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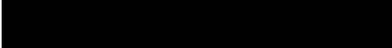
U.S. Citizenship and Immigration Services

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File: EAC 05 037 52658 Office: VERMONT SERVICE CENTER Date: **JAN 19 2007**

IN RE: Petitioner: 
Beneficiary: 

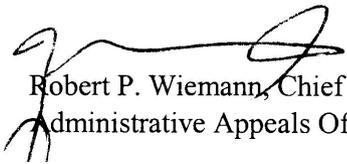
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

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, Vermont Service Center, denied the nonimmigrant visa petition. 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 employ the beneficiary 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 New York corporation established in June 2004 that claims to be engaged in the import, export and wholesale of fine jewelry. The petitioner claims to have a qualifying relationship with [REDACTED] located in Skoczow, Poland. The petitioner seeks to employ the beneficiary as the operations and vendor manager 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 petitioner has secured sufficient physical premises to house its new office; (2) that the U.S. company and the foreign entity have a qualifying relationship; (3) that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity; or (4) that the beneficiary will be employed by the U.S. company in a primarily managerial or executive capacity within one year of the petition approval.

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, petitioner clarifies the anticipated space requirements for the U.S. business and contends that the company has sufficient physical premises for the first year of operations. The petitioner further asserts that it is in the process of changing the ownership structure of the U.S. company in order to comply with the L-1 regulations governing qualifying relationships. With respect to the beneficiary's employment, the petitioner attempts to clarify the scope of the foreign entity's operations and the beneficiary's management role while employed by the foreign company. Finally, the petitioner asserts that the company's previously-submitted business plan establishes that the company will grow to a point where the beneficiary will be relieved from performing non-qualifying duties within one year. The petitioner submits a brief and evidence 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 this matter is whether the petitioner has secured sufficient physical premises to house the new office in the United States, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

The nonimmigrant petition was filed on November 22, 2004 without evidence that the U.S. company had secured sufficient physical premises from which to operate its proposed import and wholesale business. Accordingly, in a request for evidence dated December 14, 2004, the director requested evidence to establish that the petitioner had

secured sufficient physical premises to house the new office, including photographs of the interior and exterior of all of the premises secured.

The petitioner responded to the director's request on March 8, 2005. In an attached exhibit, the petitioner stated:

Due to the wholesale character of the business, at this phase of operations there is no plan to obtain additional physical space. In the first year of operation it is assumed that home office will be used ([the petitioner's] founders own a single family home at [REDACTED] in Skaneateles, NY 13152)

Costs for office space are allocated in second year of operations – more people involved in operation will require a typical office environment.

The director denied the petition on March 31, 2005, concluding that the petitioner failed to establish that it had secured sufficient physical premises to house the new office. The director observed that the business would operate out of a private home and had no immediate plans to move the business to an office or retail space.

On appeal, the petitioner states that the petitioner conducts a wholesale business which does not require the company to store any inventory, thus diminishing the need for separate office space. The petitioner further states:

Note that we own a 2,500 square foot house with an additional 1000 square foot basement, which provides for adequate space identified for the business inventory and operations that is clearly separated from the rest of the house.

In anticipation of the eventual need for office space, the financial plans for 2006 and 2007 there has been allocated \$1,000.00 and \$2,000.00 respectively per month for office rent. . . .

Finally, note that virtual operations, with little or no "classic office" space, are becoming a norm in the business world. . . .

I ask that you reconsider this approach as sufficient, due to the type of business [the petitioner] operates and future plans to have a rented office space once the number of employees increases.

Upon review, the petitioner's assertions are not persuasive. The petitioner was specifically instructed to provide documentary evidence to establish that the company had secured sufficient physical premises to house its office, as well as photographs of the interior and exterior of all premises secured. The petitioner failed to submit any documentary evidence in response, and instead merely stated that the company would operate from its president's residence during its first year of operation. 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).

