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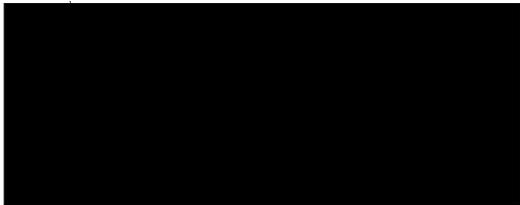
U.S. Department of Homeland Security
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U.S. Citizenship
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File: WAC 05 171 51460 Office: CALIFORNIA SERVICE CENTER Date: DEC 05 2006

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:

SELF-REPRESENTED

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, Chief
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 withdraw the director's decision and remand the petition to the director for further action and entry of a new decision.

The petitioner seeks to employ the beneficiary temporarily in the United States 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, a California corporation, states that it is engaged in the provision of promotional marketing products and services. It claims to be a branch or subsidiary of Trikora Juerg Siegrist, located in Switzerland. The petitioner seeks to employ the beneficiary as the president/chief executive officer of its new office in the United States for a three-year period.

The director denied the petition, concluding that the petitioner did not establish: (1) that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity; or (2) that the petitioner and the foreign entity have a qualifying relationship.

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, the petitioner asserts that the director based his conclusions on erroneous facts and overlooked evidence that the U.S. company is in fact owned equally by two shareholders, rather than majority-owned by the beneficiary, as stated in the director's decision. The petitioner also clarifies that the organizational chart submitted with the initial petition represented the foreign entity's current staff and therefore did not depict the beneficiary's previous overseas position. The petitioner submits an organizational chart for the foreign entity showing the structure of the company as of January 1, 2004, and depicting the beneficiary's former position within the company's organizational hierarchy. The petitioner submits a letter and new supporting documentation in support of the appeal.

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)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The first issue in the present matter is whether the petitioner established that the beneficiary has been employed by the foreign entity in a primarily managerial capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B). The petitioner does not claim that the beneficiary was employed by the foreign entity in an 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.

The nonimmigrant petition was filed on June 1, 2005. In an attachment to Form I-129, the petitioner indicated that the beneficiary was employed as a sales manager with the foreign entity from June 2003 until September 2004, and provided the following job description:

- Clarify/discuss the customer's needs
- Procured offers from different suppliers
- Negotiated proposals and offers with customers including calculation of price
- Visited clients, as well as suppliers
- Organized and coordinated orders (e.g. control of delivery schedule: coordination supplier/ forwarding agent / client)
- Established new customer relations, suppliers and items
- Issued invoices
- Handled customer and contractor complaints
- Provided after-sales support service

In a letter dated May 10, 2005, the petitioner indicated that the beneficiary "worked in a managerial position" with the foreign entity and noted "his working areas are extensive." The petitioner included essentially the same position description recited above, but added that the beneficiary was responsible for "supervision of assistants and sales."

The petitioner submitted an organizational chart for the foreign entity, but the chart did not include the beneficiary, nor did it appear to identify a "sales manager" position. The chart did depict a sales department comprised of a sales director, deputy sales director, four employees identified as "sales," five assistants, and three shipping employees.

The director denied the petition on August 5, 2005, concluding that the petitioner had not submitted sufficient evidence to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The director acknowledged the petitioner's submission of a job description and organizational chart, but observed that the petitioner had failed to identify the beneficiary's previous position

in the foreign entity nor did it identify who assumed the beneficiary's position following the beneficiary's transfer to the United States. The director concluded that "absent additional evidence, it is unclear whether the managerial position existed in the foreign company, and if so which employees were managed by the beneficiary."

The petitioner filed the instant appeal on September 2, 2005. In a letter dated August 26, 2005, the petitioner's vice president clarifies that the petitioner assumed that the most recent organizational chart should be submitted in support of the petition. The petitioner notes that the beneficiary was not included in the chart because he had already come to the United States to assist with start-up activities for the U.S. company. The petitioner encloses an organizational chart for the foreign entity dated January 1, 2004, in which the beneficiary is identified as the sales manager. The chart indicates that the beneficiary supervised an assistant, five sales staff (each of whom has an assistant), and three shipping employees. The position is located at the same level in the organizational structure as the "sales director" position identified in the company's more recent chart.

