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U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: **DEC 13 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: [Redacted]
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 classify 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, a California corporation established in June 2012, states that it engages in the wholesale and retail of golf equipment. The petitioner claims to be a subsidiary of [REDACTED] located in China. The petitioner seeks to employ the beneficiary in the position of President/CEO.¹

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed primarily in a qualifying managerial or executive capacity in the United States.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a managerial and executive position at the U.S. petitioning company. Counsel submits a brief and duplicate evidence in support of the appeal.

I. THE LAW

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.

¹ On the Form I-129, the petitioner indicates that it is not a new office as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F). However, the petition was filed on December 31, 2012 and the U.S. company was established on June 20, 2012. The petitioner has not submitted sufficient evidence to establish that it has been doing business for one year prior to the date of filing the petition. Therefore, the petition will be considered a "new office" pursuant to 8 C.F.R. § 214.2(l)(3)(v). The AAO reviews each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- (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) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to 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 involved 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.

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.

II. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed primarily in a qualifying managerial or executive capacity in the United States.

On the Form I-129, Petition for a Nonimmigrant Worker, where asked to describe the beneficiary's proposed duties in the United States, the petitioner failed to provide a response. In its initial letter of support, the petitioner described the beneficiary's proposed position and duties in the United States as follows:

[The beneficiary] is uniquely suited for the President/Chief Executive Officer for [the petitioner]. [The beneficiary's] duties as the President and Chief Executive Officer of [the petitioner] are as follow:

1. Execute business goals and policies as set by the board of directors
 - [The beneficiary] will be responsible for implementation of our strategy of broadening [the petitioner's] product lines and increasing its product mix;
 - [The beneficiary] will be responsible for the development of proper product mix which is tailored to the need of our Chinese customers;
 - [The beneficiary] will spend approximately 35% of his time on these duties.
2. Continue to develop US business network, represent parent company in contract negotiation

- [The beneficiary] will continue to develop local business contacts and to establish additional sales and additional to [sic] existing and overseas sales;
 - [The beneficiary] will represent our company at all contract negotiations and pricing structures;
 - [The beneficiary] will spend 20% of his time on these duties.
3. Control of all financial expenditures
- [The beneficiary] will work with [the petitioner's] existing management in develop our budgetary goals [sic];
 - [The beneficiary] will help formulate expenditure controls and finance management;
 - [The beneficiary] will spend 35% of his time on these duties.
4. Supervise department heads and of employees (firing and hiring of staff).
- [The beneficiary] will continue to implement our staffing increase to maintain and create a work force sufficient to support our business;
 - [The beneficiary] will spend 15% of his time on these duties.

He will report directly to the undersigned and the Board of Directors of our parent company, [the foreign entity].

The petitioner did not submit any additional information about the beneficiary's proposed position in the United States or its anticipated organizational structure.

The director issued a request for evidence (RFE), instructing the petitioner to submit evidence to establish that the beneficiary will be performing the duties of a manager or executive. Specifically, the director requested a more detailed copy of the U.S. company's organizational chart, a list of all current employees by name and job title, and a summary of duties, educational level, and salary for each employee. The director also requested a copy of the U.S. company's quarterly wage reports for the previous three quarters.

In response to the RFE, the petitioner submitted an organizational chart for the U.S. company, depicting the beneficiary as "president," supervising the "general manager," [REDACTED]. The general manager then supervises the "U.S. Retail Store Manager," (also identified as [REDACTED]), and the "International Trade Manager," [REDACTED]. As the "U.S. Retail Store Manager," [REDACTED] supervises a "store clerk/sales" position, [REDACTED] a "store clerk/administration" position, [REDACTED] and a "sales/accounting" position, to be hired. The "International Trade Manager," [REDACTED] supervises a "sales/international trade" position, to be hired, and a "purchase" position, also to be hired. The petitioner indicated that Mr. [REDACTED] had been hired and would commence employment after the approval of the petition.