On appeal, the petitioner claims to have 1,000 square feet of space in a residential home available for the U.S. company, yet still provides no documentary evidence, such as a lease or deed for the premises secured, nor the requested photographs. Nor has the petitioner described its anticipated space requirements for its import and wholesale business. 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)). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Although the petitioner asserts that it will secure office space for the company after the first year of operations, the AAO notes 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).

The petitioner has not submitted evidence on appeal to overcome the director's decision on this issue. For this reason, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner and the beneficiary's foreign employer have a qualifying relationship as required by 8 C.F.R. § 214.2(l)(3)(i). To establish eligibility, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same entity or are related as a "parent and subsidiary" or "affiliates."

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[.]

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

* * *

(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.

On the L classification supplement to Form I-129 the petitioner described the ownership of each company as follows:

US: [the petitioning entity] – 60% owned by [redacted] and [redacted] 40% owned by [redacted] (Poland); Poland: [redacted] – Sole prop. owned by [redacted]

In an attached letter dated November 17, 2004, the petitioner stated: “On October 1, 2004 Firma Handlowa Baga and [the petitioner] signed a business agreement spelling out its future cooperation, including exchange of 40% of ownership of [the U.S. entity].” The petitioner attached a copy of the referenced agreement which is identified as an “exclusive representation, agency and trade contract.” The contract states at clause two:

- a. In exchange for 40% ownership of ownership in [the U.S. entity], [redacted] grants to [redacted] exclusive right to use “[redacted]” image and brand, its business procedures (as applicable in the US), initial inventory of \$3000.00, as well as exclusive right to conduct business on behalf of [redacted] in the United States of America.

On December 14, 2004, the director instructed the petitioner to submit documentary evidence to establish the claimed qualifying relationship, including evidence of the ownership and control of each parent, subsidiary and affiliate organization of the foreign entity. The director noted that such evidence may include, but is not limited to, copies of stock certificates, stock ledgers, articles of incorporation, and/or joint venture agreements.

In a response dated March 8, 2005, the petitioner submitted: (1) the U.S. company's New York certificate of incorporation indicating that the company is authorized to issue 200 shares of stock with no par value; (2) the foreign entity's registration, showing that it was established as a sole proprietorship of [REDACTED] doing business as [REDACTED] in 1990; and (3) another copy of the contract between the U.S. company and the foreign entity, wherein the foreign entity would acquire 40 percent ownership of the U.S. company.

The director denied the petition, concluding that the petitioner failed to establish that the U.S. company has a qualifying relationship with the foreign entity. The director observed that while it appears the foreign entity owns a 40 percent interest in the U.S. entity, the regulations require that the foreign company own at least a 50 percent interest in order to establish a parent-subsidary relationship.

On appeal, the petitioner's president states:

The relationship between [the U.S. entity] and the foreign company is currently structured in a way that [REDACTED] (Poland) owns 40% of [the U.S. company]. My understanding . . . was that the US entity must hold a majority position.

To rectify this issue we are in the process on [sic] changing the current ownership structure so [REDACTED] (Poland) will own 50% of the US corporation. . . .

The business relationship between the two companies is an extension of the business started by our parents who are nearing retirement age and a need for new direction as the economic circumstances in Poland change from "mom & pop" stores to mega-stores. . . . Our intent is to turn [REDACTED] into an export company by leveraging the solid relationships built over the years through the retail business. The bottom line is this is a true and equal joint venture. . . .

The petitioner submits a "trade contract" between the U.S. company and the foreign entity, dated April 10, 2005, which states: "The two companies have formed an equal and equitable joint venture partnership with each party holding a fifty-percent (50%) interest in this venture."

