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**U.S. Citizenship
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[Redacted]

File: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 01 2005

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

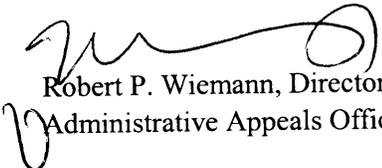
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN 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 Vice President as an L-1A nonimmigrant 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 California that operates as a seller of electrical cables and related products. The petitioner claims that it is the subsidiary of [REDACTED] and Cable Co., Ltd., located in Longkou, China. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a primarily managerial capacity. In support of this assertion, counsel submits a brief and a copy of an unpublished AAO decision.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. 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 in the present matter is whether the beneficiary will 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), defines the term "managerial capacity" as 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) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or 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), defines the term "executive capacity" as 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.

In a letter submitted with the initial petition on August 26, 2003, the petitioner described the beneficiary's job duties as follows:

1. She will assist the president in planning, developing and establishing policies and objectives of the company's business in international trade.
2. She will submit long-term and short-term business plans to the president. She will direct the subordinates to establish their own responsibilities.
3. She will review marketing reports and financial reports to ensure that the company's objectives are achieved.
4. She will direct the market research and finalize marketing plans.
5. She will direct to establish quality assurance system and review quality reports.
6. She will attend major business negotiations to establish strategic relationship with the U.S. business partners.
7. She will analyze operations to evaluate company's performance and to determine areas of cost reduction and program improvement.
8. She will direct financial and budget activities to fund operations and increase efficiency.
9. She will submit reports to the president concerning company's performance and business opportunities.

On February 9, 2004, the director requested additional evidence. In part, the director instructed the petitioner as follows:

Submit the following evidence to establish that the beneficiary has been or will be performing the duties of a manager or executive with the U.S. company:

Duties in the U.S.: Submit a more detailed description of the beneficiary's duties in the U.S.. Be specific. Indicate exactly whom the beneficiary directs including their job title and position description. List all employees under the beneficiary's direction. Also, indicate the percentage of time spent in each of the listed duties.

In a response dated March 12, 2004, in part the petitioner submitted a letter that repeats the beneficiary's job description provided above. The petitioner added that "[t]he beneficiary will spend 5% of her working time on Duty 1, 5% on Duty 2, 15% on Duty 3, 15% on Duty 4, 15% on Duty 5, 15% on Duty 6, 15% on Duty 7, 10% on Duty 8, and 5% on Duty 9." The petitioner listed six employees as the beneficiary's subordinates, including a sales manager, three sales representatives, an office clerk, and a warehouse worker.

On May 6, 2004, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director noted that the petitioner's quarterly wage report for the second quarter of 2003 indicates that the petitioner had three employees including the beneficiary during the covered period. The director stated that "[t]he fact that the petitioner claims that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity" The director found that "[t]here is insufficient detail regarding the actual duties to be performed by the beneficiary, and the percentage of time devoted to these duties." The director stated that "a preponderance of the beneficiary's duties will be directly providing the services of the business" and "[t]he petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate the beneficiary would be managing the organization, or managing a department, subdivision, function, or component of the company." The director further commented that "the petitioner's evidence is not persuasive in establishing that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve [her] from performing non-qualifying duties."

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a primarily managerial capacity. Counsel submits a brief in which he states the following:

[T]he point here . . . is not whether the job duties are sufficiently [sic] in details to establish the managerial nature of the job, but to determine whether the beneficiary has supervised other managers or professionals, thereby proving that the beneficiary has not been performing many aspects of the day-to-day operations of the business.

Counsel cites two unpublished AAO decisions to stand for the proposition that the sole employee of a petitioner can qualify as a manager or executive. Counsel claims that the director ignored the fact that the

petitioner employs seven individuals, including a sales manager. Counsel discusses the facts of a third unpublished AAO decision, and states that “[i]n light of the reasoning of [the unpublished matter], . . . [CIS] has abused its discretionary authority in denying the petition by assuming that 1) the beneficiary spent most of her time performing nonmanagerial duties, 2) the beneficiary did not manage other managers and professionals.”

Upon review, counsel's assertions are not persuasive. 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). 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.* In the instant matter, counsel asserts that the beneficiary will be employed in a primarily managerial capacity. However, the initial description of the beneficiary's position fails to establish that her duties will be primarily managerial or executive in nature.

The petitioner stated that the beneficiary will spend five percent of her time in part “direct[ing] the subordinates to establish their own responsibilities.” From this description, it is unclear what this duty entails. The petitioner provided that the beneficiary will devote 15 percent of her time to “review[ing] marketing reports and financial reports to ensure that the company's objectives are achieved.” Yet, upon examining the job descriptions for the beneficiary's subordinate employees, none are charged with the responsibility of preparing marketing reports and financial reports. Thus, the evidence of record suggests that the beneficiary will perform the non-qualifying duty of creating such documents. The petitioner indicated that the beneficiary will spend 15 percent of her time in part “direct[ing] the market research.” Yet, none of the beneficiary's subordinates are charged with performing market research, and it is assumed that the beneficiary will perform this non-qualifying task. The petitioner stated that the beneficiary will spend 15 percent of her time in part “review[ing] quality reports.” Yet, none of the beneficiary's subordinates have been delegated the duty of creating such reports, and it is assumed that the beneficiary will perform this non-qualifying task. The petitioner stated that the beneficiary will devote 15 percent of her time to “attend[ing] major business negotiations to establish strategic relationship with the U.S. business partners.” However, the petitioner has failed to adequately describe these negotiations or to name its U.S. business partners, such that this duty can be deemed a managerial or executive task. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Accordingly, as much as 65 percent of the beneficiary's time has not been shown to be devoted to managerial or executive duties. The initial job description submitted for the beneficiary fails to establish that she will be employed in a primarily managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

In his request for evidence, the director requested “a more detailed description of the beneficiary's duties in the U.S.” Yet, in response to this portion of the director's request, the petitioner merely repeated the beneficiary's duties without further detail. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been

established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner failed to adequately respond to the director's request. The absence of more specific information regarding the beneficiary's duties precludes the material line of inquiry of whether the beneficiary will in fact be primarily engaged with managerial or executive duties.

