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

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 02 272 54308 Office: VERMONT SERVICE CENTER Date: OCT

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, 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 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 organized in the State of Delaware that manufactures hygiene products. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in St. Michael, Barbados, West Indies. The petitioner now seeks to employ the beneficiary as its vice-president of sales and marketing for three years.

The director denied the petition concluding that the petitioner had failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel claims that as vice-president of the petitioning organization the beneficiary would be acting in a managerial and executive capacity, in which he would be responsible for opening the United States operation and securing the petitioner's major contracts. Counsel contends that the petitioner "has adequate staffing to cover other aspects of the company's operations, allowing [the beneficiary] to concentrate on his sales and marketing duties." Counsel submits a letter in support of the appeal.

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.

Pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The issue in the present matter is whether the beneficiary would 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), 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) 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

(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;
>
> (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.

The petitioner noted on the nonimmigrant petition, filed on August 28, 2002, that the beneficiary's proposed job duties in the United States would include developing and implementing market, channel and product strategies, strategic planning, product development, contract negotiations, and the development of strategic alliances. In an attached letter dated August 26, 2002, the petitioner stated that the beneficiary would be expected to perform the same duties as those he had been performing abroad. The petitioner outlined the beneficiary's foreign responsibilities as:

- Develop and implement market, channel and product strategies;
- Provide strategic planning, product development, contract negotiations;
- Develop strategic business relationships;
- Identify, quantify and recommend business development ideas;
- Provide and maintain market analysis, competitive assessments and recommendations for products and services.

The petitioner explained that during the beneficiary's approximately two years of employment with the foreign company, the beneficiary has demonstrated "considerable skills" in improving the company's market share, and in the areas of decision-making and problem solving. The petitioner further explained that the beneficiary was qualified to perform in the managerial position of vice-president of sales and marketing as a result of his managerial, technical and theoretical skills.

The petitioner submitted an organizational chart of the petitioning organization identifying ten employees in the U.S. company, including the beneficiary as vice-president of sales and marketing. The chart reflected that the beneficiary reported to the company's chief executive officer and indicated that the beneficiary had one subordinate worker, a secretary.

On October 1, 2002, the director issued to the petitioner a lengthy request for evidence. As the director's notice of action is part of the record it will not be entirely repeated herein. The director requested the following evidence relating to the present issue: (1) a detailed organizational chart of the United States entity clearly identifying the beneficiary's position and all employees, including their names and job titles, and a brief description of each worker's job duties, educational levels, and salaries; (2) a list of all workers

employed by the petitioner; (3) a detailed description of the beneficiary's proposed job duties explaining the education and employment qualifications for the position; (4) Forms 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2002; (5) Forms W-2 and W-3 evidencing wages paid to employees; and (6) a copy of the petitioner's payroll summary.

Counsel submitted a letter dated December 23, 2002, in which he explained that the beneficiary would perform "the exact same duties he has been performing in Barbados; the only difference is the market." Counsel stated that the beneficiary would be responsible for developing the sales and marketing department, in which the beneficiary would be required to spend approximately 80% of his time identifying clients, researching markets and trends, and developing new products. Counsel stated that the remaining 20% of the beneficiary's time would be spent on administrative duties, with which the secretary of the sales and marketing department would assist him. Counsel explained that the petitioning organization, which until now has been supplying the parent company with manufactured products, lacks sales management and noted that the petitioner would be responsible for this function.

Counsel again provided the previously submitted organizational chart of the petitioning organization. Counsel submitted a list of ten employees, of which five are identified on the organizational chart. Counsel also submitted the petitioner's quarterly federal tax returns and state quarterly reports for the periods ending March, June, and September 2002, which identified five, thirteen, and nine employees for each respective period. In addition, counsel provided the petitioner's 2001 U.S. Return of Partnership Income and payroll records for October 2002.

