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[Redacted]

FILE: WAC 03 091 50808 Office: CALIFORNIA SERVICE CENTER Date: FEB 18 2005

IN RE: Petitioner: [Redacted]
Beneficiary [Redacted]

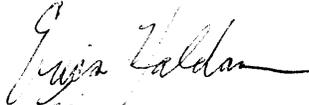
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[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 its president as an L-1A intracompany transferee pursuant to section 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 Florida that is engaged in the wholesale of imported goods and international trade. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Herzlia, Israel. The beneficiary was previously granted a one-year period of stay from January 25, 2002 to January 25, 2003 and the petitioner now seeks to employ the beneficiary for an additional three years.

The director denied the petition concluding that the petitioner did not demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel contends that the director's denial of the petition requires that the petitioner employ a "subjectively devised 'number' of employees" in order for the beneficiary to qualify as a manager or an executive. Counsel claims that the director ignored the concept of functional manager in denying the petition.

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.
- (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 issue in the instant proceeding 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 filed the instant petition on January 28, 2003 noting that it presently employed two workers, including the beneficiary as president. In an attached letter from counsel, dated January 22, 2003, counsel provided the following job description for the beneficiary:

[The beneficiary], vested with all the power by the Parent company, heads the operation as President with full discretionary authority and control of the overall business operations of the subsidiary. He develops corporate policy for company operations to comply with the development goals and directs the management of the marketing, export/import and finance operations. In addition, he will supervise the work of lower level managers and three departments. [F]urther expansion of the Company and recruitment of new employees are

expected in 2003. Thus, [the] Beneficiary is employed by the U.S. subsidiary of the Israel parent company in a managerial or executive capacity. [The beneficiary's] business performance in 2002 was quite successful and was very satisfactory to the Parent company.

Counsel explained that the beneficiary would exercise decision-making authority over such issues as:

- (1) development of long term and short term policy;
- (2) establish functional departments or subdivisions;
- (3) recruit and train department managers and executives;
- (4) delegation of power to other lower level managers;
- (5) approve large amount transaction or extension of credit to retailers;
- (6) conducting business analysis and market forecasting on routine basis[,] and
- (7) reporting business performances to the Israeli Parent company.

Counsel also noted that during the next twelve months, the petitioner anticipated hiring additional workers who would be employed in the petitioner's three departments: wholesale/retail department; finance department; and import/export department.

In a request for evidence issued on March 18, 2003, the director asked that the petitioner submit the following documentation: (1) a list of the workers employed by the petitioning organization; (2) a detailed description of the job duties to be performed by the beneficiary, including the percentage of time the beneficiary would spend on each task; (3) the job titles of the beneficiary's subordinates and the job duties performed by each; (4) California Employment Development Department Form DE-6, Quarterly Wage Report, for all employees during the last four quarters; (5) the petitioner's payroll summary and Forms W-2 and W-3; and (6) a specific description of how the beneficiary's daily job duties satisfy the requirements of executive capacity.

Counsel responded in a letter dated June 9, 2003, explaining that the petitioner employed a sales manager and the beneficiary as president/executive manager. Counsel provided the following job description for the beneficiary's employment in this capacity:

[The beneficiary] is the President/Executive Manager of [the petitioning organization]. As such, he is responsible for overseeing the sales Manager. He has the final word in regards to the hiring and firing of all the employees. [The beneficiary] establishes the policies, principals and procedures for all of these departments and then delegates the power to his general manager to implement the policies and ensure that the production, distribution and sales are in accordance with his guidelines.

In addition to [the beneficiary's] general supervisory duties, policy development and delegation powers he is also responsible for evaluating and reviewing the company information given to him by the sales manager[,] plans for efficient use of materials,

machines, and employees in order to enhance the profitable operation of the company as a whole. Finally [the beneficiary] has the ultimate word in how the company is to run, he makes the final decision in choosing market slots and approving the product line.

Counsel explained that in his executive capacity, the beneficiary: (1) primarily directs the management of the organization and formulates the petitioner's policies; (2) establishes sales goals and marketing strategies for the company; and (3) receives minimum supervision from the parent company's board of directors.

In a decision dated October 7, 2003, the director determined that the petitioner did not demonstrate that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director noted that the petitioner's 2002 corporate tax return failed to reflect any salaries or wages paid to workers during the year, and further noted that the submitted pay stubs indicated that the petitioner employed only one other worker, a sales manager, at the time of filing the petition. The director therefore concluded that the petitioner does not contain "the organizational complexity to support an executive position," and does not employ a subordinate staff of professional, managerial, or supervisory personnel who would relieve the beneficiary from performing non-qualifying job duties. The director also concluded that the record failed to demonstrate that the beneficiary's daily activities would be primarily managerial or executive. Consequently, the director denied the petition.

In an appeal filed on October 20, 2003, counsel states that the director erred "in utilizing the caprious [sic] standard to meet the criteria for 'executive or managerial capacity'." Counsel states that the director's decision requires the petitioner to employ "a subjectively devised 'number' of employees," and demands that the petitioner conform to a formula wherein the petitioner's staff must include a supervisory level under the beneficiary or a level of employees containing at least one professional. Counsel also contends that the director ignored the concept of functional manager.

