U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

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U.S. Citizenship and Immigration Services

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[redacted]

JAN 27 2006

File: [redacted] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Oregon in April 1995. It imports and exports merchandise and operates a Chinese herbal store and acupuncture clinic. It seeks to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary's assignment was primarily in a managerial or executive capacity. The director also determined that the petitioner had not established a qualifying relationship with a foreign entity.

On appeal, the petitioner asserts that the director erred in his decision.

The beneficiary of this petition was initially approved for L-1A intracompany transferee status on June 8, 1995. His L-1A status was extended on November 13, 1996 and again on November 23, 2001. The November 23, 2001 approval was revoked on March 4, 2002. The petitioner filed the petition that is the subject of this appeal on September 24, 2002. The director requested additional evidence on October 4, 2002. A response to the request was received on December 20, 2002. The director denied the nonimmigrant petition on December 31, 2002.

On September 23, 2002 the petitioner also filed an employment-based petition (LIN 02 293 50997) that the director denied. The petitioner submitted an appeal of the decision on January 30, 2003. The appeal is pending with the AAO.

To establish L 1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. Furthermore, 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.

The first issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily
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> 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), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the organization, component, or function;
>
> iii. exercises wide latitude in discretionary decision making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The AAO notes counsel's misunderstanding regarding the purported requirement that the petitioner choose whether the beneficiary is primarily performing in an executive capacity or in a managerial capacity. CIS does not require that the petitioner make such a choice. However, the petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. A beneficiary

may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Based on this misunderstanding, the petitioner requests that the beneficiary's assignment be considered only as an executive assignment.

When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). In this matter, the petitioner indicates that the beneficiary's primary responsibility for the import/export division is to retain current customers and markets and to gain access to new markets and customers. The beneficiary travels cross-country to finalize deals started by the marketing manager as well as communicating with executives of customer companies. This primary responsibility is indicative of an individual performing the necessary tasks of marketing, customer service, and sales. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The lengthy description of the beneficiary's duties with examples of those duties does not describe an individual whose assignment is primarily directing the management of the company, rather than, primarily providing services to continue the existence of the company.

The petitioner also provides a breakdown of the beneficiary's overall duties. The petitioner indicates that the beneficiary spends 20 percent of his time receiving reports from the marketing manager, marketing specialist, and herbal store manager and making decisions on new business opportunities. The petitioner indicates that the beneficiary spends 15 percent of his time monitoring market trends and developing new business relationships. The petitioner indicates the beneficiary spends an additional 15 percent of his time overseeing and evaluating the performance of the marketing manager, marketing specialist and herbal store manager and herbal specialist. The petitioner indicates that the beneficiary spends 10 percent of his time engaging in negotiations and supervising the marketing manager's interaction with buyers. It is clear from the record that the beneficiary spends a majority of his time supervising the three full-time employees, negotiating contracts, and exploring new business opportunities. It is not clear from the record, that these duties comprise primarily managerial or executive duties, rather than the providing the services of a first-line supervisor of non-professional, non managerial, and non-supervisory employees and negotiating contracts to continue the petitioner's business.

Although the petitioner does not request consideration of the beneficiary's assignment in a managerial capacity, the AAO will consider the beneficiary's assignment in this context because of counsel's misunderstanding of the director's request for evidence. However, the AAO takes exception to counsel's assertion that CIS must choose whether the beneficiary is a manager or executive. The petitioner should be in the best position to determine if it is using the beneficiary's services primarily in an executive capacity or a managerial capacity or both. It is then up to CIS to determine if the petitioner has provided sufficient evidence to establish that the beneficiary's duties fulfill the requirements of an executive or manager for immigration purposes.

The petitioner initially divided the beneficiary's managerial duties between its import/export business and its Chinese herbal clinic. The petitioner indicated that its import/export division employed the beneficiary, a marketing specialist, and a marketing manager and utilized the services of custom brokers to ship, receive,

and distribute products. The petitioner indicated the marketing specialist spent 80 percent of his time conducting market research. The petitioner stated that the marketing manager spent 40 percent of his time working with custom brokers and 40 percent of his time working with customer's engineering teams on new projects.

