted the requested tax returns, as well as documentation identifying the three owners of the foreign entity. In the denial the director noted the initial documents submitted by the petitioner and stated that the tax returns submitted in response to the RFE are inconsistent with the previously submitted documents in regard to the issue of the U.S. entity's ownership. Specifically, the director stated that neither of the submitted tax returns suggest that the U.S. entity is at least 50% foreign owned.

On appeal, counsel reiterates the petitioner's initial claim that the U.S. entity is a subsidiary that is wholly owned by the petitioner. However, 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). In the instant case, the petitioner does not submit any evidence to reconcile the significant inconsistency discussed by the director. Rather, counsel merely explains that the information found in the U.S. entity's tax return may have been the result of an accountant's error. However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 of 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.

On review, the record contains documents that contradict one another in regard to the ownership of the U.S. entity. As the AAO cannot determine whether the U.S. entity is owned by the petitioner as claimed, it cannot be concluded that a qualifying relationship exists between the petitioner and the U.S. entity. For this initial reason, the petition cannot be approved.

The second issue in this proceeding is whether the petitioner currently has sufficient premises in which to house the U.S. operation. The lease initially submitted in support of the petition expired in 2001. The director noted this fact in the RFE and requested that the petitioner submit a current lease to show that the U.S. entity still has premises for its business operation. In response, the petitioner submitted a purchase and sale agreement for a condominium in a business center. However, as accurately pointed out by the director based on the agreement, there is no indication whether the premises said to house the U.S. enterprise are still in the process of being built or whether such premises have already been erected. Further, the agreement was signed on August 7, 2002, five months after the petition was filed. Case law states that 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). There is no record to show that the U.S. entity had the necessary premises for its business at the time the petition was filed. For this additional reason the petition cannot be approved.

The third 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-
>
> 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-
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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;
>
> 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 support of the petition, the petitioner stated that the beneficiary's overseas job duties included establishing the company's sales plans and heading its international expansion projects. The beneficiary also assisted with training, technology, and personnel. The petitioner provided the following description of the beneficiary's proposed duties in the U.S.:

> [The beneficiary] will be supervising a team of approximately 10 sales associates and personnel in our market expansion project.
>
> Furthermore, she will be creating contacts and business relationships with providers and clients in order to establish a niche for our company in the United States.
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> She will be responsible for day to day discretionary decisions involving sales contracts, marketing programs, advertising, personnel, payroll, and other administrative duties.

In the director's RFE, the petitioner was instructed to submit additional evidence regarding the beneficiary's past and proposed job duties. Namely, the director instructed the petitioner to provide a detailed description of the beneficiary's past and proposed position, listing specific job duties; the percentage of time that has been and would be spent performing those duties; the number of subordinates the beneficiary has supervised and would supervise, as well as their job titles, descriptions of duties, and their educational backgrounds. The petitioner was asked to specify the level of the beneficiary's authority, as well as her position within each organizational hierarchy.

The response included the following description of the beneficiary's duties with the foreign entity:

> As our sales manager, [the beneficiary] is completely in charge of our sales team and works closely with our other department heads such as the Production Manager, the Quality Control Manager, the Accounting Manager and the Marketing and Finance Manager. She is responsible for hiring and firing within her department and supervises a team of approximately ten sales associates and independent employees and representatives. She has complete and full authority over our sales department.
>
> She spends her working hours equally between creating new business sales contacts, servicing existing sales clients, supervising the sales team, and working directly with marketing and advertisement for our future sales projections.

The petitioner's response also included the following description of the beneficiary's proposed duties in the United States:

> As to her intended employment in our U.S. subsidiary, we proposed to transfer her in her same position as a Sales Manager. We have grown incredibly in our U.S. subsidiary and we are in need for [her] to fill her same position within the U.S. company as she has ample experience with our company's products and sales objectives.
>
> As stated before, she will have full and complete authority of the Sales Department and will continue to work closely with our other department heads. We expect that she will be supervising a team of approximately 5-7 sales associates which are needed to our tremendous expansion in the U.S.
>
> At first, she will be spending her working hours on hiring an appropriate team of sales associates and participate in their training as well as continue to search for new business and

> service our current clients. Once our sales team is in place, she will supervise the team and work with our other departments in order to increase our sales and market share in the U.S.

Although the petitioner indicated that the beneficiary has been and would continue to supervise sales associates, it failed to provide the sales associates' exact job descriptions, leaving the AAO to speculate as to their actual duties. Furthermore, even though the petitioner stated that the beneficiary also supervised "independent employees and representative," it failed to identify their exact position titles or to specify what job duties these individuals performed. The petitioner also failed to discuss the educational levels of the beneficiary's subordinates overseas and in the United States. It is noted that 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). In the instant case, the job descriptions and educational levels of the beneficiary's subordinates are considered essential information, which would have helped the director, and subsequently the AAO, to decide whether the beneficiary has managed and would manage subordinates that are managerial or professional. *See* 8 C.F.R. § 214.2(l)(1)(ii)((B)(*2*). Without such information, the AAO cannot determine that the beneficiary's subordinates have been and would be managerial or professional. Although counsel asserts on appeal that the petitioner submitted all essential information regarding the beneficiary's past and proposed job duties, the record contradicts counsel's claim. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or would be employed in a managerial or executive capacity. The descriptions of the beneficiary's past and proposed duties are too vague to determine what duties the beneficiary has been and would be performing on a day-to-day basis. The record does not establish that a majority of the beneficiary's duties have been and would be of a primarily managerial or executive nature. Rather, based on the information submitted, the beneficiary has been and would continue to manage employees that cannot be deemed either managerial or professional. Furthermore, the beneficiary has been and would continue to directly perform the sales function in an effort to solicit clientele to purchase the company's products. However, 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 not discussed the beneficiary's position either within its own organizational hierarchy or that of the U.S. organization. As such, the AAO cannot determine that the beneficiary operates at a senior level within an organizational hierarchy. 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). Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this final 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.