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U.S. Department of Justice

Immigration and Naturalization Service

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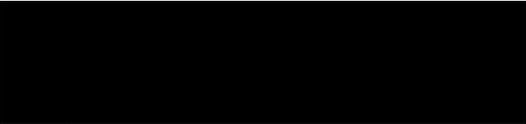


File: EAC-02-042-54824 Office: Vermont Service Center Date: FEB 05 2003

IN RE: Petitioner: [Redacted]
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:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Myra L. Roseberry
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, a company that markets frequency control electronics, seeks to employ the beneficiary temporarily in the United States as its vice president. The director determined that the petitioner had not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel rebuts to the director's findings characterizing the decision as being "unreasonably narrow."

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.

Title 8 C.F.R. 214.2 (1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

A) Sufficient physical premises to house the new office have been secured;

B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to

remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The United States petitioner was established in 2001 and states that it is a wholly-owned subsidiary of Start Telecom Co., Ltd., located in Kyung-Ki, Korea. The petitioner seeks to employ the beneficiary for a three-year period at an annual salary of \$86,000.

At issue in this proceeding is whether the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

"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:

"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 initially as follows:

The beneficiary of this application for L1 visa, is President, Executive Director, and a substantial shareholder of the company. [The beneficiary] has been employed by the Company's Korean Headquarters since the company was formed in 1998, and has been continuously employed since that time. His principal responsibilities have been investor relations; capital management; product development; and marketing and operational oversight. [The beneficiary] is the single most important executive of the Company, and he intends to personally supervise the development and growth of the Company's United States operations in Edgewater, New Jersey.

[The beneficiary] will continue to serve in substantially the same capacities in the United States regional office of the Company, with a view toward significantly increasing the Company's sales of telecommunications parts and devices within the United States.

In response to a Service request for additional evidence, the petitioner stated, in pertinent part, that:

Immediately upon INS approval of an L-1A visa, Parent will transfer its president [the beneficiary] to oversee Subsidiary's development and conduct of business in the United States. Presently, Subsidiary is being managed solely by its regional president, [named individual]. [Named individual] will continue to manage the day-to-day tasks. Such tasks include (1) identifying likely U.S. purchasers of Subsidiary's products and services, (2)

referring such information to [the beneficiary], (3) paying bills incident to Subsidiary's offices, and miscellaneous tasks. [The beneficiary] will focus his efforts on pursuing possible customer leads; conducting marketing presentations and meetings; obtaining orders; and transmitting orders to parent for appropriate disposition. [The beneficiary] will not be engaged in non-managerial, day-to-day operations of the Subsidiary.

Book-keeping [sic] will be handled by [named individual] and staff, to be hired as need increases. Accounting tasks will be performed by a professional CPA with experience in Subsidiary's field of business activity, in accordance with generally accepted accounting principles.

In the year 2002, [the beneficiary] will be exclusively responsible for cultivating new clients and procuring orders. All day-to-day office tasks, including transmitting orders to Parent's offices, will be handled by [named individual]. During the progress of business, likely by summer or early fall 2002, Subsidiary will hire support staff starting with the position of Assistant to Regional President, [named Individual], at a stated salary range of \$22,000 to \$27,000 per year based on experience. The Assistant will assume all day-to-day secretarial and related tasks.

Subsidiary will next hire a technician to handle all service and defects-related inquiries, at market salary, estimated to be between \$40,000 and \$55,000 per year. Such technician will handle all inquiries relating to defects and service.

On appeal, counsel submits a revised business plan, which states in part that:

Vice President Functions

The role of the vice president is executive in nature. The vice president's principal duty is to use his broad management discretion to execute the business plan, and to modify it as opportunity and circumstances dictate. The vice president is expected to bring his operation to break even (on a cash flow basis) within 14 months, to achieve at least \$25,000 in pretax profit within 24 months, and to achieve at least \$250,000 profit within thirty six months. The parent will provide financial, technical and other resources as needed to ensure the U.S. domestic operation can be sustained during the start-up phase, and can thrive during the high growth post-startup [sic] phase. A minimum of \$250,000 in

investment capital has been made available to the vice president to this end, and additional funds shall be invested as needed.

Financial

The vice president will be responsible for administering the daily financial functions of the organization, including the co-ordination of inventory transfers from overseas, maintaining U.S. banking relationships, approving of customer credit decisions and the advice of the marketing department, and approving of payroll.

Human Resources

Recruit and hire the sales/marketing director and other personnel. Establish employment policies, performance standards and compensation, and hire and terminate employees as dictated by judgement, discretion and economic circumstances.

Marketing

Recruit and hire the marketing director, and collaborate with the marketing director to develop a detailed sales plan, including a workup of prospect lists [sic], key sales points, and a budget for implementing the plan.

Administrative

The vice president must use his executive discretion to perform general administrative functions, including the purchase or lease of office equipment, negotiating additional office or warehouse space as needed, and dealing with insurance, legal, and business compliance matters. These responsibilities may be delegated to a Controller as financial circumstances warrant.

The business plan indicates that the petitioner has two full-time employees, the beneficiary as "Executive Vice President" and [named individual] as "Regional President." The petitioner also claims to have contracted for the services of a "General Counsel" and "Consultant." It must be noted, however, that the record does not contain copies of any employment contracts. Further, it cannot be concluded that an attorney or business consultant would need much supervision as such positions as attorney or consultant bring with themselves a high level of expertise for which the company is willing to pay.

Although the record indicates that the U.S. entity will hire additional full time employees, the record contains no position

descriptions identifying the duties for any of the named proposed additional hires, "Sales Director," "Comptroller," "Assistant to the Regional President," or "Technician." Absent complete position descriptions for all of the U.S. entity's proposed employees, it cannot be determined that the beneficiary will function at a senior level within an organizational hierarchy other than in position title. Further, the U.S. entity's business plan indicates that it will sell electronic frequency control products for the parent company. However, there is no indication that the U.S. entity will hire any sales representatives to conduct such operational duties. Rather, the record strongly suggests that the beneficiary will continue to be the sole agent involved in the proffering of the parent company's products.

Upon further review of the record, there is no evidence to establish that the petitioner will employ a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing nonqualifying duties. The record contains no comprehensive description of the beneficiary's duties that demonstrates that the beneficiary will be managing or directing the management of a department, subdivision, function, or component of the petitioning organization. For this reason, the petition may not be approved.

Beyond the decision of the director, the record indicates that the beneficiary is a major stock holder of the petitioning company. 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 case, the petitioner has not furnished demonstrative 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 on the grounds discussed, this issue need not be examined further.

In visa petition proceedings, the burden of proof 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.