Upon review, counsel's assertions and the submitted documentation do not establish that the petitioner has a qualifying relationship with the foreign entity. 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 or member 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, or equivalent documents, must also be examined to determine the total number of shares or membership units issued, the exact number issued to each shareholder or member, and the subsequent percentage ownership and its effect on control of the company. Additionally, a petitioning company must disclose all agreements relating to 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.*, 19 I&N Dec. at 362. Without full disclosure of all relevant documents, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

The petitioner initially stated that the beneficiary's foreign employer owns a minority (40 percent) interest in the petitioning company, but failed to submit evidence, such as stock certificates, stock transfer ledger, corporate bylaws, or other documentation identifying the foreign company as a shareholder. Although the petitioner submitted an agreement referencing the foreign entity's acquisition of an ownership interest, absent evidence that the shares were actually issued to the foreign entity, the agreement is insufficient to establish that the foreign entity had acquired any ownership in the petitioning entity as of the date the petition was filed. 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.

Accordingly, the director requested additional documentary evidence to establish the ownership and control of the petitioning company. The petitioner did not submit the requested documentation in response. Instead, the petitioner re-submitted the October 14, 2004 contract, along with the U.S. company's certificate of incorporation, which does not address the ownership or control of the U.S. company. 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).

Regardless, if the foreign entity owns only a forty percent interest in the petitioning company, then the U.S. company does not qualify as a subsidiary pursuant to the regulatory definition at 8 C.F.R. § 214.2(l)(1)(ii)(K), absent evidence that the foreign entity in fact controls the U.S. entity with its minority interest. The record contains no such evidence. Accordingly, the petitioner has failed to establish the claimed parent-subsidary relationship between the foreign entity and the U.S. entity.

On appeal, the petitioner indicates that the U.S. company is "in the process of changing the ownership structure" so that the foreign entity will hold a 50 percent interest in the U.S. entity. However, A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Finally, although the petitioner emphasizes that the U.S. company and the foreign entity are owned by members of the same family, this familial relationship does not constitute a qualifying relationship under the regulations.

Based on the foregoing discussion, the petitioner has not established that the U.S. company has a qualifying relationship with the foreign entity. For this additional reason, the appeal will be dismissed.

The third issue in this matter is whether 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, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

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.

The nonimmigrant petition was filed on November 22, 2004. Therefore, the beneficiary's one year of qualifying employment must have occurred between November 22, 2001 and November 22, 2004. On the L classification supplement to Form I-129, the petitioner indicated that the beneficiary's was employed by the foreign entity from 1995 to 2000 as a part-time store assistant, from 2000 to 2001 as a store manager, and from 2001 to 2002 as a senior manager. The petitioner indicated that the beneficiary had been employed in a local government position from 2002 to 2003. The petitioner stated in its November 17, 2004 letter that the beneficiary had been "involved in opening of multiple new operations" while employed in these roles by the foreign entity.

The petitioner submitted a copy of the beneficiary's resume which provided the following job descriptions for her positions with the foreign entity:

Senior Manager (2001 – 2002)

- **Developed and implemented** marketing and advertising strategies.
- Developed and managed financial analysis models and reports.
- Managed product selection and procurement.
- Designed and implemented surveys of customers' preferences and purchasing habits.

Store Manager (2000 – 2001)

- **Managed product selection** and procurement.
- Managed jewelry, giftware and apparel retail sales.
- Managed sales clerks.

The beneficiary's resume indicates that she was employed by a county government office in Poland from 2002 to 2003. The petitioner submitted a November 3, 2004 letter from the foreign entity confirming the beneficiary's job titles, job duties and dates of employment. The letter incorporated the same employment information contained in the beneficiary's resume.

In his December 14, 2004 request for evidence, the director instructed the petitioner to submit an additional letter from the foreign employer describing the nature of the beneficiary's employment, including: (1) the beneficiary's current position title and a complete position description that identifies all duties performed; (2) the beneficiary's salary and the source of the salary; (3) the date the beneficiary joined the foreign entity; and (4) an outline of all positions held during her employment with the foreign entity. The director also requested: an updated resume for the beneficiary; payroll records or other evidence establishing the beneficiary's one year of full-time employment within the three years preceding the filing of the petition; and additional evidence regarding the typical managerial responsibilities performed by the beneficiary abroad. The director specifically requested information regarding the number of managers, supervisors or professional employees supervised, the job title and duties of the beneficiary's subordinates, and the percentage of time the beneficiary devoted to managerial duties and how much time was devoted to non-managerial duties. Finally,

the director requested an organizational chart for the foreign entity that includes the position held by the beneficiary as well as all subordinates.

