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U.S. Citizenship and Immigration Services

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[redacted]

JAN 27 2005

FILE: WAC 03 149 50996 Office: CALIFORNIA 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, California 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 section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L). The petitioner is a general partnership formed in the State of California that is a distributor of the foreign entity's drink ingredients and supplies to United States retailers. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Ontario, Canada. The petitioner now seeks to extend the beneficiary's stay for three years.

The director denied the petition concluding that the petitioner failed to demonstrate that the beneficiary would be employed under the extended petition in a primarily managerial or executive capacity. Specifically, the director determined that the beneficiary would be acting as the petitioner's representative rather than as a manager or executive of the business.

On appeal, counsel outlines the beneficiary's job duties in the petitioning organization, and states that in addition to his position as president of the petitioning organization, the beneficiary "presides as chairman of management, executive, and sales." Counsel also states that the beneficiary manages the company as he personally supervises the financial and marketing managers, who counsel claims are not lower-level employees. Counsel submits a brief 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 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.
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> (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.
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> (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.
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> (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 the beneficiary would be employed in the United States under the extended petition 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 filed the nonimmigrant petition on April 14, 2003 noting that the beneficiary would be employed under the extended petition as president. In an accompanying letter, the petitioner explained that as president of the organization, the beneficiary has been responsible for the daily operations and activities of the petitioning entity.[1] Specifically, the petitioner explained that the beneficiary has spent the majority of his time developing the petitioner's policies and has been spent 20% and 30% of his time supervising financial matters and planning and supervising marketing objectives, respectively. The petitioner provided the following description of the beneficiary's tasks:

> [The beneficiary's] management duties and responsibilities have included making decisions and implementing policies regarding the company's marketing policies and programs in the U.S. market. In this capacity, he has been charged with developing and implementing the company's intermediate and long-term plans and objectives for the company's business expansion projects in the United States. In addition, [the beneficiary] negotiates and authorizes contracts with distributors of soft drinks in the United States who show interest in our products. In essence, [the beneficiary] exercises discretion over day-to-day activities of [the petitioning organization], which encompasses the direct responsibility of developing and managing the company, including directing activities, gathering and analyzing market information regarding current U.S. drink market and trend in the United States.
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> Furthermore, [the beneficiary] provides the parent company, Tea Shop 168, with the timely evaluations of the current U.S. economic conditions. He has been working with Advertising and Promotions firms in Canada and the United States to develop literature, advertisements, and incentive pieces for the cars we sell. [The beneficiary] has also been representing [the petitioner] at various convention/shows to promote the presence of our company in the

[1] The AAO notes an inconsistency in the letter that the petitioner claims was submitted in support of the petition to extend the beneficiary's classification as a nonimmigrant intracompany transferee. The petitioner's letter, which is dated October 15, 2001, implies that it was written approximately 1 and ½ years prior to the filing of the petition on April 14, 2003. It is unclear whether this is merely a typographical error. Because the October 2001 letter contains information relevant to the beneficiary's position in the United States, the AAO will consider the letter in the instant matter.

> United States and the products we sell. He has been meeting regularly with his staffs [sic] to review current policies and procedures and to develop appropriate plans necessary to continue the company's devotion in selling and distributing drinking products on [the] retail and wholesale level in the United States. In addition, [the beneficiary] has discretional decision-making power in hiring and firing of employees. In sum, [the beneficiary] has autonomous control over, and exercises wide attitude [sic] and discretionary decision-making in, establishing the most advantageous courses of action for the successful management and direction of [the petitioning organization] and other related activities.

The petitioner further explained that the beneficiary is responsible for marketing its products, including working with agencies to create advertisements and directing product placement in the marketplace.

On April 23, 2003, the director issued a notice of request for evidence, asking that the petitioner submit the following evidence demonstrating the beneficiary's employment in a qualifying capacity: (1) the petitioner's organizational chart describing its managerial hierarchy and staffing levels, clearly identifying the beneficiary's role in the organization, and describing the job duties, educational levels, wages and immigration status of all its employees; (2) a detailed description of the tasks performed by the beneficiary in the United States, including an explanation as to which of the beneficiary's subordinate employees handles the daily operations of the business; and (3) copies of the petitioner's insurance policies.

