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

U.S. Citizenship and Immigration Services

D1

[redacted]

File: WAC 03 009 51164 Office: CALIFORNIA 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)

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

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 distributes jade and other craft products. It seeks to temporarily employ the beneficiary as its deputy general 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 wholly owned subsidiary of Zhengzhou Friendship Commercial Co. (Group), located in Zhengzhou, China.

The director denied the petition concluding that the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner disagrees with the director's decision in this matter.

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 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
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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;
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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 an October 2, 2002 letter appended to the petition, the petitioner stated that the beneficiary would be assuming the management responsibilities of the chief executive officer or president as it currently did not

have a chief executive officer or president on duty in the United States. The petitioner indicated the beneficiary would direct and manage the U.S. entity's business development activities and day-to-day operations. The petitioner stated that the beneficiary's specific duties would include:

> [D]evelop long-term and short-term business plan and development strategies, organize and direct market development activities, supervise store managers and other key management personnel, make decisions on terms and conditions of major transactions, oversee company's financial affairs, set up internal management and operational policies, make decisions on personnel arrangement including hiring and firing of employees, [and] consult with parent company on the U.S. Subsidiary's operations

The petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that it employed two personnel. The petitioner provided payroll records substantiating the employment of two individuals beginning in October 2001.

On January 17, 2003, the director requested among other things: (1) the U.S. entity's organizational chart including the named employees on the chart; (2) a more detailed description of the beneficiary's job duties including the percentage of time spent on each duty; (3) a list of employees under the beneficiary's supervision including name, job title and duties, and source of remuneration; and, (4) California Forms DE-6, Employer's Quarterly Wage Report for the previous four quarters and Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement evidencing wages paid to employees.

In response, counsel for the petitioner indicated that the beneficiary would spend 60 percent of his time managing the petitioner's marketing development efforts, 30 percent of his time managing the retail sales of the business, and 10 percent of his time managing the company's financial affairs and supervising managerial employees. Counsel also indicated that:

- [T]he beneficiary will direct and supervise the development of long-term and short-term business plans and marketing strategies including reviewing market research reports and data, market development proposals, sales strategies, discussing business plans with managerial staff, revising and approving business plans and proposals.
- The beneficiary will direct and supervise market development activities, supervise business managers and other managerial staff, make decisions on promotion and demotion of managerial personnel and hiring and firing of employees.
- The beneficiary will make decisions on major business transactions and oversee the company's financial affairs.
- The beneficiary will also be responsible for establishing and implementing the U.S. company's internal management policies including setting up responsibilities and authorities for managers and job duties for sales representatives, business records keeping system, customer complaint handling procedure, employee compliant procedure, and making decisions on employee compensations.
- The beneficiary will consult with the parent company in China on issues pertaining to the U.S. subsidiary's operations and management.

Bullets added.

Counsel also indicated that the petitioner employed a marketing manager and retail store manager. Counsel stated that the marketing manager developed market plans, directed and supervised market research, developed wholesale distribution channels and selected Chinese suppliers and the art products to be imported into the United States; and that the retail store manager managed the day-to-day operation of the art products retail store and supervised its employees.

The petitioner provided its California Forms DE-6 and IRS Forms W-2 evidencing the employment of the two individuals in the positions of marketing manager and retail store manager. The petitioner did not provide evidence of other employees or independent contractors.

The director observed that the petitioner had an approved L-1A petition for Jun Han, an individual other than the beneficiary, who had been admitted into the United States as an L-1A intracompany transferee in May 2001. The director also observed that the petitioner claimed that Jun Han had returned to China and that the beneficiary of this petition would be his replacement. The director noted, however, that the record did not contain evidence that the petition approved for Jun Han had been revoked.

The director further observed that a company with three managers and no other employees raised questions regarding the nature of their actual duties. The director determined that the record contained insufficient evidence to establish that the beneficiary would supervise and control the work of other supervisory, professional, or managerial employees who would relieve him from performing non-qualifying duties. The director concluded that the beneficiary would not be employed primarily in a managerial or executive capacity.

On appeal, counsel for the petitioner indicates that the petitioner has requested that Citizenship and Immigration Services (CIS) revoke the approved petition for Jun Han and claims that a copy of the request has been included with the appeal.[1] Counsel claims that the marketing manager and the retail shop manager "are front-line managers and the only employees of the company." Counsel asserts that as the beneficiary is the replacement for the previously approved general manager position and that since there have been no other changes in the petitioner's number of employees, there is no factual or legal basis to deny this petition.

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.* 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.

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[1] The record of proceeding does not contain a copy of the petitioner's request to revoke Jun Han's L-1A classification.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The petitioner's description of the beneficiary's duties and the duties of the marketing manager and retail shop manager do not substantiate that the beneficiary will perform tasks associated primarily with managerial or executive duties rather than with carrying out the necessary day-to-day operations of the petitioner.

For example, the petitioner indicates that the beneficiary will spend 60 percent of his time managing market development, and also indicates that the marketing manager develops market plans and directs and supervises market research. The record does not contain sufficient information to discern who will be responsible for supervising the market research and who will carry out the actual duties of the market research. 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). Moreover, the marketing manager's duties also include developing distribution channels and selecting Chinese suppliers and the art products to be imported into the United States, apparently leaving the actual market research duties to the beneficiary. However, 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).

Upon review of the totality of the record and the petitioner's employees' job descriptions, the record does not sufficiently demonstrate that the beneficiary's proposed job duties comprise primarily managerial or executive duties. The record does not contain sufficient evidence to demonstrate that the beneficiary would be relieved from performing many of the petitioner's non-qualifying operational and administrative duties.

Counsel's assertion that the beneficiary's proposed employment will replace the employment of an individual with a previously approved L-1A position, and would thus require the approval of this petition, is not persuasive. First, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Second, it is worth emphasizing that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

Finally, the AAO observes that the previously approved petition for Jun Han may have involved consideration of the petitioner as a "new office." If so, the AAO notes that the criteria to establish eligibility pursuant to the new office regulations differs significantly from the criteria to establish eligibility for an existing concern. The regulations concerning a new office require that the U.S. entity, within one year of approval of the

petition, would support the beneficiary in a primarily managerial or executive capacity. 8 C.F.R. § 214.2(l)(3)(v). In this matter, as the petitioner has been operating for over one year, the petitioner is obligated to employ the beneficiary in a primarily managerial or executive position when the petition is filed. *See* 8 C.F.R. § 214.2(l)(3)(ii); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The petitioner has not submitted sufficient evidence on appeal to overcome the director's decision in this matter.

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.