U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

D7

FILE: SRC 02 093 55036 Office: TEXAS SERVICE CENTER Date: MAY 21 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]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

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DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner claims to be engaged in the business of purchasing industrialized machinery and equipment for distribution in Latin America. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. On appeal, counsel submits a statement disputing the director's findings.

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 U.S. petitioner states that it was established in 2000 and that it is a subsidiary of Inversora Punta Gorda, C.A., located in Venezuela. The initial petition was approved and was valid from March 12, 2001 to January 3, 2002, in order to open the new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of $36,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary will primarily perform managerial or executive duties.

Section 101(a)(44)(A) of the Immigration and Nationality Act ("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.

In support of the petition, the petitioner stated that the beneficiary has total authority over the petitioner's business operation, including its corporate goals and the purchase and shipment of goods. The petitioner did not provide any further information regarding the beneficiary's past or proposed set of duties. Therefore, the director issued a request for additional evidence on February 2, 2002. The petitioner was asked to explain how the beneficiary would refrain from performing non-qualifying duties given its small support staff. The petitioner was also instructed to provide the names of the beneficiary's subordinates and to provide their education backgrounds and a description of their job duties.

In the response, the petitioner stated, "[T]he Beneficiary's [sic] primary duties will be to direct or manage the entire U.S. Operation [sic] and be responsible for overall sales and marketing of products." The petitioner also provided two employment contracts indicating that the petitioner hired two employees on February 15, 2002. Aside from claiming that the beneficiary is a function manager, the petitioner provided no additional information regarding the beneficiary's job duties. The director denied the petition concluding that the petitioner failed to establish that the beneficiary would primarily perform managerial or executive duties.

On appeal, counsel asserts that the beneficiary is a function manager and claims that the essential function the beneficiary manages is purchase and export operations. 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. 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). In this matter, counsel states that the beneficiary's responsibilities include client relations, negotiating contracts with manufacturers and

distributors, and looking for new lines of products. Although this brief list of duties falls short of a detailed description, it is enough to suggest that the beneficiary has been and would continue to perform, rather than manage, the essential function. Therefore, the petitioner has not provided evidence that the beneficiary manages an essential function. Furthermore, while the petitioner submitted employment contracts indicating that it employs a support staff, the two individuals were not hired until February 15, 2002. The petition, however, was filed in January of 2002 and had therefore already been filed at the time the employees were hired. 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). As such, the employees hired after the date of the filing of the petition will not be considered in determining the petitioner's overall eligibility for the visa classification sought in the instant case.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a managerial or executive capacity. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. Rather, the record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. While counsel stresses the beneficiary's heightened degree of discretionary and decision-making powers, this factor does not determine the actual nature of the duties to be perform. 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 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). 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. *Id.* In the instant case, the petitioner has failed to include any specific information about the beneficiary's daily tasks. Therefore, the AAO cannot determine that the nature of the duties the beneficiary would be performing would be either managerial or executive. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that he will otherwise be relieved from performing non-qualifying duties. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.