Counsel responded in an undated letter, providing the following description of the beneficiary's role as president:

> [The petitioner] employs [the beneficiary] in the U.S. to manage and direct the day-to-day business operations of the company. This position is a key managerial and executive position because it is the President who oversees and sets the tone for the company. [The beneficiary] is responsible for all aspects of [the petitioning organization]. He undertakes numerous responsibilities for the company. He coordinates sales distribution by establishing sales territories, quotas, and goals and advises the distributors and dealers concerning sales and advertising techniques. He analyzes sales statistics to formulate policy and to assist the distributors in promoting sales and maintaining a continuous communications flow aimed at fueling their cooperation and loyalty. In addition, [the beneficiary] plans and develops corporate policies and objectives for [the petitioning organization]. He directs corporate government and legal affairs of the company. He conducts specific product placement, which involves identifying which markets the company products are best suited for and pricing of the products within each market. [The beneficiary] also supervises the company's financial matters.
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> In the area of human resources management, [the beneficiary] exercises authority in regard to hiring, firing, training, delegation of assignments according to capabilities, preferences and technical goals, discipline, promotions, and remuneration. He conducts performance evaluations and ensures that his staff followed company procedures. Furthermore, he provides the parent company with the timely evaluations of each U.S. distribution outlet and current economic conditions. Currently, there are four employees under the direct supervision of the Beneficiary. For company organizational chart, please see Exhibit A. [The petitioner] is in the process of increasing its working staff as follows: By July 2003, the

> company anticipates hiring two additional Sales Representatives, making the total number of Sales Representatives to four. [The petitioner] will also hire one Warehouse/Inventories Controller who will be responsible for directing warehousing activities, such as verification of incoming and outgoing shipments, handling and disposition of materials, and keeping warehouse inventory current. Currently, the Sales Representatives process the materials and products of the company, and accept customer orders.
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> Functioning autonomously, [the beneficiary] is responsible for managing and directing all activities of the Company as they pertain to the U.S. operations. [The beneficiary] establishes and promotes sales campaigns to accommodate the goals of the company. He does so by performing Market Analysis Review with the distributors. He determines customer needs, volume potential, prices schedules, and discount rates in developing the sales campaigns. [The beneficiary] also represents [the petitioning organization] at trade association meetings and conventions to promote products. He coordinates liaison between the Southern California office, other international offices, and the Headquarters in Canada. [The beneficiary] establishes and promotes the standardization of sales support and service based upon the corporate model. He represents the unique concerns and requirements of the United States operations to Headquarters and provides significant contributions in the formulations of strategic plans to ensure that the business and strategic policies are effectively incorporated into the international business activities.

The petitioner again provided the previously outlined time allocation of the beneficiary's tasks.

In addition, the petitioner stated that it currently employed the following four employees, all who are under the beneficiary's supervision: account executive/secretary; two sales representatives; and a marketing/customer service agent. The petitioner provided a brief description of the responsibilities of each position. The petitioner also submitted an illegible organization chart. The director subsequently issued a second request for evidence, dated June 12, 2003, requesting that the petitioner provide a clear chart of the U.S. organization. The petitioner's second organizational chart identified the beneficiary as president, supervising the four employees.

In a decision dated July 9, 2003, the director determined that the petitioner did not establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director stated that the description of the beneficiary's job duties "strongly suggests that the beneficiary will be performing more as one of the office's main representatives, along with the others, rather than as an executive or manager." The director also concluded that due to the petitioner's limited staff, the beneficiary would be involved in the daily operations of the business and would not direct executives, managers, or professionals who would relieve him from performing the petitioner's non-qualifying duties. The director determined that the petitioning entity "[did] not possess the organizational complexity to warrant having an executive." Accordingly, the director denied the petition.

