U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 02 268 52793 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

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

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

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 filed this nonimmigrant petition seeking to extend the employment of its president as an L-1A nonimmigrant 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 Georgia that is engaged in small business investments. The petitioner claims that it is the affiliate of the beneficiary's foreign employer, located in Karachi, Pakistan. The petitioner now seeks to extend the beneficiary's stay for three years.

The director denied the petition concluding that the petitioner had failed to demonstrate that the beneficiary, who at the time of filing the petition was the petitioner's sole employee, would be employed under the extended petition in a primarily managerial or executive capacity.

On appeal, counsel claims that the beneficiary is performing both managerial and executive job duties. Counsel contends that the employees hired subsequent to the filing of the petition should be considered in the analysis of the beneficiary's employment capacity, "as the petitioner's business was shown to be expanding." Counsel states that a brief and evidence would be submitted to the AAO within sixty days. To date, the AAO has received nothing further and the record will be considered complete.

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.

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

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

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

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

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

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

The issue is whether under the extended petition 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.

On the nonimmigrant petition, filed on September 16, 2002, the petitioner noted that as president, the beneficiary would negotiate contracts, hire personnel, explore investment opportunities, and establish all policies and objectives of the company. In an attached letter from counsel, dated August 12, 2002, counsel provided the following job description for the beneficiary:

> [The beneficiary] is employed as President of [the petitioning organization] during the period of his U.S. assignment. As President, [the beneficiary] plans, develops, and establishes policies and objectives of [the foreign entity] in the United States. He directs and coordinates business contracts in the entire operation of [the petitioner's] market, and develops other relevant policies and procedures implementing the overall objective of [the foreign entity]. [The beneficiary] serves as incorporator and director to make sure that [the petitioning] company complies with established policies and objectives of the parent company. He has established a convenience store complex on behalf of the company, evidence of which is attached.

Counsel submitted the following documentation related to the petitioning organization: (1) Form 1120, U.S. Corporation Income Tax Return, for the year 2001; (2) Form 941, Employer's Quarterly Federal Tax Return, for the quarter ending on December 31, 2001; and (3) Form W-4, Employee's Withholding Allowance Certificate, for 2002.

In a request for evidence dated October 29, 2002, the director noted that the record was not sufficient to establish that the beneficiary would be employed in the United States as a manager or executive. The director requested that the petitioner submit copies of Forms W-2, Wage and Tax Statement, for all employees and an organizational chart for both the foreign and U.S. entities reflecting the positions of the beneficiary and the employees in both companies, including position titles and the duration of employment.

Counsel responded in a letter dated January 22, 2003 and provided the following description of the beneficiary's job duties during the previous year:

> [The beneficiary] was responsible for all contact [sic] negotiations, vendor relations, and overseeing the management of the business. The estimated time breakdown of his activities is: Contract-related work – 25%; Vendor Relations/Marketing – 30%; General Management –

> 45%. [The beneficiary] has the highest level of authority, answering only to the Board of Directors of the Parent Company.

In the attached documentation, counsel included an additional description of the beneficiary's responsibilities:

> Conduct all business accounting activities, banking, bill payment, salary, and insure [sic] funds availability; Marketing and sale of products and services; Negotiate cost of goods and merchandise purchases to assure timely and economic resupply [sic] of merchandise; Insure [sic] facilities comply with state and local safety and operational requirements; Provide overall supervision for all subordinates.

The petitioner noted on the beneficiary's position description that it has employed one store manager since the middle of 2002 and has employed two employees as general staff since October 1, 2002. The petitioner also noted that it anticipated hiring an additional two employees in 2003.

The petitioner also included in the documentation its state Employer's Quarterly Tax and Wage Report for the quarter ending in December 2002. The petitioner reported three employees on the quarterly report for this period. The petitioner also submitted its Employer's Quarterly Federal Tax Return, which, in contrast, failed to identify any employees for the quarter ending December 2002. Also provided were the petitioner's 2002 Wage and Tax Statements for the three employees identified on the petitioner's state quarterly tax and wage report.

In her June 2003 decision, the director determined that the petitioner had failed to establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director stated that, at the time of filing the petition, the beneficiary was the sole employee of the petitioning organization. The director acknowledged that since that time, the petitioner hired two staff employees to work in the petitioner's Shell Mart convenience store and gas station. The director determined that at the time of filing the petition, which the director noted is the appropriate period at which to analyze the beneficiary's employment capacity, the beneficiary was not functioning in a managerial or executive capacity. The director further noted that, even though the petitioner currently employs two workers, "there is nothing to suggest that the beneficiary is overseeing professional employees, more than a first-line supervisor, or not engaging in activities that are necessary for the day-to-day menial operation of the business." Accordingly, the director denied the petition.