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. 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(1)(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.*

While counsel provides a job description and an outline of managerial and executive tasks to be performed by the beneficiary, the record does not support the petitioner's claim that the beneficiary would be primarily employed in a qualifying capacity. Specifically, it does not seem credible that the beneficiary would supervise lower-level managers in the marketing, export/import, and finance departments, and direct the operations of these departments, as the petitioner employed only one additional worker, a sales manager, at the time of filing the petition. Because the petitioner does not yet employ any workers in these three departments, the beneficiary cannot be deemed to be supervising and directing the lower-level marketing, import/export, and finance managers. The AAO is therefore left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Moreover, because the petitioner has not accounted for the employment of any workers to perform the marketing, import and export, and financial operations of the company, it is reasonable to assume that the

beneficiary, himself, is performing these non-qualifying functions for the company. 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).

Although counsel claimed in her January 22, 2003 letter that the petitioner would hire additional employees during the next year, counsel fails to recognize the petitioner's obligation to establish eligibility for the nonimmigrant classification at the time of filing the petition. Unlike situations involving the establishment of a new United States office, the petitioning organization has been operating since 1999, and therefore will not be given one year within the date of approval of the petition to support an executive or managerial position. See 8 C.F.R. § 214.2(l)(3)(v)(C). Consequently, the proposed employment of additional lower-level managers will not be considered. 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, although specifically requested by the director, the counsel merely provided a limited restatement of the regulations in support of the beneficiary's employment in an executive capacity. Counsel's statements in her June 9, 2003 letter that the beneficiary "directs the management of the organization and formulates policies for the Petitioner," "establishes the sales goals and marketing strategies for the company," and "receives minimum supervision from the Board of Directors of the Parent Company" fail to identify the specific executive tasks to be performed by the beneficiary. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Lastly, counsel's claim on appeal that the director ignored the concept of functional manager when denying the petition is unsupported by the record. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Other than noting the concept of functional manager on appeal, which counsel merely addresses as "the issue of 'function'," counsel does not assert or, more importantly, provide any evidentiary basis for the AAO to consider the beneficiary a functional manager. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based on the above discussion, the petitioner has not demonstrated that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether a qualifying relationship exists between the petitioning organization and the beneficiary's foreign employer as required in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). 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.

Here, the petitioner claimed that it is the subsidiary of the beneficiary's foreign employer and submitted a stock certificate identifying the foreign organization as the owner of 1,000 shares of stock in the petitioning organization. Neither the corporate by-laws nor the minutes from the board of directors meeting on October 20, 1999 identify the amount of shares the petitioning organization is authorized to issue. Absent additional documentation, the AAO is unable to determine whether the beneficiary's foreign employer is the sole owner of the entire amount of issued stock, thereby confirming a parent-subsidiary relationship, or if a greater amount of authorized stock was issued to another stockholder. This information is relevant in verifying the petitioner's claim that it is a subsidiary of the beneficiary's foreign employer. 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).

Moreover, Schedule K of the petitioner's 2001 corporate tax return fails to identify that a foreign corporation owns the stock of the petitioning organization. After the director raised this issue in his request for evidence, counsel submitted a "new" corporate tax return, which was actually the petitioner's 2002 corporate tax return, stating "there was a mistake by the accountant who was not familiar with the Petitioner's ownership relationship." The petitioner's 2002 corporate tax return indicated that 100% of the petitioner's stock is owned by the beneficiary's foreign employer. However, as both the 2001 and 2002 tax returns are signed by the beneficiary himself as the preparer, counsel's claim regarding a mistake by the petitioner's accountant is questionable. Moreover, it creates doubt as to the authenticity of the claimed parent-subsidiary relationship. 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. *Matter of Ho*, 19 I&N Dec. at 591. Furthermore, the director specifically requested copies of the petitioner's *certified* income tax returns, which the petitioner failed to submit. 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). For this additional reason, the appeal will be dismissed.

An additional issue not addressed by the director is whether the foreign corporation is continuing to do business during the beneficiary's absence as required at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). Counsel submitted the foreign entity's business and purchase invoices, license, and product catalog as evidence of the overseas business. However, the majority of documentation is not translated and is dated prior to the filing the petition. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

Moreover, the beneficiary is identified in the record as the "independent business owner" of the foreign entity. If the foreign organization is in fact a sole proprietorship, unlike a corporation, it does not exist as an entity apart from the individual owner. *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm. 1984). A sole proprietorship is a business in which one person owns all of the assets and operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Edition). As the beneficiary is noted to be the owner and sole proprietor of the foreign business, the presence of the beneficiary in the United States raises the question of whether the foreign business continues to do business abroad. Again, the lack of current evidence leads the AAO to conclude that the foreign sole proprietorship is no longer doing business. The appeal will be dismissed for this additional reason.

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).

The AAO notes that the petitioner did not file the petition for an extension within the required time frame. The regulation at 8 C.F.R. § 214.2 (l)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the beneficiary's original petition expired on January 25, 2003. However, the petition for an extension of the beneficiary's L-1A status was filed on January 28, 2003, three days following the valid status of the beneficiary. The AAO notes that the petitioner failed to file a timely petition extension, and thus is precluded from extending the L-1A status of the beneficiary.

Further, pursuant to 8 C.F.R. § 214.1 (c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. As the beneficiary's status expired on January 25, 2003, and the extension petition was not filed until January 28, 2003, the beneficiary is ineligible for an extension of stay in the United States.

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.