In a decision dated March 24, 2003, the director determined that the petitioner had failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director noted that although requested, the petitioner had failed to provide a description of the positions held by the petitioner's workers, and stated that the description of the beneficiary's job duties was vague and did not specifically identify what the beneficiary would be doing in the United States operation. The director also noted that the beneficiary would have one subordinate worker, a secretary, who is not considered to be a professional as required in the definition of managerial capacity. In addition, the director identified a discrepancy with the number of remaining employees, noting that the petitioner indicated nine employees on the nonimmigrant petition, while the petitioner's March 2002 quarterly tax return indicated five workers, none of which appear to be salespersons. The director concluded that the beneficiary would therefore be primarily engaged in providing sales services to the company's clients, rather than directing the organization. The director further noted that giving the beneficiary the job title of vice-president does not demonstrate that the beneficiary is functioning at a senior level within the petitioning organization, and concluded that the beneficiary would not be managing a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing the company's non-qualifying job duties. Accordingly, the director denied the petition.

In an appeal filed on April 25, 2003, counsel states that the beneficiary was unfairly denied classification as a nonimmigrant intracompany transferee. Counsel contests the director's finding that the beneficiary would be functioning as a salesperson of the petitioning organization, and states that the beneficiary would be responsible for developing the United States factory and securing major contracts. Counsel states that the record contains many "objective indications" of the beneficiary's managerial capacity, including the fact that he secured a multimillion-dollar exclusive sales agreement with a United States distributor. Counsel contends

that the beneficiary's role as "a major, strategic decision maker" is indicative of his important position in the United States company.

With regard to staffing, counsel explains that the U.S. company does not yet employ salespersons as "there can be [no] salespersons until the operations are set up and the department is created." Counsel states that the petitioner employs adequate workers to handle the company's other operations, allowing the beneficiary to concentrate solely on the sales and marketing functions. Counsel explains that the fact that there is one employee in the sales and marketing department, the secretary, "can only mean that [the beneficiary] is entirely responsible for sales and marketing." Counsel states that, although requested, the petitioner believes that the employees' job titles were already descriptive of the job duties performed by each, and likewise, irrelevant to the present issue. Counsel contends that the fact that the petitioner proved that other workers were employed in the U.S. company demonstrates that the beneficiary "is not a one man team, and that the new company has a developing structure." Lastly, counsel explains that the petitioning organization is a manufacturer of products supplied to major companies, which does not "involve the traditional retail, door-to-door, or other similar sales techniques which normally involve a sales team."

On review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Although the petitioner notes on the nonimmigrant petition that the beneficiary is not being transferred to the United States to open or be employed in a new company, the record demonstrates that the petitioning organization has not been doing business in the United States for one year. Such documentation includes the petitioner's 2001 U.S. Return of Partnership Agreement, which indicates zero in gross receipts and sales, and counsel's explanation that the petitioner had not yet begun selling its products in 2001. Therefore, the AAO will review this issue pursuant to the regulation at § 214.2(l)(3)(v).

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans, organizational structure, and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

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.* Moreover, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A 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.* Therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of either capacity.

In the present matter, the petitioner has not identified whether the beneficiary would be employed as a manager, executive, or both. In his August 26, 2002 letter, counsel referred to the beneficiary's proposed employment in a managerial capacity, yet on appeal, states that the beneficiary "by definition, acts in a managerial or executive capacity," and asserts that the beneficiary "is a manager/executive." A petitioner may not claim to employ the beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If it is representing the beneficiary is both an executive and a manager, the petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. As explained below, the petitioner has not demonstrated that the beneficiary would be employed as a manager or an executive.

It appears from the record that the beneficiary's responsibility for the petitioner's sales and marketing department would include performing all functions of the department including those not characteristic of a manager or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Specifically, the beneficiary would spend the majority of his time performing the non-qualifying functions of identifying clients, researching markets and market trends, and developing new products. While the regulations allow for the beneficiary's performance of these non-managerial and non-executive job functions during the first year of approval of the petition, the petitioner has not accounted for the employment of future workers who would relieve the beneficiary from performing the job functions of the marketing department. In fact, counsel acknowledges that the beneficiary's sole subordinate employee in the sales and marketing department is a secretary, and does not document the petitioner's anticipated personnel structure. The lack of information regarding the petitioner's proposed staffing levels is relevant in order to determine whether the beneficiary would be employed in a primarily managerial or executive capacity within one year of approval of the petition. 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). The AAO notes 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*, 19 I&N Dec. 593, 604 (Comm. 1988).

