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U.S. Citizenship
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Services

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[redacted]

File: WAC 03 203 52195 Office: CALIFORNIA SERVICE CENTER Date: FEB 23 2005

IN RE: Petitioner:
Beneficiary: [redacted]

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:

SELF-REPRESENTED

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 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 filed this nonimmigrant petition seeking to extend the employment of its president as an L-1A 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 is a corporation organized in the State of California that is engaged in the import and wholesale distribution of wood furniture. The petitioner claims that it is the subsidiary of Eurim Furniture Co., Ltd., located in Pochun, Korea. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and was subsequently granted a two-year extension of stay. The petition now seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive status.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner disputes the director's findings and asserts that the beneficiary has been employed in a managerial capacity despite the company's small staff size. The petitioner also states that it hired additional staff subsequent to submitting its response to the director's request for evidence. In support of these assertions, the petitioner submits additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. 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) 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.

At issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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.

In a June 26, 2003 letter submitted with the initial petition, the petitioner described the beneficiary's job duties as follows:

> [The beneficiary] is occupying an extremely important position in the company. He is essentially unsupervised and his duties entail directing overall management and control of the enterprise, including participating in establishing policies and goals. As the president of the U.S. subsidiary, [the beneficiary] meets with new and existing vendors and buyers to promote increase in sales, to develop cost-effective distribution route and to purchase raw materials. He will continue to exercise wide latitude in discretionary decision-making, subject only to supervision by the board of directors of the parent company.
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> As president, [the beneficiary] will continue to be responsible for managing and controlling the company including hiring new salary-based employees and independent sales agents as needed. Finally, [the beneficiary] will continue to exercise complete discretion over the company's day-to-day operations.

The petitioner indicated that it had two employees, including the beneficiary, at the time the petition was filed, but that "the number of employees is expected to increase."

On July 15, 2003, the director requested additional evidence. Specifically, the director requested the U.S. entity's organizational chart showing all employees under the beneficiary's supervision, including their job titles, detailed job duties, education level and annual salary/wages. The director also noted the beneficiary's general job duties and requested that the petitioner indicate what percentage of time is devoted to each duty. The director also asked that the petitioner clarify each duty and indicate who, if anyone, assists the beneficiary with the company's marketing function, legal affairs, and financial matters.

In response, counsel for the petitioner submitted a letter dated August 27, 2003, which provided the following description of the beneficiary's job duties:

> **Planning and developing policies**: The beneficiary spends 20% of his time planning, developing and initiating company policies and goals. As the executive of the company, the beneficiary devises and initiates business polices, short-term and long-term goals himself with concurrence of the foreign parent company's board of directors. In formulating business policies and goals, the beneficiary incorporates market research data to better accommodate customer demands. For finance, accounting and related matters, the beneficiary consults with certified public accountants and attorneys.
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> **Directing legal affairs**: The beneficiary consults with outside legal firms which takes [sic] charge of the petitioning company's legal affairs. The petitioning company contracts legal counselors to review and negotiate contract terms and to resolve disputes with customers and/or vendors as such incidents occur. The beneficiary spends 15% of his time consulting and cooperating with these legal firms.
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> **Planning and supervising marketing**: [The petitioner] periodically conducts market research and analysis to gather information on market trend and customer demands. The beneficiary spends 20% of his time planning and devising research target and methodology

and when the research is complete, applying the research data into long-term and short-term business policies and goals, marketing strategy, target area and methodology. The actual survey and other forms of market research are conducted by subordinate employee and part-time employees temporarily hired when necessary.

Supervising financial matters: The beneficiary spends 15% of his time supervising financial matters of the petitioning company. All financial affairs of the petitioning company are handled by [a certified pubic accountant]. The beneficiary devises financial polices and goals in coordination with the CPA as well as the parent company in Korea.

Developing new customers: The beneficiary spends 15% of his time meeting with potential customers and vendors to discuss choice of products, customized options and contract terms and conditions. The beneficiary frequently consults with the parent company in Korea to ensure both companies can meet customer requirements and when necessary, seeks legal advice from lawyers.

Provident [sic] customer service to existing customers and vendors: The beneficiary spends 15% of his time providing customer service to existing customers and vendors. The beneficiary conducts periodic review of day-to-day business transactions and level of achievement of business policies and goals executed on behalf of existing customers to ensure customer satisfaction.

The petitioner also submitted an organizational chart showing the beneficiary and only one additional employee who is responsible for overseeing the product distribution process and warehouse control. The chart shows that this employee supervises "independent freight forwarding and sales agents." The chart also shows that the beneficiary supervises "part-time employees hired for periodic research and analysis," a Certified Public Accountant and legal advisers.

On September 13, 2003, the director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director noted that the record indicates that a preponderance of the beneficiary's duties had been and would be directly providing the services of the business.