Counsel filed an appeal on August 1, 2003. In an accompanying letter dated July 30, 2003, counsel stated that the beneficiary maintains the positions of both president and chairman of the petitioner's management and sales, and is engaged in the purchasing and distribution of the petitioner's products. Counsel states that in

these capacities, the beneficiary performs the following functions: (1) reviews sales orders and inventory to determine stock requirements; (2) authorizes purchases; (3) directs assembly and storage of merchandise; (4) advises customers on product availability and market conditions; and (5) prepares and assigns work schedules and specific tasks to employees. Counsel also states that the beneficiary personally supervises the petitioner's financial and marketing managers, who, counsel claims, are executive employees in the petitioning organization. Counsel further states that the petitioner utilizes independent contractors for the shipping of all merchandise. Counsel submits additional documentation in support of the appeal, including import and export broker confirmations, sales invoices, a revised organizational chart, a company brochure, seller's permit, and a new lease for office space.

On review, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. 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.*

Although the petitioner provided a detailed account of the tasks to be performed by the beneficiary as president of the organization, the job description clearly identifies non-qualifying functions that prohibit the beneficiary's classification as a manager or executive. A sample of these non-managerial and non-executive functions include negotiating contracts with distributors, marketing and promoting the petitioner's products, representing the petitioner at conventions, coordinating sales distribution through his analysis of sales territories and quotas, identifying markets for product placement, advising distributors on advertising and sales techniques, authorizing purchases and merchandise storage, and directly communicating with customers concerning merchandise availability. Additionally, according to the petitioner's allocation of the beneficiary's time, the beneficiary would spend approximately 70% of his time planning and supervising the petitioner's marketing operations, financial matters, and sales and distribution. Despite the petitioner's claim that the majority of the beneficiary's time would be spent planning and developing the petitioner's policies, this task accounts for only 30%. The petitioner has not demonstrated that the beneficiary would primarily perform the high-level responsibilities of a manager or an executive. *See Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991) (finding that the petitioner must prove that the beneficiary *primarily* performs managerial and executive responsibilities and does not spend a majority of his or her time on day-to-day functions). Rather, the beneficiary would clearly be performing the 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).

Moreover, as correctly noted by the director, the beneficiary would not be supervising and controlling the work of other supervisory, managerial or professional employees. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). The petitioner indicates that it plans to hire additional sales representatives and an inventory controller. Counsel also states on appeal that the beneficiary presently supervises the work of the petitioner's marketing and financial managers. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C), however, 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. Furthermore, 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). Therefore, the petitioner's employment of two managers after the filing of the petition will not be considered in the analysis of the beneficiary's employment as a manager or executive. In the instant matter, the petitioning organization has not reached the point that it can employ the beneficiary in a primarily managerial or executive position.

Based on the foregoing discussion, the beneficiary would not be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary' s foreign employer and the petitioning organization meet the definition of qualifying organization as outlined in the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulations and case law further confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and 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.

Here, the petitioner claims that it is the subsidiary of the beneficiary's foreign employer, because the Canadian company, Tea Shop 168, Inc., holds an 80% interest in the partnership as a general partner and two individuals, [redacted] and [redacted] hold equal interests in the remaining 20%. The documentary evidence in the record, however, is not consistent in establishing that the beneficiary's foreign employer holds a majority interest, or, in fact, any interest, in the partnership. Schedule B of the petitioner's Form 1065, U.S. Return of Partnership Income, for the year 2001 indicates that the partnership does not have any foreign partners and further notes that only two Schedules K-1 are provided in conjunction with the return.[2] The petitioner does not provide for the record the applicable Schedules, so it is unclear which partners the petitioner is referencing. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Moreover, the petitioner submitted two Schedules K-1 for the year 2003, which identify the interests in the petitioning partnership as: Tea L3 Enterprise, Inc., 40% and Canmen Lu, 60%. Neither partner is the beneficiary's foreign employer. This documentary evidence clearly contradicts the petitioner's claim of a parent-subsidiary relationship between the two organizations. The petitioner has failed to establish that the beneficiary's foreign employer holds an interest in the petitioning entity, and likewise, failed to demonstrate that the organizations possess a qualifying relationship. 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

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[2] As indicated on Form 1065, the number of Schedules K-1 attached to the return represents the number of partners in the partnership at any time during the tax year.

(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.