The petitioner also submitted a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2012 indicating that it had three employees and paid \$13,500.00 in wages, tips, and other compensation. The petitioner's Form DE-9C, State of California Quarterly Contribution Return and Report of Wages, for the fourth quarter of 2012 lists the three employees as [REDACTED] and [REDACTED] each making \$4,500.00 in total wages for the quarter. The petitioner also submitted its IRS Form W-3, Transmittal of Wage and Tax Statements, for 2012 indicating that it paid a total of \$13,500.00 in wages, tips, and other compensation for the entire year.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed primarily in a qualifying managerial or executive position in the United States. In denying the petition, the director found that there is no supporting documentation to show that the beneficiary will be relieved from performing day to day non-supervisory duties. The director noted that, although specifically requested, the petitioner failed to provide a summary of duties and the educational level of all employees subordinate to the beneficiary.

On appeal, counsel for the petitioner contends that the beneficiary's position meets the requirements for both managerial capacity and executive capacity. Counsel lists the same duties presented with the petition (listed above) for the beneficiary's position in the U.S. and correlates them to the statutes as follows:

The proposed job duties clearly meet the four-prong definition of managerial capacity:

1. Manage the organization – the beneficiary is the President/CEO of the entire company, which are the highest executive and corporate officer position. The beneficiary will have the assistant from [sic] the company's general manager/retail store manager and international trade manager and their support staff.
2. Supervises and controls work of other supervisory professional, or managerial employees – the beneficiary, as President/CEO, supervises and controls the work of general manager, retail store manager and international trade manager. These managers supervise and control their respective subordinate employees within each departments [sic]. Furthermore, all employees under the beneficiary's direct supervision are professionals, with bachelor degrees. These functions are supervisory in nature where the beneficiary "supervises and controls work of other supervisory, professional and managerial employees" as required by the definition of managerial capacity.
3. Has the authority to hire and fire...as well as other personnel action – the beneficiary has "Supervise department heads and of employees (firing and hiring of staff)" [sic].
4. Exercises direction over the day-to-day operations – the beneficiary is responsible to "Execute business goals and policies as set by the board" which includes the oversight of the company's day-to-day operations.

* * *

The proposed duties for the beneficiary, while managerial, can also be considered executive:

1. Directs the management of the organization – As the President/CEO, the highest level corporate officer, the beneficiary will supervise and direct the management, organization and functioning of any and all operations. Various department managers, general manager, retail store manager and international trade manager all report to the beneficiary.
2. Establish the goals and policies – As the President/CEO, the beneficiary is responsible to "execute business goals and policies as set by the board."
3. Exercise wide latitude in discretionary decision-making – the proposed duties for the President/CEO contain general and broad job duties for the beneficiary. As the most

senior corporate officer, the beneficiary has a wide range of discretion is to [sic] the operation of the corporation's entire operation and its various departments.

4. Receives only general supervision or direction – the beneficiary, being the highest ranking corporate officer, does not have an immediate supervisor. The beneficiary receives only general supervision and/or direction from the company's board of directors and its parent company in China.

Based on the above and the supporting letters and documents already submitted, the petitioner has shown that the proposed position, Account Manager, clearly meet the statutory requirements of either "managerial capacity" or "executive capacity."

* * *

Even given the existing three employees structure, [the beneficiary] will manage and supervise, through the general manager, three employees. [The beneficiary] is NOT required to assist "with the day to day non-supervisory duties." With two entry level staff and one manager, [the beneficiary] will not be required to assist "with the day to day non-supervisory duties," and will not need to perform "those tasks."

Counsel for the petitioner provided a very brief summary of duties for each of the beneficiary's current subordinates and explained that the petitioner has selected a candidate to fill the international trade manager position, [redacted] but he will not commence his employment until the beneficiary's L-1A petition is approved. The petitioner also submitted a declaration from [redacted] the general manager, dated May 7, 2013. In the declaration, Ms. [redacted] provides a brief summary of job duties for each of the beneficiary's subordinates and states that each of them holds a bachelor's degree.

Upon review, and for the reasons stated herein, the petitioner has not established that it would employ the beneficiary in a qualifying managerial or executive capacity in the United States.

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(i)(3)(ii).