In this matter, the petitioner does not provide sufficient documentary evidence that either the marketing manager or the marketing specialist is a supervisor, manager, or an employee holding a professional position. The description of duties for the marketing specialist indicates that he primarily performs market research. The record does not substantiate that the marketing specialist supervises or manages others or that his position is a professional position. The description of duties for the marketing manager is not sufficient to show that he primarily supervises or manages others, manages an essential function or holds a professional position. Further, the petitioner does not provide documentary evidence that it utilizes custom brokers to perform the operational tasks of importing, exporting, and distributing products. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner indicates that the beneficiary created the Chinese herbal clinic division and that two full-time employees now operate the Chinese herbal clinic. The herb store manager works with suppliers and insurance companies and oversees the daily operations of the store. The herbal specialist/acupuncturist provides customer service in herbal consulting and acupuncture. Again, these descriptions do not demonstrate that either of the employees primarily performs duties of a manager, supervisor, or professional employee.

Counsel's citation to various unpublished decisions on appeal is without merit. Unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c). Unpublished decisions have little or no probative value. The petitioner must establish that the beneficiary is relieved from primarily performing many of the day to-day operational tasks. The petitioner must convey a clear and consistent understanding of the beneficiary's daily tasks and must clearly and consistently set out how the tasks are managerial or executive, rather than the performance primarily of non-qualifying duties. Further, the record must contain documentary evidence substantiating the claim to managerial or executive capacity and the proportion of duties that are managerial and executive and the proportion that are non managerial and non executive. See Ikea US, Inc. v. INS, supra.

Counsel observes that several of the conclusions made by CIS in its decision are erroneous. Although the director unnecessarily uses a hypothetical and overlooks the petitioner's expansion, the AAO disagrees that the director's conclusion is erroneous. The director focuses on the petitioner's description of the beneficiary's duties, the description of duties of the beneficiary's subordinates, and the organizational complexity of the company. The director concludes that the beneficiary does not perform in an executive capacity, but rather performs the day-to-day tasks of operating a small company including the supervision of non-professional, non-supervisory, and non-managerial employees.

As stated above, the petitioner's description of the beneficiary's duties does not comport with a description of an employee who primarily provides executive services to the company. The petitioner's description of the beneficiary's duties indicates that the beneficiary spends a significant portion of his time representing the company in marketing and sales duties. The petitioner's description of the beneficiary's duties and the description of the subordinate's duties demonstrate that a significant portion of the beneficiary's time is spent as a first line supervisor of non-professional, non-managerial, and non-supervisory employees. Although, the petitioner's organizational chart shows that the herb store manager is on a tier higher than the herbal specialist and part time clerk, the description of the herb store manager's duties conflicts with the organizational chart showing her in a supervisory position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

In sum, the record as a whole does not reflect that the beneficiary's position is primarily working in an executive capacity or a managerial capacity. Counsel's arguments on appeal are not sufficient to overcome the director's decision on this issue.

The second issue in this proceeding is whether the petitioner has established a qualifying relationship with a foreign entity. As the director observed, the record contains contradictory evidence of the petitioner's ownership and control. The director found the information submitted to explain the contradictory evidence insufficient. The director observed that the beneficiary had responsibility to review and correct errors made by the petitioner's accountant and failed to do so. The director found that correcting the claimed errors after the fact failed to establish the petitioner's credibility.

Counsel on appeal mischaracterizes the affidavit of the petitioner's accountant by stating that the accountant was responsible for a clerical error when preparing the petitioner's tax returns. The accountant's affidavit states, "[d]uring the initial set up of the corporation, we were under the belief that [the petitioner] was a 100% domestic corporation." The accountant's affidavit further states, "[w]hen loans to the corporation were made, you advised us that these were your own personal monies." The accountant stated that such transactions led him to believe that there was no foreign ownership.

The AAO finds that the accountant's error was based on information provided by the petitioner. The petitioner has not adequately explained how the accountant's firm came to be under the impression the petitioner was a corporation with no foreign ownership. Moreover, the record does not contain documentary evidence supporting the accountant's version of IRS requirements. The accountant's re-statement of IRS advice is not accompanied by information detailing the circumstances of that advice. The history of this matter and the contradictory evidence continues to cast doubt on the petitioner's proof. As previously noted, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho, supra.*

Merely asserting that the tax returns contained "clerical errors" does not qualify as independent and objective evidence. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, evidence that is created by the petitioner after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event that is to be proven and existent at the time of the director's notice.

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.