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: WAC 01 197 55127 Office: CALIFORNIA SERVICE CENTER Date: SEP 14 20[illegible]

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

PUBLIC COPY

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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

According to the documentary evidence contained in the record, the petitioner was established March 28, 2000 and is described as an Internet services business. The petitioner claims to be a subsidiary of Toubro [redacted] located in India. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its executive director for one year.

The director determined that the petitioner had not submitted sufficient evidence to establish that (1) a qualifying relationship exists between the U.S. and foreign entities; and (2) the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity.

On appeal, counsel states that the petitioner has submitted sufficient evidence to establish that a subsidiary relationship exists between the U.S. and foreign entities, and that the beneficiary will be employed by the U.S. entity primarily in a managerial capacity.

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

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

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

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

> (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.
>
> (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 with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;

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

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

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

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

The first issue to be addressed in this proceeding is whether the petitioner has established that a qualifying relationship exists between the U.S. and foreign entities.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define a "qualifying organization" and related terms as:

(G) *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.

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

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

(K) *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.

(L) *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.

In a letter of support dated July 10, 2000, the petitioner stated that 85 percent of the shares of its outstanding stock were owned by the parent company and 15 percent by the beneficiary.

The petitioner submitted as evidence copies of the U.S. entity's IRS Form 1120, Corporate Income Tax Return for 2000; corporate Articles of Incorporation dated March 28, 2000, company By-Laws dated May 8, 2000; two stock certificates; and a Notice of Transaction Pursuant to Corporations Code Section 25102(f) dated May 8, 2000.

The director denied the petition after determining that the evidence submitted by the petitioner was insufficient to establish that a qualifying relationship existed between the U.S. and foreign entities. The director noted that the two stock certificates indicated that the foreign entity owned 85 percent and the beneficiary owned 15 percent of the U.S. Company. The director also noted that the petitioner's IRS Form 1120, Corporate Income Tax Return for 2000 indicated that the beneficiary owned 100 percent of the shares of stock in the U.S. entity, and that no foreign individual or entity owned any shares of stock during 2000. (See director's decision page 5). The director determined that the petitioner had submitted conflicting information with regard to the actual ownership of the U.S. entity, and therefore, had not established that a qualifying relationship existed between the U.S. and foreign entities.

On appeal, counsel asserts that the discrepancy was due to the company's accountant inadvertently failing to show the foreign entity's stock interest in the U.S. Company. Counsel presents an amended Form 1120X and Form 5472, Depreciation and Amortization Schedule for 2000, as evidence of the stock distribution.

On reviewing the petition and the evidence, the petitioner has not established that a qualifying relationship exists between the U.S. and foreign entities. The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between U.S. and foreign entities for purposes of a nonimmigrant visa petition. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm. 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of*

Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988) (in immigrant visa proceedings). In the 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.*

In the instant matter, the petitioner has not submitted sufficient proof of stock purchase by the foreign entity. Although counsel presents an explanation for the discrepancies contained in the record and submits an amended 1120X, evidence of record still brings into question the existence of a qualifying relationship. The record does not reflect that a subsidiary relationship exists between the U.S. and foreign entities as the record does not show that the foreign entity owns, directly or indirectly, more than half of the U.S. entity and controls the entity; nor does it show that the foreign entity owns, directly or indirectly, half of the U.S. entity and controls the entity; nor does the record reflect that the foreign entity owns, directly or indirectly, less than half of the U.S. entity, but in fact controls the U.S. entity.

The U.S. entity's Articles of Incorporation indicate that the corporation is authorized to issue a total of 20,000,000 shares of stock. The company's By-Laws and Organizational Meeting Minutes also indicate that the organization is authorized to issue a total of 20,000,000 shares of stock. The Organizational Meeting Minutes indicate that 15,000 of the 20,000,000 shares of company stock were issued to the beneficiary upon unanimous agreement by the board, for consideration of $15,000.00. Likewise, the State of California Notice of Transaction Pursuant to Corporations Code Section 25102(f) indicates that 15,000 shares of the U.S. entity's company stock were sold to the beneficiary on May 8, 2000. The information contained in the U.S. entity's Articles of Incorporation, By-Laws, Organizational Meeting Minutes, and the State of California Notice of Transaction Pursuant to Corporations Code Section 25102(f) directly conflict with the information contained in the stock certificates, which are dated the same day of the company By-Laws, organizational meeting and notice of transaction. There is no evidence to show that 85,000 shares of the U.S. entity's stock were ever issued to the foreign entity. The information contained in the initial company tax returns for 2000 appear to reflect the true posture of the U.S. entity's stock issuance. 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).