Additionally, the petitioner has not demonstrated that the beneficiary would be supervising and controlling the work of other supervisory, professional, and managerial employees as required in sections 101(a)(44)(A) and (B) of the Act. Following the director's claim that the beneficiary's subordinate employee is not a professional, counsel states on appeal that "[a]nother error [in the director's decision] is the suggestion that [the beneficiary] supervises professionals; we never made such an assertion." While not asserted by counsel, this element is critical to establishing the beneficiary's employment in a managerial capacity. *See* section 101(a)(44)(A)(ii) of the Act. The record does not demonstrate that the beneficiary would be supervising or controlling the work of supervisory or managerial employees either. *Id.* Again, the lack of evidence regarding the petitioner's proposed staffing levels implies that the beneficiary would supervise a secretary only. As the petitioner has failed to demonstrate this crucial requirement, the AAO cannot conclude that the beneficiary would be employed in a primarily managerial capacity.

Moreover, the petitioner failed to submit the additional evidence requested by the director. 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. Counsel claims on appeal that the job descriptions for the petitioner's employees are not relevant to the present issue. Although not necessarily determinative of the beneficiary's employment in a qualifying capacity, the regulations allow the director to request any information that he or

she deems probative. 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).

The AAO recognizes the authority given to the beneficiary to establish the petitioner's sales and marketing department and bind the petitioning organization in a supply agreement with a United States distributor. However, this documentation alone is not sufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity. As noted previously, the regulations specifically require that the petitioner clearly identify the qualifying function to be performed by the beneficiary, and the scope and organizational structure of the petitioning organization in order to establish the beneficiary's proposed managerial or executive position. As described above, the petitioner has not satisfied the regulatory requirements. Therefore, the AAO cannot conclude that the beneficiary would within one year of approval of the petition be employed in the United States in a qualifying capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether a qualifying relationship exists between the beneficiary's foreign employer and the United States entity as required in section 101(a)(15)(L) of the Act. 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 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); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). 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*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. 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. *See Matter of Siemens Medical Systems, Inc.*, at 364-365. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In the present matter, the petitioner stated that the petitioning organization is a subsidiary of the beneficiary's foreign employer, BDS Hygiene Products, Ltd., through the foreign company's indirect ownership of a holding company. The petitioner explains that BDS Hygiene Products owns 100% of Harom Holding, Inc., which in turn owns 51% of the U.S. entity. The petitioner submitted two stock certificates reflecting the above-outlined ownership interests. It is unclear who owns the remaining 49% interest in the petitioning organization. As evidence of funding the petitioning organization, counsel provided three copies of currency transfers initiated by a bank in Nova Scotia to two separate accounts held in banks located in Milwaukee, Wisconsin and Detroit, Michigan. It is unclear from the photocopied currency transfers whether the recipient bank accounts are related to the petitioning organization. Moreover, the documents reflect a total transfer of $352,500. If these funds were used to purchase a membership interest in the petitioning organization, a discrepancy exists in Schedule L of the petitioner's 2001 U.S. Return of Partnership Income, which identifies

the partners' capital accounts in the amount of $550,200. Furthermore, other than a stock certificate, the petitioner did not provide any documentation concerning the holding company, Harom Holding, Inc. This information is relevant in order to determine the accuracy of the petitioner's notation on its 2001 partnership return that it does not have any foreign partners, and is relevant to substantiating the foreign entity's claim of indirect ownership of the United States entity. The petitioner did not provide the supplemental statements of the tax return. 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). Also, 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 appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.

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