U.S. Department of Homeland Security
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Washington, D.C. 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 02 207 55255 Office: TEXAS SERVICE CENTER Date:

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.

The petitioner claims to be in the business of selling Mexican jewelry and crafts. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary had been or would continue to 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 beneficiary's duties have been and will continue to be managerial or executive in nature.

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.
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> (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.
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> (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.
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> (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.

According to the documentary evidence contained in the record, the petitioner was incorporated in 1997 as a business engaged in the sale of Mexican jewelry and crafts. The petitioner claims that the U.S. entity is an affiliate of [redacted], located in Guerrero, Mexico. The petitioner declares four employees with a projected gross annual income of $523,579.00. The petitioner seeks to extend its authority to utilize the beneficiary's services as president for a period of two years, at a yearly salary of $36,000.00.

The issue in this proceeding is whether the petitioner has established that the beneficiary's employment with the U.S. entity has been and will continue to be primarily managerial or executive in nature.

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—
>
> (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
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> (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;
>
> (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.

In a letter of support, dated June 21, 2002, the petitioner stated that the beneficiary's position involved managerial and executive duties including:

> . . . . [The beneficiary] directs the management of [the U.S. entity], as well as all strategic plans an implementation of such plans for our growth over the next two years. He has been ultimately responsible for all major decisions and transactions made by [the U.S. entity], which includes directing the importing, sales, marketing and personnel decisions . . . . [the U.S. entity] continues to require the day-to-day services of a president who is intimately and uniquely familiar with the Mexican jewelry and crafts business, including having the necessary contacts with Mexican suppliers, as well as the process to import such items from Mexico.

In response to the director's request for additional evidence on this issue, the petitioner stated that it owned three establishments and employed five persons to operate the three businesses. The petitioner stated that it employed a president, manager, and three sales associates. The petitioner further stated that the employees, excluding the beneficiary, were responsible for answering the phones, selling the products, mailing letters, and operating the cash register. The petitioner also asserted that the manager supervised the sales associates and the execution of their duties. The petitioner provided copies of a work schedule, hours of operation, and a description of duties. The petitioner stated that the beneficiary's responsibilities include: directs the management of the U.S. company; develops the goals and strategies of the organization; directs strategic plans and the implementation of those plans for company growth; directs the importing, sales, and marketing of the U.S. entity's product; and directs personnel decisions. The petitioner also stated that the beneficiary provides executive guidance, determines logistics, conducts sales training for employees, and develops the sales and marketing strategies for the U.S. entity. The petitioner submitted a copy of petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return for the period ending June 30, 2002; copies of IRS Form W-2 for 2001; and an organizational chart of the U.S. entity.

The director determined that the petitioner had not submitted sufficient evidence to establish that the beneficiary had been or would be employed primarily in a managerial or executive capacity. The director stated that it was apparent that with four employees and three business locations, the beneficiary would primarily be engaged in the day-to-day operations of the businesses.

On appeal, counsel disagrees with the director's decision and states that the evidence demonstrates that the beneficiary performs primarily managerial and executive duties as president. Counsel contends that the beneficiary performs duties similar to those performed by beneficiaries whose petitions have been approved by the AAO, such as: "having ultimate authority over all policies and objectives, coordinating and directing the formulation of sales and marketing strategies, establishing financial policies with responsibility for such things as profit and loss and asset management; public relations, export and all personnel matters." The petitioner submitted a letter on appeal, dated October 15, 2002, which states in part:

> . . . [the beneficiary] directs the management of [the U.S. entity], as well as all strategic plans and implementation of such plans for our business. As president, he exercises the usual duties of an executive. He has been ultimately responsible for all major decisions and

> transactions made by [the U.S. entity] . . . . [the beneficiary's] duties include the hiring and development of all of our staff . . . . [the beneficiary] is also responsible for all final decisions in connection with the acquisition and development of our inventory. . . . [The beneficiary] is also charged with the development and coordination of our marketing and sales strategy . . . . [the beneficiary] develops and oversees our financial goals and budget, and develops our overall financial strategy.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. When examining the managerial or executive capacity of the beneficiary, the AAO will look first to the petitioner's description of the beneficiary's 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. In the instant matter, counsel states that the beneficiary performs both managerial and executive duties. However, the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. 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.

Counsel asserts that similar extension of benefits petitions have been granted by the AAO, and cites to unpublished decisions in support of his contentions. However, 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)).

On appeal, counsel states that the petitioner has hired new employees since the petition in the instant matter was filed. However, the regulations and case law dictate that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.,* 17 I&N Dec. 248, 249 (Reg. Comm. 1978). CIS cannot consider facts that come into being only subsequent to the filing of a petition. *See Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi,* 22 I&N Dec. 169, 175 (Assoc. Comm. 1998).

Furthermore, 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: directing the management of the organization; implementation of plans for growth; directing imports, sales, marketing, and personnel activities of the organization; and determines logistics. 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). Furthermore, 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

There has been insufficient evidence submitted to establish that the beneficiary manages a function of the organization. The petitioner stated that it employs a manager and sales associates that perform all of the non-qualifying duties of the corporation. The petitioner also stated that their duties consist of answering the phones, selling the products, mailing letters, and operating the cash register. On the other hand, the petitioner described the beneficiary as being responsible for developing and implementing sales, marketing, imports, and personnel activities. There has been no evidence submitted to show that the subordinates perform the functions that the beneficiary allegedly manages. To the contrary, rather than managing these functions, it appears that the beneficiary has been and will continue to perform the functions while supervising non-professional employees. 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). There has been no evidence submitted to demonstrate that anyone other than the beneficiary performs the sales, marketing, and distribution functions of the organization.

In the instant case, it does not appear that the petitioner has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has failed to demonstrate that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity.

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.