Upon review, the AAO will withdraw the director's decision and remand the petition to the director for further consideration and entry of a new decision.

The regulation at 8 C.F.R. § 103.2(b)(8) states the following:

If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence [I]n other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence

In this case, the director examined the petitioner's evidence and determined that the petitioner failed to establish the beneficiary's eligibility. The director's decision was based in part on a finding that the petitioner did not submit sufficient documentation regarding the foreign entity's organizational structure and the beneficiary's position within it. However, the director did not point to any evidence of clear ineligibility that would justify his decision to deny the petition without first requesting additional evidence to clarify why the submitted organizational chart did not identify the beneficiary's position within the foreign entity. *See* 8 C.F.R. § 103.2(b)(8); *see also* Memorandum of William R. Yates, Associate Director, Operations, USCIS, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)*, HQOPRD 70/2 (February 16, 2005).

Accordingly, as the evidence of record does not directly reflect that the petitioner or beneficiary is ineligible, the director should not have denied the petition based on a lack of evidence without first requesting additional explanation and documentation. *See* 8 C.F.R. § 103.2(b)(8); 8 C.F.R. § 214.2(l)(14)(i). The AAO agrees that the evidence of record raises underlying questions regarding eligibility. In such an instance, the director "shall request the missing initial evidence, and may request additional evidence" 8 C.F.R. § 103.2(b)(8). The petition will be remanded to the director, who is instructed to request additional evidence consistent with the discussion below.

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.*

Although the petitioner has submitted an organizational chart on appeal to clarify the beneficiary's former position within the foreign entity's hierarchy, there is an unexplained discrepancy between the beneficiary's claimed position as the manager of sales department with fourteen employees and the position description submitted with the initial petition. Specifically, the beneficiary's duties, as described by the petitioner, appear to comprise the routine operational sales, supplier relations, and customer service tasks of the company, rather than managerial tasks as defined by section 101(a)(44)(A) of the Act. The beneficiary's sales-related tasks included clarifying and discussing customers' needs, visiting clients, negotiating proposals and offers with customers, establishing new customer relations, organizing and coordinating orders with suppliers, forwarding agents and clients, and issuing invoices. Without further explanation, these operational and administrative tasks cannot be distinguished from duties that would typically be performed by a sales representative. The petitioner also indicated that the beneficiary was responsible for procuring offers from suppliers, and visiting their sites, handling customer and contractor complaints and providing after-sales services. None of the duties referenced above appear to be managerial in nature, as the beneficiary appears to be performing non-qualifying tasks personally, rather than overseeing the performance of these duties by subordinate employees. 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). An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

As noted above, the petitioner submitted two similar, but not identical, job descriptions in support of the petition, only one of which reflected the beneficiary's responsibility for "supervision of sales and assistants." 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). Moreover, all of the other duties included in the beneficiary's job description appear to be non-qualifying tasks, thus suggesting that the beneficiary's did not in fact serve in a managerial capacity, other than in position title. The petitioner has not indicated that the beneficiary exercised discretion over the day-to-day operations of the foreign entity's sales department or that he had authority to hire and fire employees or to recommend these and other personnel actions. See sections 101(a)(44)(A)(iii) and (iv) of the Act. Collectively, a review of the totality of the record raises considerable doubts as to the credibility of the organizational chart submitted on appeal, and the evidence has limited probative value.

Since the director's decision did not provide the petitioner with notice of these deficiencies, the matter will be remanded to the director, who is instructed to issue a notice of intent to deny or request for evidence to allow the petitioner an opportunity to submit additional evidence in support of its claim that the beneficiary was employed by the foreign entity in a managerial capacity.

The petitioner is advised that it may not make material changes to the initial job description submitted with this petition, although it may seek to clarify how the listed responsibilities fall under the statutory definitions of managerial capacity, and identify the percentage of time the beneficiary devotes to each of the stated duties.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

To corroborate the petitioner's claim that the beneficiary supervised the claimed staff while employed by the foreign entity, the director may request the foreign entity's payroll records for the beneficiary's period of employment, evidence that the beneficiary was responsible for hiring, firing and/or conducting performance reviews of his claimed staff, and any other documents, such as contracts or business correspondence, that would confirm the beneficiary's job title and claimed level of authority within the foreign entity's organizational structure. To establish that the beneficiary supervised managerial, professional or supervisory employees, the petitioner should provide the job titles and descriptions, educational credentials, and salaries of all employees identified as the beneficiary's subordinates.