On appeal, counsel explains that the beneficiary will effectively act as president of the petitioner, as the president "is not working on the [sic] daily basis with the petitioner . . ." Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted counsel's further description of the beneficiary's duties to be considered, it should have submitted such information in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the additional explanation submitted on appeal.

Counsel states that the emphasis of this proceeding should be on "whether the beneficiary has supervised other managers or professionals," not whether the petitioner has provided sufficient details of the beneficiary's duties. However, as indicated by the director, the beneficiary's duties are at issue in this proceeding. The petitioner has the burden of proof to establish that the beneficiary will be employed in a primarily managerial or executive capacity. 8 C.F.R. § 214.2(l)(3)(ii); section 291 of the Act, 8 U.S.C. § 1361. Assessing whether the beneficiary supervises managerial or professional subordinates is but one factor in determining the beneficiary's employment capacity. Section 101(a)(44)(A)(ii) of the Act. The petitioner must provide sufficient evidence to show that the beneficiary's duties meet each of the criteria listed in section 101(a)(44)(A) of the Act. To that end, 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). The director appropriately examined the level of detail the petitioner provided in describing the beneficiary's duties.

Nevertheless, the beneficiary's subordinates are an important consideration in this proceeding. The regulation at 8 C.F.R. § 214.2(l)(14)(ii) requires the petitioner to provide "[a] statement describing the staffing of the new operation, including the number of employees and types of positions held . . ." On Form I-129, the petitioner indicated that it employs three individuals including the beneficiary. Yet, the organizational chart submitted with the initial petition reflects that the petitioner has four employees including the beneficiary. These representations regarding the petitioner's staff are inconsistent. 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).

In response to the director's request for evidence regarding the beneficiary's subordinates, the petitioner stated that it employs seven individuals including the beneficiary, and that the beneficiary supervises six subordinates. On appeal, counsel reiterates that the petitioner employs seven individuals. As correctly noted by the director, the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the second

quarter of 2003 reflects that the petitioner had three employees during the covered period. The petitioner has provided no documentation to support that it hired additional workers between June 30, 2003, the closing date of the second quarter of 2003, and August 26, 2003, the date the petition was filed. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The possibility that the petitioner hired new workers after the date of filing the petition has no bearing on the petitioner's eligibility as of the filing date. 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).

Five of the workers that the petitioner now claims to employ are not listed in its Form 941 for the second quarter of 2003. Accordingly, the petitioner has at most established that it employed three individuals as of the date the petition was filed, namely the beneficiary, the sales manager, and the employee titled "Operation [Department.]"

Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not established that a bachelor's degree is actually necessary to perform the duties of the sales manager or operation department employee. Thus, these individuals cannot be deemed professionals. Nor has the petitioner shown that these two employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. The fact that the sales manager possesses a managerial title is not sufficient to show that her duties are managerial in nature. The actual duties themselves reveal the true nature of the employment. *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). Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Counsel cites two unpublished AAO decisions to stand for the proposition that the sole employee of a petitioner can qualify as a manager or executive. Counsel discusses the facts of a third unpublished AAO decision, and states that “[i]n light of the reasoning of [the unpublished matter], . . . [CIS] has abused its discretionary authority in denying the petition by assuming that 1) the beneficiary spent most of her time performing nonmanagerial duties, 2) the beneficiary did not manage other managers and professionals.” However, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the cited matters. Counsel’s conclusory statement that the reasoning in the third cited matter renders the director’s decision an abuse of discretion is not persuasive. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. The cited decisions will not be considered in this proceeding.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. 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. 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 established that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(ii). For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the beneficiary’s foreign employer as required by 8 C.F.R. § 214.2(l)(1)(ii)(G), as the petitioner has failed to establish that the foreign entity is a qualifying organization engaged in the regular, systematic, and continuous provision of goods and/or services pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H). The regulation at 8 C.F.R. § 214.2(l)(ii)(G)(2) reflects that, in order for an entity to be considered a qualifying organization, the petitioner must show that it:

Is or will be doing business (engaging in international trade is not required) as an employer in the United States and 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

The regulation at 8 C.F.R. § 214.2(l)(ii)(H) defines the term "doing business" as:

[T]he regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) requires the petitioner to submit “[e]vidence that the United States and foreign entities are still qualifying organizations.” The petitioner provided no new evidence to show that the foreign entity continues to do business. The documentation that the petitioner provided of the foreign entity’s operations represents business activity that occurred at least one year prior to filing the present petition. Such documentation does not serve as sufficient evidence that the foreign entity was engaged in “the regular, systematic, and continuous provision of goods and/or services” during the one-year period prior to filing the petition, including the date the petition was filed. *See* 8 C.F.R. § 214.2(l)(ii)(H). Thus, the petitioner has failed to show that the foreign entity is a qualifying organization. *See* 8 C.F.R. § 214.2(l)(ii)(G)(2). Accordingly, the petitioner has not established that it has a qualifying relationship with the foreign entity. *See* 8 C.F.R. § 214.2(l)(14)(ii)(A). For this additional reason, the petition may not be approved.

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.