U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: [illegible] 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)

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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was established in 2001 and is described as a wholesaler, retailer, and exporter of audio and security systems and accessories. The petitioner claims to be a subsidiary of [redacted] located in Maracaibo, Venezuela. The petitioner claims three employees and $200,000.00 in gross annual income. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president for two years, at a monthly salary of $2,500.00.

The director determined that the petitioner had not submitted sufficient evidence to establish that the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity

On appeal, counsel submits a brief in opposition to the director's decision. Counsel states that the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed by the U.S. entity primarily in a managerial capacity.

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 demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

> *Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

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 (1)(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 with 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 serves 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)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;

B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);

C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

E) Evidence of the financial status of the United States operation.

The issue to be addressed in this proceeding is whether the evidence establishes that the beneficiary will be employed primarily in a managerial or executive capacity.

The term "managerial capacity" means 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), provides:

> The term "executive capacity" means 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 petitioner described the beneficiary's duties in the petition as directing the management of the U.S. entity, establishing goals and polices, implementing strategies to improve productivity, and reducing operational costs.

In a letter of support dated July 18, 2002, the accounting manager of the foreign entity described the beneficiary's duties as:

> As president, [the beneficiary] is responsible for directing the overall management and administration of [the U.S. entity]. In doing so, he establishes goals and policies relating to structure organization, distribution of assignments, plan development and project creation. He also implements strategies to increase the company's productivity and reduce operational costs. . . .

In a letter of support dated August 7, 2002, counsel described the beneficiary's duties as follows:

> The beneficiary has been president of the petitioner since September 4, 2001. In said capacity, he is responsible for the overall direction and administration of the company, which includes overseeing the business operations at the two locations and investigating future investments and expansion opportunities.

In response to the director's request for evidence, the petitioner submitted a list of the employees of the U.S. entity along with their titles. The document lists the beneficiary as president, a sales manager, a warehouse & delivery manager, and a salesman. The petitioner submitted corporate tax returns, bank statements, occupational licenses, business receipts and invoices to demonstrate that it is doing business in the United States.

The director determined that the evidence was not sufficient to establish that the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's decision and asserts that the evidence is sufficient to establish that the beneficiary will be employed in an executive capacity. Counsel asserts that the director's factual conclusions with respect to the beneficiary's position are based upon assumptions rather than evidence contained in the record. Counsel further asserts that the director incorrectly denied the petition without allowing the petitioner an opportunity through a request for evidence to detail or clarify the beneficiary's managerial or executive duties. Counsel also asserts that the petitioner should have been given an opportunity to provide a detailed explanation or clarification concerning the other employee's duties. Counsel contends that the director placed improper weight on the petitioner's size and staffing levels. Counsel describes the beneficiary's duties as: "directing the management and administration of the company to ensure the successful operation; establishing goals and policies relating to structure organization, distribution of assignments, plan development and project creation; implementing strategies to increase productivity and reduce operational costs; and investigating business opportunities." Counsel states that the beneficiary directs essential functions of the organization including:

1- Establishing and negotiating contracts and other related matters;
2- Hiring and firing employees;
3- Establishing goals and policies;
4- Hiring and firing independent contractors (e.g. accountants, attorneys, etc.); and
5- Investing capital to expand holdings.

Counsel's assertions are not persuasive. Counsel contends that the director should have requested additional information from the petitioner about the duties of the beneficiary and the petitioner's other employees. The director did request additional evidence of the petitioner's staffing on October 21, 2002. The director asked for a list of the three employees of the petitioner and their job titles. The petitioner did not provide the requested list of its three employees at the time the petition was filed. The petitioner stated that it had hired an additional employee, and listed four employees without specifying which employee had been hired after the petition was filed.

Counsel contends that the evidence of record demonstrates that the beneficiary qualifies as an executive. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel argues that similar extension of new office petitions have been granted by the AAO, and cites to unpublished decisions in support of his contentions. While 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Further, an unpublished decision carries no precedential weight. *See Chan v. Reno*, 113 F.2d 1068, 1073 (9th Cir. 1997) (citing 8 C.F.R. § 3.1(g)). As the Ninth Circuit says, "[U]npublished precedent is a dubious basis for demonstrating the type of inconsistency which would warrant rejection of deference." *Id.* (citing *De Osorio v. INS*, 10 F.3d 1034, 1042 (4th Cir. 1993)).

Further, counsel contends that the director failed to consider evidence of the new hire in determining the beneficiary's eligibility. Counsel also contends that there is nothing in the statute or regulations that would bar the admission of evidence of new hires subsequent to the filing of the petition. Contrary to counsel's

claims, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the 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).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

At the time of filing, the petitioner had been established as a wholesaler, retailer, and exporter of audio and security systems and accessories. The firm employed the beneficiary as president, plus two other employees. After the petition was filed, the petitioner hired an additional employee, and now employs the beneficiary, a sales manager, a warehouse and delivery manager, and a salesman. The AAO notes that all but one of the employees has managerial or executive titles. Counsel stated that the petitioner operates two stores in the Florida area, and that the beneficiary is responsible for overseeing the business operations of both companies. The petitioner did not submit evidence to demonstrate that it employed a subordinate staff to relieve the beneficiary from performing non-qualifying duties at either business location. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president where the other employees, who also hold managerial or executive titles, are not said to be performing managerial or non-managerial duties. In the instant case, the record does not establish that the managers manage anyone or that their positions are professional, managerial, or supervisory in nature. The reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

There has been insufficient evidence submitted to establish that the majority of the beneficiary's duties will be managerial or executive in capacity. Counsel contends that the business has grown and will continue to grow due to the accomplishments of the beneficiary as an executive. Counsel also contends that the director failed to take into consideration the totality of circumstances in deciding the beneficiary's eligibility. Counsel's maintains that the evidence demonstrates the progress made by the U.S. entity in developing its business. Contrary to counsel's contentions, although the record demonstrates that the petitioning company has been doing business, this aspect of eligibility is not at issue. 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 must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail

executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include establishing goals and policies, directing the management and administration of the two operations, implementing strategies, and investigating business opportunities. The petitioner did not, however, define the beneficiary's goals, policies, or clarify how the beneficiary would actually go about directing the management and administration of the U.S. entity. 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). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of managerial or executive capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as directing the entire operation of the organization, establishing goals and policies of the organization, and hiring and firing employees. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava, supra*; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the petitioner describes the beneficiary as being involved in the sales and negotiating processes, marketing the petitioner's product, and investigating business opportunities. Since the beneficiary actually sells the product, negotiates the contracts, and markets the petitioner's product, he is performing a task necessary to provide a service or product. 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).

Counsel asserts that the beneficiary manages essential functions in that he manages contract negotiations, personnel matters, investment matters, and the establishment of goals and policies. However, the record demonstrates that the beneficiary performs rather than manages these functions. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Here, the petitioner has not established that the beneficiary manages an essential function. Rather, it appears that the beneficiary is performing the functions of the organization.

Beyond the decision of the director, the petitioner's Internal Revenue Service (IRS) Form 1120, schedule K, of its corporate tax returns for 2001 reveal that it is not a subsidiary and is not affiliated with any other entity,

thus directly contradicting the claim that it is a subsidiary of a foreign entity. Consequently, it cannot be concluded that the petitioner is a qualifying organization doing business in the United States and in at least one other country, or that it has a qualifying relationship with a foreign entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G). For this additional reason, this petition may not be approved.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.