The second issue to be discussed in this matter is whether the petitioner has established that a qualifying relationship exists with the beneficiary's overseas employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

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

- (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
 - (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
 - (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and,

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

* * *

- (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
- (J) *Branch* means an operating division or office of the same organization housed in a different location.
- (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.
- (L) *Affiliate* means
 - (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
 - (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner stated on Form I-129 that the petitioner is a branch office of the foreign entity. In its letter dated May 10, 2005, the petitioner further described the ownership and control of each company as follows:

On the 1st October 2004 [the beneficiary] began setting up a branch office for [the foreign entity] in the United States. [The beneficiary] owns 50% of this new branch office and the other 50% is owned by [the foreign entity]. [The foreign entity] is a sole proprietorship and is owned and controlled by [REDACTED] [The petitioner] (branch office in the United States) is a cooperation [sic]; controlled and operated by [the beneficiary].

The petitioner submitted the following documentation in support of the petition: (1) the U.S. company's articles of incorporation, indicating that the company is authorized to issue one million shares of no par value capital stock; (2) a copy of its stock certificate number two for 45,000 shares issued to the foreign entity on November 23, 2004; (3) a copy of its stock certificate number three for 50,000 shares issued to the beneficiary on May 25, 2005; and (4) a copy of its stock certificates number four for 5,000 shares issued to the beneficiary on May 25, 2005. The reverse side of stock certificate number four indicates that the 5,000 shares represented by the certificate were sold, assigned and transferred to the foreign entity on May 30, 2005.

The director denied the petitioner concluding that the petitioner failed to establish a qualifying relationship between the U.S. company and the beneficiary's foreign employer. The director noted that although the

petitioner claimed to be owned in equal proportions by the beneficiary and the foreign entity, the evidence submitted indicates that the beneficiary in fact owns 55 percent of the total shares issued, while the foreign entity owns 45 percent of the stock. The director found that the U.S. entity is owned by the beneficiary and the foreign entity, a sole proprietorship, is owned by Jürg Siegrist. The director therefore determined that the evidence did not support a finding that both organizations are owned and controlled by the same parent or individual, or that the petitioner is a subsidiary of the foreign entity.

On appeal, the petitioner asserts that the director's statement that the beneficiary owns 55 percent of the U.S. entity is incorrect, and emphasizes that the stock certificates previously submitted show the transfer of 5,000 shares of stock from the beneficiary to the foreign entity on May 30, 2005, thus establishing a 50-50 ownership between the two shareholders. The petitioner submits copies of the previously submitted stock certificates as well as the following documents: (1) the petitioner's stock certificate number one, issuing 55,000 shares of stock to the beneficiary on November 23, 2004; (2) a stock purchase agreement by which the beneficiary agreed to sell 5,000 of his 55,000 shares of stock to the foreign entity in exchange for \$2,000 in cash to be paid on May 23, 2005; (3) a unanimous written consent of the directors dated August 17, 2004, which shows that the company's initially issued 55,000 shares of stock to the beneficiary for \$22,000 and 45,000 shares of stock to the foreign entity for \$18,000; (4) the by-laws of the U.S. company; and (5) a letter from the petitioner's attorney, dated May 25, 2005, referencing the issuance of stock certificate numbers 3 and 4 and the cancellation of stock certificate number one.

The petitioner states that the stock transfer was officially completed on May 30, 2005, and that [REDACTED] owns 50% of a 50-50 joint venture and has equal control and veto power over" the U.S. company. The petitioner emphasizes that [REDACTED] is actively involved with the U.S. company, and submits evidence in the form of invoices, e-mail correspondence, faxes and letters to demonstrate his involvement with the company. The petitioner also submits a formal written agreement between the beneficiary and Jürg Siegrist, which states that as of May 25, 2005 the two parties "have gained equal ownership, control and votes of [the petitioner]. And that the petitioner "has become a 50-50 joint venture" between the foreign entity and the beneficiary. The agreement states that the two parties must agree on any strategic, long-term, or significant financial decisions affecting the company, and that Jürg Siegrist will make the final decision in instances in which the owners cannot reach an agreement.