In a response dated March 8, 2005, the petitioner submitted a new resume for the beneficiary which includes the job descriptions recited below. The dates of employment for the beneficiary's two most recent positions were different from those identified in the previous resume, and reflect that she worked for the foreign entity as a senior manager from 2001 to 2003, and worked for a local government office in Poland from 2002 to 2004. The petitioner re-submitted the November 3, 2004 letter from the foreign entity confirming that the beneficiary was employed by the company from 1995 to 2002.

In an undated statement, the petitioner provided the following information regarding the beneficiary's foreign employment:

Senior Manager (2001 – 2003)

- Designed and implemented surveys of customer preferences and purchasing habits.
- Managed marketing and advertising strategies.
- Created financial analysis models and reports.
- Assisted with produce selection and procurement

Store Manager (2000 – 2001)

- Assisted with product selection and procurement
- Conducted customer service and retail sales
- Closing manager

While working for [the foreign entity] [the beneficiary] secured several strategic deals, including establishment of distributorship agreements....

Through the years [the beneficiary] oversaw from 2 to 4 sales people.

The petitioner indicated that no official records pertaining to the beneficiary's dates of employment were available and instead submitted two statements from individuals "not related to our family." Both statements indicate that the beneficiary was employed by the foreign entity in the positions of sales clerk, assistant and store manager between 2000 and 2002.

Finally, in an attached statement, the petitioner indicated that the foreign entity employed five people "in the past" and the beneficiary "was responsible for managing these people," including a shift manager, senior sales clerk, sales clerk and interns. The petitioner stated that "since the applicant performs multiple roles in [the foreign entity], it requires her to perform sales, procurement and accounting tasks, as well as strategic activities related to laying down company's future strategies, negotiation of vendor contracts and attendance of trade shows." The petitioner indicated that "there is quite an even split between managerial and non-managerial duties." Finally, the petitioner indicated that the foreign entity currently employs one person.

The director denied the petition on March 31, 2005, concluding that the petitioner failed to establish that the beneficiary was engaged in primarily managerial or executive level duties for one year out of the three years prior to the filing of the petition. The director observed that the documentation submitted regarding the foreign entity was “contradictory and insufficient” making it difficult to determine exactly how many people are employed and the volume of business carried out.

On appeal, the petitioner clarifies that the foreign entity currently operates one store, but at one time operated three stores and had six employees. The petitioner further explains the beneficiary’s duties as follows:

Regarding the beneficiary’s managerial capacities, when she was working at [REDACTED] there were still three stores open. The beneficiary specifically was responsible for the expansion of the company into new product areas. . . . Additionally, [the beneficiary] has negotiated exclusivity contracts with key suppliers for the export and sales of their products in the US.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity, or that she was employed by the foreign entity for one continuous year in the three years preceding the filing of this petition.

As a preliminary matter, the AAO notes that the majority of the evidence submitted regarding the beneficiary’s foreign employment, including the beneficiary’s initial resume, petitioner’s statement on Form I-129, the foreign entity’s November 3, 2004 letter, and the signed statements submitted in response to the request for evidence, indicate that the beneficiary was employed by the foreign entity until an unspecified date in 2002. As noted above, the petitioner must establish that the beneficiary was employed for one continuous year in the three years preceding the filing of the petition. Therefore, absent evidence that the beneficiary was employed with the foreign entity through November 22, 2002, the AAO cannot determine that she was employed by the foreign entity for a full year within the relevant three-year time period.