There has been no company by-laws, tax records, stock certificate registry, purchase of shares agreements, bank statements, cancelled checks, wire transfers, or any other business documents presented to substantiate the purchase of U.S. entity stock by the foreign entity. There are no certified meeting minutes that demonstrate the foreign entity's interest in purchasing shares of stock in the U.S. entity, nor has there been evidence presented to show an agreement by the directors and shareholders of the U.S. or foreign entity to purchase such stock. Neither does the record establish that the control of the entity is *de jure* or *de facto,* or to what extent proxy votes are utilized. *Matter of Hughes,* 18 I&N Dec. 289 (BIA 1982). Claims of ownership and control without independent documentary evidence to substantiate such an allegation 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).

Neither does the record reflect that a qualifying affiliate relationship exists between the U.S. entity and the foreign company as the record does not show that both entities are owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity.

The second issue in this proceeding is whether there is sufficient evidence to establish that the beneficiary will be employed by the U.S. entity primarily in an executive capacity.

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.

Initially the petitioner classified the beneficiary as the U.S. entity's executive director. The petitioner described the beneficiary's duties as:

> . . .perform all duties as an executive including overseeing the implementation of the foreign companies [sic] policies and procedures, making key corporate decisions and negotiating substantial contracts nationally and internationally, associations, governmental authorities, private or commercial entities, leaders in the computer industry. [The beneficiary] will liaison between the parent company and the U.S. company as well as maintaining [sic] control over operations and management in the United States.

The petitioner submitted an organizational chart depicting the U.S. entity's hierarchy structure. The chart demonstrated that the beneficiary served under the president as vice president and director, and that the general manager served under the direction of the beneficiary. The chart also listed four software developers as working with the U.S. entity pursuant to an agreement with Global Dynamic International LLC. The petitioner submitted copies of service agreements as proof of the company doing business.

In response to the director's request for additional evidence with regard to this issue, the petitioner described the beneficiary's proposed duties in part as:

> As the executive director of [the U.S. entity], [the beneficiary] is overall responsible for the operations of [the U.S. entity]. He is required to expand and explore the business opportunities of [sic] for the services of [the U.S. entity] in the United States, including services in information technology area. [sic] He is responsible for meeting potential customers and grow [sic] and develop [sic] this business.
>
> In addition with the growth of the business in the United States, the beneficiary will be responsible for hiring additional managers for [the U.S. entity]. It is anticipated in the

> coming year the beneficiary will hire the services of senior project manager and business development manager. [sic] The beneficiary will be directly associated with and responsible for hiring senior managers and for developing a strategy to expand the business.
>
> It is anticipated that the beneficiary will spend 25% of his time in business development activities, including meeting potential clients; he will spend 35% of his time on operational issues, including supervising the activities of [the general manager] and his team.
>
> In addition it is anticipated that the beneficiary will spend 25% of his time on hiring of senior personnel for various line functions and the balance 15% of his time will be spent on keeping the senior management of [the foreign entity] appraised on the development of [the U.S. entity].

The director determined that the evidence submitted was insufficient to establish that the beneficiary would be employed primarily in a managerial or executive capacity. The director noted that a review of the service contract agreements submitted indicated that the petitioner located companies who had computer programmers for hire and searched for companies that needed programmers, computer consultants, or other computer service work in order to facilitate that need. The director also noted that the contracts submitted established that the computer programmers and consultants recruited by the petitioner were not employees of the petitioner, in that the contracting companies would be responsible for directing their activities. The director stated that the supervision of the general manager appeared to be only incidental and not a primary function of the beneficiary. The director also stated that since the other individuals were not employed by the U.S. entity, the general manager's duties were unclear. The director stated that considering the number of current employees who possessed managerial or executive titles, it appeared that the beneficiary's duties would encompass non-qualifying duties.

