U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

D7

[redacted]

File: WAC 03 101 52334 Office: CALIFORNIA SERVICE CENTER Date: AUG 19 2004

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. 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 California in June 2001. It imports and sells cosmetic goods. It seeks to temporarily employ the beneficiary as its branch manager. Accordingly, the petitioner endeavors to classify the beneficiary as a 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 claims that it is a 95 percent owned subsidiary of Ajou Medics Co., Ltd., located in Seoul, Korea.

The director denied the petition concluding that the record did not establish: (1) that the beneficiary would be employed in a primarily managerial or executive capacity; or, (2) that the petitioner is doing business on a regular and systematic basis, but rather was acting as an agent soliciting vendors and retailers to sell the parent company's products.

On appeal, counsel for the petitioner challenges the director's grounds of denial.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). 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) further 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 first issue to be discussed is whether the petitioner has been doing business as defined by the regulations. The regulations at 8 C.F.R. § 214.2(l)(1)(ii) state: "*Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

The petitioner submitted invoices, packing lists, and bills of lading dating from January 2002 through November 2002 to substantiate that it was engaged in the regular, systematic, and continuous provision of goods. The petitioner also submitted a statement from a customs house broker indicating that the beneficiary worked for the petitioner clearing customs for all imported goods. The customs house broker also provided its list of activities for the petitioner.

The critical focus in the definition of "doing business" is not whether the petitioner is an agent or representative office, but whether the entity constitutes the "mere presence of an agent or office" without conducting any business activities. The proper focus on this issue thus, is the nature and conduct of the petitioner's business activities, if any. In the matter at hand, the petitioner has presented evidence that it is involved in a high volume of transactions. The petitioner has submitted sufficient evidence to establish that it facilitates the annual import of significant quantities of cosmetic goods per year. The petitioner has adequately established that it is engaged in facilitating the regular, systematic, and continuous provision of goods. The director's decision will be withdrawn as it relates to the question of whether the petitioner was doing business in a regular, systematic, and continuous manner.

The second issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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;
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> 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;
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> 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;
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> 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 petitioner initially stated that the beneficiary occupied the highest position in the company and listed the beneficiary's duties as:

> (1)Research market trend, collect information and increase goods importing from the parent company, (2) Improve corporate image and satisfy local customers' needs in the United States, (3) Settle distribution and marketing system for the subsidiary, (4) [E]nlarge the scope of business by investment to the United States, (5) [H]ire and train new employees and supervise and direct managers and employees, and (6) Coordinate all business matters with the petitioner and the foreign parent company in Korea.

The petitioner added that:

> [The beneficiary] is essentially unsupervised, and his duties entail directing the overall management and control of the enterprise, establishing policy and goals, exercising wide latitude in discretionary decision-making and subject only to supervision by the Board of Directors of the parent company. In addition to the foregoing executive duties, the applicant is also managing and controlling the work of other enterprise officers, managers, and supervisors, including hiring, firing, promoting, and demoting personnel. He is exercising complete discretion over the enterprise's day-to-day operations. The applicant possesses the skills requisite for this position as can be seen from the previous recount of how he

successfully has served the parent and the US enterprise. He currently receives $36,000 for annual salary.

The petitioner also included its organizational chart showing the beneficiary as branch manager, an import/wholesale manager, and a customer service/accounting assistant manager. The chart also included a marketing manager working in the Chicago office of a distinct and separate company, Eden USA, Inc., identified as the petitioner's exclusive sales agent. The chart also listed several unfilled positions.

The petitioner included its 2002 fourth quarter California Form DE-6, Employer's Quarterly Wage Statement, listing the beneficiary and the individuals identified as the import/wholesale manager and the customer service/accounting assistant manager.

On February 24, 2003, the director stated that the petition required additional evidence. The director noted that the record did not establish that the beneficiary would be performing primarily managerial or executive duties or that the petitioner would support an individual in an executive or managerial capacity. The director specifically stated that the petitioner had failed to provide evidence that it would be hiring three additional employees (as had been alluded to in the initial petition) in the 2003 year.

In a February 23, 2003 response, counsel for the petitioner indicated that the beneficiary supervised three employees and referenced the previously submitted California Form DE-6 and organizational chart. The petitioner supplied a contract between the petitioner and [redacted] wherein the petitioner agreed to furnish the services of its marketing manager and [redacted] agreed to pay for the marketing manager's services. The petitioner also provided checks showing that [redacted] had compensated the marketing manager pursuant to the agreement. The petitioner also included a customer list and claimed that the list showed that the petitioner had 26 agents in Chicago, Atlanta, New York, and New Jersey. Counsel concluded that the beneficiary's supervision and direction of three managers, contracted sales agents, and future employees established that the beneficiary would be employed in a managerial and executive position.

The director concluded that the beneficiary would at best be a first-line supervisor.

On appeal counsel for the petitioner indicates that in February and March 2003, the petitioner added three employees. The petitioner submits its California Form DE-6 for the first quarter of 2003 showing that in March 2003, the petitioner hired three additional employees. Counsel also submits the petitioner's updated organizational chart showing that the three new employees hold positions subordinate to the import/wholesale manager and the customer service/accounting assistant manager. Counsel asserts that the director erred in characterizing the beneficiary's position as a first-line supervisory position.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner's description of the beneficiary's duties includes researching market trends, collecting information, improving corporate image, and settling the petitioner's distribution and marketing

system. These duties are indicative of an individual actually performing tasks necessary to promote and market the parent company's product. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The remaining portion of the petitioner's description of the beneficiary's duties primarily paraphrases the elements contained in the statutory definitions of executive and managerial capacity. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Moreover, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A 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. The petitioner's description of the beneficiary's actual duties does not establish that the beneficiary meets each of the criteria in the statutory definitions. 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).

Further, the petitioner's employment of three additional employees in March 2003, a month after the petition was filed and shortly after the director's note that the petition was deficient in providing evidence of the employment of additional staff, does not establish the beneficiary's eligibility when the petition was filed. A visa petition may not be approved based on speculation of future eligibility or after the petitioner 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). Furthermore, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Citizenship and Immigration Services (CIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

In sum, the petitioner has not provided sufficient evidence to establish that the beneficiary's assignment for the petitioner is primarily managerial or executive. The record does not contain sufficient evidence to overcome the director's decision on this issue.

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.