The AAO recognizes the submission of a revised resume on which the beneficiary’s employment dates were changed to indicate that she remained with the foreign entity through 2003. However, the initial resume clearly indicated that she had joined an unrelated employer in 2002. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). 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).

Therefore, the petitioner has not established that the beneficiary was employed with the foreign entity for one full year during the required time period. For this additional reason, the appeal must be dismissed.

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.* Whether the beneficiary is a managerial or executive

employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

The petitioner has provided only a brief job description of the beneficiary's duties with the foreign entity which suggests that she performed primarily non-qualifying duties associated with the foreign entity's purchasing, marketing and financial functions. For example the petitioner stated that the beneficiary "designed and implemented customer surveys," "created financial analysis models and reports," and "assisted with product selection and procurement." The petitioner further conceded that the beneficiary performs "multiple roles" and was required to perform sales, procurement and accounting tasks, and attend trade shows. While it appears that the beneficiary was involved in establishing strategy for the company and had a role in negotiating certain contracts, the petitioner does not claim that these were her primary duties. Rather, the petitioner concedes that the beneficiary had an "even split" between managerial and non-managerial duties. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

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). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the supervision of lower-level employees or the performance of the duties of another type of non-managerial or non-executive position. In the instant matter, the petitioner has failed to show that non-qualifying duties will not constitute the majority of the beneficiary's time.

Such a conclusion is further supported by the lack of evidence of subordinate employees to relieve the beneficiary from performing the non-managerial and non-executive tasks associated with her responsibilities. Nor does the record establish that the beneficiary supervised a subordinate staff composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. The beneficiary's job description for her most recent role of "senior manager" does not include any supervisory duties. The petitioner has nevertheless indicated that she oversaw "from 2 to 4 sales people" over the years, and also indicated that she managed a shift manager, senior sales clerk, sales clerk and interns. Although requested by the director, the petitioner has provided no organizational chart depicting the structure of the entity during the beneficiary's claimed qualifying year of employment, nor the requested job titles and duties for the beneficiary's employees. Any 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).

An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates, if any, were supervisors, managers, or professionals.

Instead, the record indicates that the beneficiary's subordinates performed the actual day-to-day tasks of operating the foreign entity's retail store(s). The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

Based on the foregoing discussion, it cannot be found that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity. For this additional reason, the appeal will be dismissed.

The fourth and final issue in this matter is whether the petitioner has established that it will employ the beneficiary in a managerial or executive capacity within one year.

The petitioner stated on Form I-129 that the beneficiary, as vendor and operations manager, would "establish operations, including vendors and business procedures." The petitioner indicated in its November 17, 2004 letter that, within a "couple years" the company will be "a successful (tax-paying) company, but also will expend [sic] in a way that will allow to hire local employees." The petitioner noted that the beneficiary "will help in start-up and operation growth efforts" for the new company. The petitioner did not submit a detailed job description of the duties to be performed by the beneficiary, a business plan, or other evidence of its proposed organizational structure.

Accordingly, on December 14, 2004, the director requested the following evidence: (1) a detailed description of the type of business to be conducted by the petitioner; (2) a copy of the company's business plan for commencing operation of the start-up company, giving specific dates for each proposed action for the next two years, beginning with the date of filing the petition on November 22, 2004; (3) evidence to establish the size of the United States investment and the financial ability of the foreign organization to remunerate the beneficiary; and (4) evidence to show that the company will grow to sufficient size to support a managerial or executive position, including evidence demonstrating that the beneficiary will be relieved from performing non-managerial tasks associated with the day-to-day operation of the company within one year.

In a response dated March 8, 2005, the petitioner provided its February 2005 business plan, which indicates that the U.S. company is engaged in the wholesale distribution of fine jewelry imported from Poland, with a current client base of jewelry stores, art galleries and upscale boutiques located in New York State. The business plan includes financial projections for the period 2005 through 2007, with an anticipated \$216,000 in gross sales and \$108,000 in gross margin for the first year of operations. The petitioner indicated that its projections were derived under the assumption that the company will employ one sales employee in 2005, four employees in 2006 and 6 sales employees in 2007.