Upon review, the petitioner's assertions are persuasive, in part. The director's decision will be withdrawn, as the director clearly overlooked the transfer of 5,000 shares of stock from the beneficiary to the foreign entity, as indicated on the company's stock certificate number four, which was submitted in the initial petition filing. Had the director reviewed the evidence carefully, it is unlikely that he would have denied the petition without first issuing a request for evidence. The evidence of record suggests that there is a qualifying affiliate relationship between the petitioner and the foreign entity based on common ownership and control by Jeurg Siegrist. The AAO finds that additional evidence is necessary to properly document the claimed relationship, however, the record contains no clear evidence of ineligibility, and it appears the deficiencies discussed below could be cured if the petitioner is allotted an opportunity to submit additional evidence.

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 the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

Upon review, the record as presently constituted contains insufficient evidence of the ownership of the foreign company. While the petitioner has consistently claimed that the foreign entity is a sole proprietorship owned by Jürg Siegrist, the petitioner has provided no documentary evidence in support of that claim. Accordingly, the director should request and review such evidence prior to rendering a decision in this matter. In addition, the director is instructed to request evidence that the petitioner's claimed shareholders paid for their prospective interest in the company. Based on the petitioner's representations, the petitioner should be able to document that the beneficiary and Jürg Siegrist each paid a total of \$20,000 for their interest in the company, and may do so through bank statements, wire transfer receipts, deposit receipts, and/or copies of canceled checks. Finally, the petitioner should submit copies of its California Notices of Transaction Pursuant to Corporations Code Section 25102, a copy of the company's stock transfer ledger, a copy of its 2004 and 2005 IRS Forms 1120, U.S. Corporation Income Tax Return, with completed Schedules K and L, and any other documents the director deems necessary to support the claimed qualifying relationship.

Beyond the decision of the director, the AAO finds insufficient evidence to establish that the petitioner's new office will employ the beneficiary in a managerial capacity or executive capacity within one year.

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. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of

the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

The petitioner indicates that the U.S. company, like the foreign entity, will be engaged in the provision of customized marketing and promotional products and services. The record shows that the company has already commenced operations in the United States and has sufficient premises from which to operate the business. However, the petitioner has not provided a detailed business plan, nor described its current or proposed staffing levels or the scope of the organization for the coming year. The record does contain five-year sales forecasts and pro forma profit and loss statements, which indicate an anticipated payroll of only two employees in 2005 and three employees in 2006. Based on the limited information provided, it cannot be concluded that the beneficiary would be relieved from performing the routine operational tasks of the business within one year with only one or two subordinates. Accordingly, the director is instructed to request the petitioner's detailed business plan. If not included in the business plan, the petitioner should provide a hiring plan outlining when it intends to staff each of its open positions. The petitioner should also provide job duties and educational requirements for each position, and indicate whether the beneficiary's subordinates will be employed on a full-time, part-time or commissioned basis. The evidence submitted should establish who will be responsible for performing the petitioner's administrative, clerical and operational functions, including, if applicable, market research, marketing, advertising, purchasing, sales, customer service, administrative and clerical tasks and any other functions inherent to the type of business to be operated by the petitioner.

The petitioner has also failed to provide a detailed position description for the beneficiary's proposed role as president and chief executive officer. For example, the petitioner indicated that the beneficiary will "oversee all operations," "direct the . . . development and implementation of long-term and short-term strategies and policies," "analyze and resolve business and financial issues," and will be "directing sales and marketing activities to establish the new company's market position in North America." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will 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). The director is instructed to request a comprehensive, specific description of the duties performed by the beneficiary, including a breakdown of the percentage of time he will devote to those duties on a weekly basis, and a description of the duties he will perform on a "typical day." If the petitioner states that the beneficiary will "direct," "manage," "oversee," or "supervise" an aspect of the petitioner's business, it should clarify who would perform non-qualifying duties associated with the activity or function. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

It is emphasized that 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). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, June 1, 2005.

In this matter, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the petitioner and beneficiary meet the requirements for this nonimmigrant visa classification as of the date of filing the petition. The director's decision will be withdrawn and the matter remanded for further consideration and a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence he deems necessary.

ORDER: The decision of the director dated August 5, 2005 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.