In an appeal filed on June 30, 2003, counsel states that the beneficiary's duties were clearly of a managerial and executive nature, and claims that the beneficiary was functioning as an executive and a manager. Counsel contends that the petitioner's additional employees, hired after the instant petition was filed, should be considered in the analysis of the beneficiary's employment capacity, "as the petitioner's business was shown to be expanding." In addition, counsel explains that the size of the petitioner's business, which is grossing approximately $1,000,000 in annual sales, justifies having an executive and manager to operate the company.

On review, the petitioner has failed to demonstrate that under the extended petition the beneficiary would be employed by the petitioning organization in a primarily managerial or executive capacity.

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. The regulation at 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. In order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's job duties and the staffing of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity. There is no provision in Citizenship and Immigration Services (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.

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). A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. As required in the regulations, 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.*

Contrary to counsel's assertion on appeal, the AAO will review this issue according to the facts at the time of filing the petition. It is a well-established rule that the petitioner must demonstrate eligibility for the classification sought at the time of filing the nonimmigrant visa petition. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Counsel has not provided a detailed explanation as to why the AAO should deviate from case law and consider changes in the petitioner's staffing levels that occurred following the filing of the 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. *Id.* at 249.

In the present matter, the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Counsel claims on appeal that the beneficiary was functioning as a manager and an executive. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A 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 if it is representing the beneficiary is both an executive and a manager. The petitioner has failed to satisfy this regulatory requirement.

Specifically, the petitioner has not established that at the time of filing the petition the beneficiary would be supervising and controlling the work of other supervisory, professional, or managerial employees, or directing the management of the petitioning organization. *See* sections 101(a)(44)(A) and (B) of the Act. Although the petitioner indicated in its response to the director's request for evidence that it employed a store manager since mid-2002, there is no documentation in the record, such as quarterly tax returns or employee records, supporting the petitioner's claim that the manager was hired prior to the filing of the present petition. The petitioner provided quarterly tax returns for the fourth quarter only and stated that its two staff employees were hired after the petition was filed. The record therefore lacks sufficient documentation that the beneficiary would be supervising or directing a subordinate staff that would support the beneficiary in a managerial or executive position.

Additionally, the beneficiary's job duties support a finding that the beneficiary would be performing the functions of the business rather than managing or directing those employees responsible for the business' operations. Counsel explains in his January 22, 2003 letter that the beneficiary would spend 55% of his time performing the non-qualifying duties of contract-related work, vendor relations and marketing. The additional job description provided by the petitioner indicated that the beneficiary would also be responsible for accounting, banking, payroll, and purchasing. As addressed previously, the petitioner does not employ any workers who would relieve the beneficiary from performing these non-managerial and non-executive job duties. The beneficiary is clearly spending the majority of his time performing the non-qualifying functions of the business. 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). As such, the petitioner has failed to demonstrate that under the extended petition the staffing of the U.S. operation would support the beneficiary in a primarily managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).

Based on the foregoing discussion, the AAO cannot conclude that the beneficiary would be employed by the United States entity in a qualifying capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed abroad in a qualifying capacity as required in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). The petitioner stated in its August 12, 2002 letter that the beneficiary was employed as a manager in the foreign entity and was responsible for personnel operations and contract negotiations with suppliers. In its response to the director's request for evidence, the petitioner noted that the foreign entity employed a vice-president, two managers, including the beneficiary, a supervisor, a supplier, and a driver. There is no indication in the record that the beneficiary managed or directed any of the named employees. Additionally, the brief job description provided by the petitioner indicates that the beneficiary was performing at least some of the foreign entity's non-qualifying functions, such as contract negotiations and personnel operations. Absent additional evidence, the AAO cannot determine whether the majority of the beneficiary's time was spent on non-managerial and non-executive job duties. Again, 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. at 604. For this additional reason, the appeal will be dismissed.

An additional issue not addressed by the director is whether the requisite 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 petitioner noted on the nonimmigrant petition that the U.S. company is an affiliate of the beneficiary's foreign employer. The regulation at § 214.2(l)(1)(ii)(L) defines affiliate as:

> *(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 petitioner stated that an affiliate relationship exists as a result of a majority ownership of each company's stock by one individual, [redacted] Schedule K of the petitioner's 2001 tax return however indicates that the petitioning organization is owned solely by the beneficiary. There is no documentation

reflecting a subsequent change in ownership or transfer of stock in the petitioning organization to Shaikh Mohammed Younus. There is also insufficient documentation to determine whether the beneficiary owns and controls the foreign entity. As such, the AAO cannot conclude that the beneficiary's foreign employer and the U.S. entity possess a qualifying relationship. The appeal will be dismissed for this additional reason.

Lastly, the inconsistent documentation in the record raises the issue of how the petitioning organization is doing business in the United States. The petitioner indicated on Schedule K of its 2001 corporate income tax return that it was engaged in the sale of fabric. However, the petitioner indicated on the nonimmigrant petition that it was engaged in small business investments. Supplementary documentation reflects that, as of May 6, 2002, the petitioning organization has been operating a convenience store and gas station. The inconsistencies in the petitioner's claimed business raise serious doubts regarding the petitioner's eligibility for the nonimmigrant petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* 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.