The business plan indicates that the company has achieved sales of \$10,000 since its inception and has inventory valued at \$20,000. However, the petitioner did not specifically respond to the director's request for evidence to establish the size of the U.S. investment.

In his decision, dated March 31, 2005, the director determined that the petitioner had failed to establish that the U.S. company would grow to the point where a managerial or executive level position could be supported. The

director observed that, according to the business plan, the company anticipates employing only one sales employee after one year, and income of only \$108,000. The director concluded that there would not be sufficient personnel to relieve the beneficiary from performing primarily non-managerial duties after one year of operation.

On appeal, the petitioner asserts that the projected financial figures in the company's 2005 business plan are relatively low due to the expectation that the beneficiary would not be immediately available to provide services to the company. The petitioner contends that the projected number of employees for each year was interpreted incorrectly, noting "the forecast is based on the expectation that once the petition is approved the number of employees provided would be fulfilled by the beginning of each year." The petitioner further states:

Also, in the financial plans it is assumed that after a year of hands on work, the beneficiary will move away from day-to-day activities and focus on development of the business and its strategies, managing and creating strategic relationships with vendors and oversee the growth of sales relationships with major chain department stores as well as hiring sales representatives.

The petitioner asserts that the business plan satisfies the requirements of the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C), and indicates that the plan "provides employment for several people and a stable base for the potential for additional business activities."

The petitioner's assertions are not persuasive. The petitioner has not established that the U.S. entity will support the beneficiary in a managerial or executive position within one year.

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.* Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

The petitioner has failed to provide a detailed position description for the beneficiary's proposed role as vendor and operations manager. The petitioner has stated that she will "help in start-up and growth efforts" and "establish business operations, including vendors and business procedures." These brief statements are insufficient to establish that the proposed employment involves executive or managerial authority over the new operation, as required by 8 C.F.R. § 214.2(l)(3)(v)(B), particularly since the company claims to have already commenced operations and already has a president and vice president.

The petitioner's description of the beneficiary's role following the first year of operations is similarly vague, and fails to establish that she will perform primarily managerial or executive duties. The petitioner states that the beneficiary will manage and create strategic relationships with vendors, "oversee the growth" of sales relationships and hire sales representatives. Without further explanation, these duties suggest that the beneficiary would be responsible for non-qualifying duties such as purchasing products from vendors and directly performing certain sales activities, even after the U.S. company is fully operational. 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 answer a critical question in this case: What does the beneficiary primarily do on a daily basis? 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 petitioner's minimal descriptions of the beneficiary's proposed duties do not allow the AAO to determine the actual duties to be performed by the beneficiary, such that they could be classified as managerial or executive in nature.

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). The director requested that the petitioner provide a detailed business plan outlining its proposed actions for the next two years, starting with the date the petition was filed. The business plan submitted in response failed to provide the level of detail requested by the director and indicates that the beneficiary would be, at most, a first-line supervisor of non-professional personnel once the business is fully operational. The business plan indicates no intention on the part of the company to hire employees other than sales representatives, and it appears that only one additional employee would be hired within one year of the date the petition was filed. The petitioner does not indicate that it intends to hire employees to perform duties associated with its purchasing, marketing, importing, administrative, financial or clerical functions. Thus it is reasonable to assume, and has not been shown otherwise, that the beneficiary would be responsible for performing many of the non-qualifying duties associated with these functions, rather than supervising other employees to do so. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

In addition, although specifically requested by the director, the petitioner failed to provide evidence to establish the size of the United States investment and the financial ability to commence doing business in the United States. Any 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 evidence submitted does not 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 has not submitted evidence on appeal to overcome the director's determination. Accordingly, the appeal will be dismissed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

ORDER: The appeal is dismissed.