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



U.S. Citizenship  
and Immigration  
Services



FILE: WAC 02 034 58336 Office: CALIFORNIA SERVICE CENTER Date:

APR 21 2004

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)

ON BEHALF OF PETITIONER:



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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

**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 claims to be engaged in the business of developing and selling e-commerce software. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its chief financial officer. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that the beneficiary has been and would continue to act in a managerial capacity and is therefore eligible for L-1 classification.

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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The U.S. petitioner states that it was established in 1998 and that it is a subsidiary of iMas Co., Ltd., located in South Korea. The initial petition was approved and was valid from November 2, 2000 to November 2, 2001, 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 \$90,000.

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

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-

- 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:

The term "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.

In support of the petition, the petitioner provided the following description of the beneficiary's job duties:

[The beneficiary] will continue to be responsible for developing all financial policy for corporate planning. He will organize, supervise, and manage all daily budget, cash flow, accounting, and financing requirements for [the petitioner]. This will include the establishment of project budget plans and negotiating letters of credit for general business matters or specific project needs.

[The beneficiary] will oversee the preparation and analysis of financial reports and documents while monitoring and making recommendations for [the petitioner's] current and future financial needs. [He] will also have the sole responsibility for reviewing pricing and contractual terms of [the petitioner's] transactions and agreements. This includes the evaluation of the feasibility and profitability of launching new business partnerships or affiliations, as well as the formulation of new business strategies. He will report all of his findings to the CEO and make any recommendations for significant modifications to preset financial policy.

[The beneficiary] will also have the essential and sole responsibility of establishing and maintaining daily investor relationships, reporting on the financial status and business direction of [the petitioner], as well as responding to any current or potential investor's concerns. In addition [he] will oversee all personnel-related activities as related to financial matters and compensations.

On December 28, 2001, the director issued a request for additional evidence. The petitioner was asked to provide a copy of its organizational chart naming all of its employees and pointing out those employees that are directly under the beneficiary's supervision. The petitioner was also asked to provide several of its quarterly wage reports, its federal tax return, and W-2 and W-3 tax statements regarding wages paid to its employees.

The petitioner's response included an organizational chart naming a total of seven employees, two of who were named as the beneficiary's subordinates. The petitioner indicated that the beneficiary's annual salary was \$80,000 and stated that the beneficiary is the main liaison between the U.S. and Korean organizations. The petitioner also stated that the beneficiary performs fundraising duties and coordinates research and development duties between the parent and subsidiary. The beneficiary's subordinates were said to include a vice president of marketing and sales, as well as a business manager of accounting. The petitioner also complied with the request for submission of tax documents.

On May 10, 2002, the director denied the petition noting that none of the petitioner's quarterly wage statements show 23 employees as claimed originally in the Form I-129 petition. The director indicated further that the petitioner went from having nine employees during the first quarter of 2001 to having only two employees in the last quarter of 2001 rather than the 23 employees indicated on the petition. The director also pointed out that none of the petitioner's senior management or executive team members appear to have been paid for at least a portion of the 2001 tax year despite the petitioner's claimed earnings in excess of \$1.2 million.

On appeal counsel reconciled the above discrepancies by stating that the director erred in assuming that the U.S. company, rather than the foreign company, was the petitioner described in the petition. Counsel stated that the 23 employees and \$1.2 million earnings are characteristics of the foreign entity, which counsel claims is the petitioner in the instant case. However, the petitioner's belief that a foreign entity can petition on behalf of a beneficiary for employment in the United States is erroneous. It is fundamental to this nonimmigrant classification that there be a United States entity to employ the beneficiary. Although the statute refers to an alien that seeks to enter the United States temporarily in order to render his or her services to "the same employer or a subsidiary or affiliate thereof," the phrase "same employer" refers to a "branch office" of a foreign entity that is authorized to do business in the United States. The regulations define the term "branch"

as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). If the claimed petitioner is incorporated in the United States, as in the present matter, CIS must examine the nature of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer and whether the entity employs the beneficiary in a primarily managerial or executive capacity.

Counsel further urges the AAO to take into account the nature of the petitioner's business and its stage of development. However, taking into account the software redesigning element of the petitioner's business has an adverse effect on the petitioner's case as it leads the AAO to question who actually performs the redesigning function within the petitioner's personnel structure. According to the organizational chart submitted earlier, none of the named employees is involved in the designing or redesigning of software. Consequently, the petitioner provides no insight as to who actually makes the product to be sold in the U.S. market; nor does it rule out the possibility that this essential function is actually performed by the beneficiary. It is noted that 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). Furthermore, counsel makes it clear that the petitioner has not attained the stage of development that it originally anticipated, thereby furthering the director's conclusion that the petitioner does not yet require the beneficiary to focus primarily on executive duties.

Section 101(a)(44)(C) of the Act states that the petitioner's stage of development must be considered as it instructs CIS to consider the "reasonable needs" of the petitioning entity. However, 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 non-managerial or non-executive duties. 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. In the instant case, the petitioner's initial description of the beneficiary's job duties indicates the intent that his role be primarily of an executive nature. However, the record does not contain sufficient documentation to support that description. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). According to the 2001 fourth quarter wage reports the beneficiary was not among the petitioner's staff, which is just one of several discrepancies in the petitioner's case. As previously stated by the director, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence; any attempts to explain or reconcile such inconsistencies, absent

competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the instant case, rather than submitting evidence the petitioner merely explains that the beneficiary's salary, as well as the salaries of several other alleged executives, were withheld for an undisclosed period of time for the purpose of preserving the petitioner's revenue.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily executive capacity. Nor does the record demonstrate that the beneficiary primarily directs 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 record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States and abroad pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H). Even though the essence of the petitioner's business is selling a product created abroad by the parent organization, the petitioner has submitted only one sales invoice to indicate that it has commenced doing business. A single sales invoice is insufficient to indicate that the petitioner has regularly, systematically, and continuously sold its product. However, as the appeal will be dismissed on other grounds, this issue need not be further addressed.

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.