On appeal, counsel asserts that the director should have examined whether the U.S. entity employs or intends to employ other workers or subcontractors who will be responsible for producing the product or providing the services of the organization. Counsel further contends that the beneficiary supervises the general manager, who in turn supervises the independent contractors. Counsel contends that the independent contractors represent the petitioner and that the beneficiary is responsible for their overall performance. Counsel also asserts that the majority of the beneficiary's time is spent supervising managerial staff; establishing and implementing company short and long-range plans; deciding issues related to company financing, policies, and procedures; negotiating contracts; and liaising with the foreign entity's board of directors. Counsel continues by reiterating the statutory definition of executive capacity in describing the beneficiary's responsibilities.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. In evaluating whether the beneficiary is employed in a primarily managerial capacity, the AAO will look first to the petitioner's description of the beneficiary's 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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). In the instant matter, there is

insufficient evidence to show that the beneficiary performs the high-level responsibilities as defined, or that he primarily performs those duties rather than spending the majority of his time performing day-to-day functions of the organization.

Further, while company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other pertinent factors such as the nature of the petitioner's business. Together, these factors can be used as indicators which help determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. In the instant matter, the latter more accurately describes the beneficiary's role. The record demonstrates that the majority of the beneficiary's job duties will entail marketing, sales, and recruitment of other companies' personnel in order to service companies in need of their assistance.

Although counsel contends that the beneficiary supervises the company's general manager and a myriad of independent contractors, there has been no documentary evidence submitted detailing his supervisory responsibilities. To the contrary, the contract agreements demonstrates that the independent contractors are not employees of the petitioner, but are instructed and supervised by the petitioner's clients for whom the petitioner has arranged for the use of the contractor's services. As evidence of this fact, a clause contained in the service agreement between Haufe & Associates, Inc. (H&A) and Toubro Systems, Inc. (Toubro) reads:

> It is agreed H&A consultants are for all purposes employees or agents of H&A and not employees or agents of Toubro. Toubro will not be responsible for worker's compensation, disability benefits, unemployment insurance, withholding income taxes or Social Security taxes which may be required under Federal, State, and local laws and regulation.

There has been no evidence presented to establish that the independent contractor's are compensated by the U.S. entity for their contract services. Additionally, counsel has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. 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).

In the instant matter the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. The petitioner has provided no comprehensive description of the beneficiary's or the subordinates' duties that would demonstrate that he will be directing the management of the organization. Evidence of record does not establish the level of education required to perform the general manager's duties, nor does it show that the manager manages or supervises a subordinate staff.

Evidence of record demonstrates that the U.S. entity employs three individuals, all of who maintain executive or managerial titles. There is no evidence to demonstrate that a subordinate staff exists within the organization's hierarchy. Based upon the evidence of record it appears that the beneficiary is primarily engaged in the sales and services aspect of the business, therefore the beneficiary cannot be deemed to be primarily acting in an executive capacity. Furthermore, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not

satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The evidence of record demonstrates that the beneficiary will perform the services of the organization as sales and marketing agent, rather than directing the activities of the organization. As case law confirms, an employee who primarily performs the tasks necessary to produce a product or to provide a service 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 upon the evidence submitted it does not appear that the reasonable needs of the petitioning company would plausibly be met by the services of the beneficiary as executive.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. In the instant matter, the U.S. entity was established in 2000. Counsel infers that the U.S. entity is still in its developmental stages. The petitioner indicates that it plans to hire additional employees and independent contractors in the future. However, the record shows that the entity has been operational for more than one year and therefore, it will be treated as an established entity pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C). 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 executive position.

In summary, the record as presently constituted is not persuasive in demonstrating that a qualifying relationship exists between the U.S. and foreign entities or that the beneficiary will be employed primarily in an executive capacity.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.