On review, the petitioner's description of the beneficiary's duties fails to establish that the beneficiary will be engaged in either a primarily managerial or primarily executive position. While the petitioner indicates that the beneficiary will exercise discretionary authority over the U.S. company as its president, the petitioner has not provided sufficient information detailing the beneficiary's proposed duties to demonstrate that these duties qualify him as a manager or an executive. The petitioner did not submit any details about the beneficiary's proposed position in the United States. The description provided in support of the petition is vague and brief and does not provide any insight regarding the beneficiary's actual tasks. The petitioner did not provide any further description of the beneficiary's duties or a specific staffing plan indicating the duties to be performed by the beneficiary's subordinates to demonstrate that he will be relieved from performing primarily non-qualifying duties within one year of the commencement of operations. While several of the vague duties described by the petitioner would generally fall under the definitions of managerial and executive capacity, the lack of specificity raises questions as to the beneficiary's actual proposed responsibilities. 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).

Even though the petitioner is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. In its response to the RFE, the petitioner provided an organizational chart and tax documentation showing that it hired three employees immediately preceding the filing of the petition. However, the record does not contain any information pertaining to the beneficiary's subordinates, their job duties, educational level, or salaries, as specifically requested by the director. As such, it is impossible to determine, based on the lack of evidence submitted, that the beneficiary would be relieved from performing non-qualifying duties within one year of commencing operations. The regulations require the petitioner to present a credible picture of where the company will stand in one year, and to provide sufficient supporting evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position. *See generally* 8 C.F.R. § 214.2(l)(3)(v)(C). 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The petitioner has provided the requested information pertaining to the beneficiary's subordinates on appeal. 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 the submitted evidence to be considered, it should have submitted the documents 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 evidence submitted on appeal.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary will perform the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary will *primarily* perform these specified responsibilities and will 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 fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

Based on the evidentiary deficiencies addressed above, the AAO will uphold the director's determination that the petitioner failed to establish that the beneficiary would be employed primarily in a qualifying managerial or executive capacity in the United States. Accordingly, the appeal will be dismissed.

III. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

Although not addressed by the director, the petitioner has not established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

On the Form I-129, the petitioner stated that the beneficiary commenced employment with the foreign entity in August 1995 as general manager. Where asked to describe the beneficiary's duties abroad for the 3 years preceding the filing of the petition, the petitioner failed to provide a response.

In support of the petition, the petitioner submitted a letter from the foreign entity describing the beneficiary's employment abroad as follows:

Our company has employed [the beneficiary] since our inception. Since our inception in 1995, [the beneficiary] has been employed the general manager and a director of our board. He oversees all aspects our operations [sic], such as over-all corporate decision-making, project development, competitive bidding, contract negotiation, departmental management, construction scheduling and personnel development, etc. He is very familiar with overall operations and strategies of our company. [The beneficiary] also received academic training in electrical engineering and received engineer license issued by Ministry of housing and Urban-rural Development.

Furthermore, [redacted] is the brain-child of [the beneficiary]. [The beneficiary] has an instrumental hand in the very development aspect of [redacted] [The beneficiary] first formulated the conceptual idea of [redacted] out of his personal interest in golf and his business need in having a high-end club for socialization and entertainment with his business partner and associates. [The beneficiary] played an active and dynamic role from the acquisition of real estate property, to concept design, to architectural rendering, to actual construction. [The beneficiary] personally negotiated with [redacted] prior to recommending to our board for its acquisition and our investment.

The petitioner did not submit any additional details about the beneficiary's duties abroad. The petitioner submitted an organizational chart for the foreign entity depicting the beneficiary as general manager. According to the chart, the beneficiary directly supervises three vice-general managers, and a general engineering office. However, the fact that the beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). While the information provided by the petitioner indicates that the beneficiary may exercise discretion over the foreign entity's day-to-day operations as its general manager, the petitioner has failed to show that the beneficiary's actual duties are primarily managerial or executive in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Here, the petitioner has provided a vague description of the beneficiary's job duties abroad. Absent a detailed description of the beneficiary's actual duties and a consistent account of how the beneficiary allocates his time to specific duties, the AAO cannot conclude that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity. For this additional reason, the petition cannot be approved.

The AAO maintains discretionary authority to review each appeal on a *de novo* basis. The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9th Cir. 2003).

IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that petitioner has not met that burden.

ORDER: The appeal is dismissed.