On appeal, the petitioner asserts that the beneficiary was in fact employed in a managerial capacity as he was actively engaged in the planning and overall management of the organization. The petitioner further states that, as a result of the beneficiary's planning, the petitioning entity hired an additional six employees subsequent to its submission of its response to the director's request for evidence. However, 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). Further, the AAO notes that, according to the petitioner's Form DE-6, Employer's Quarterly Wage and Withholding Report for the third quarter of 2003, all of the new employees were hired in August 2003. Since the petitioner responded to the director's request for evidence on August 27, 2003, it is not clear why the petitioner did not include the new employees in its

previous organizational chart. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been or would be employed in a primarily managerial or executive capacity. 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 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).

Although the petitioner provided a breakdown of the percentage of time the beneficiary devotes to each area of responsibility, part of the job description generally paraphrases the statutory definition of 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 overall management and control of the company," "establishing policies and goals," and "exercising complete discretion over the company's day to day operations." 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 is 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.). 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).

In addition, some of the percentages assigned to the beneficiary's duties are not credible based on a review of the petitioner's business. The beneficiary is described as devoting a full 30 percent of his time to directing legal affairs and supervising the company's financial matters through consultations with outside law firms and a certified public accountant. However, the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Return for 2001 and 2002 show that the petitioner paid no fees for legal services in the two years prior to filing the petition, and only a total of $2,650 for accounting services over the same two-year period. Based on this evidence, which suggests that the petitioner does not actually regularly utilize the services of outside attorneys or accountants, it appears unlikely that the beneficiary spends 30% of his time overseeing outside legal and accounting firms. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation for the reliability and sufficient of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Further, the record reveals that the beneficiary is engaged in many non-managerial and non-executive duties which would necessarily prevent him from devoting the preponderance of his time to qualifying duties. In response to the request for evidence, the petitioner stated that the beneficiary devotes 30% of his time to "developing new customers" and "providing customer service to existing customers and vendors." In addition, the beneficiary is described as devoting 20% of his time to "planning and supervising marketing" but the petitionerdoes not employ any staff who perform marketing responsibilities. Although the petitioner claims that it occasionally employs part-time staff for this purpose, the petitioner has not provided evidence to document the existence of these employees. Additionally, the petitioner has not explained how the occasional services of a part-time marketing employee would obviate the need for the beneficiary to be primarily responsible for the company's marketing activities. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California.* 14 I&N Dec. 190 (Reg. Comm. 1972). In addition, the petitioner also stated that the beneficiary himself purchases raw materials, but does not assign a percentage of time devoted to this duty. Since the beneficiary actually purchases raw materials, markets the petitioner's product, sells the petitioner's product, negotiates routine contracts, and is solely responsible for customer service, he is performing nearly all of the tasks necessary to provide a service or product and these duties, which comprise more than 50% of his time, will not be considered managerial or executive in nature. 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 AAO also notes that the petitioner did not indicate who is responsible for purchasing and importing products from abroad to be sold in the U.S., or preparing the related import and customs documentation. Without probative evidence to the contrary, these non-qualifying duties must also be attributed to the beneficiary.

Based on the above, it is apparent that the beneficiary is regularly supported only by a part-time warehouse employee who oversees product distribution and warehouse inventory. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional or managerial. *See* section 101(a)(44)(A)(ii) of the Act. The petitioner has not established that the warehouse position requires an individual with a bachelor's degree, such that the employee could be classified as a professional. Nor has the petitioner shown that the employee supervises subordinate staff members or manages a clearly defined department or function of the petitioner such that he could be classified as a manager or a supervisor. Thus the petitioner has not shown that the beneficiary's subordinate employee is supervisory, professional or managerial as required by section 101(a)(44)(A)(ii) of the Act.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of the many non-managerial or non-executive duties described above. 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).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicated in the initial petition that it plans to hire additional managers and employees in the future. However, as stated above, 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).

The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. 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. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. 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 petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization or that he operates at a senior level within an organizational hierarchy. 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.

Beyond the decision of the director, the petitioner's Internal Revenue Service (IRS) Form 1120 corporate tax returns reveal that it is not a subsidiary and is not affiliated with any other entity. The tax returns further indicate that the beneficiary is the sole owner of the petitioning company, thus directly contradicting the claim that is a subsidiary of a foreign entity. Although the petitioner submitted a single stock certificate showing issuance of 1,000 shares of stock to the claimed parent company, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has provided no documentation regarding the ownership of the foreign company. Consequently, it cannot be concluded that

the petitioner is a qualifying organization doing business in the United States and at least one foreign 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, the petition may not be approved.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this matter, the petitioner has not furnished evidence that the beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. As the appeal will be dismissed, these issues need not be examined further.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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. § 1362. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.