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U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: 4/1/07

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

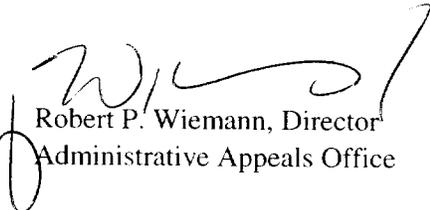
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was established in 2000, and claims to be an international freight forwarding company. The petitioner claims to have a subsidiary relationship with Intergate Forwarding Co., Ltd., located in Seoul, Korea. The petitioner seeks to extend its authorization to employ the beneficiary as its president for a period of three years, at a monthly salary of \$3,000.00. The petitioner claims one employee.

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

On appeal, counsel disagrees with the director's decision, and asserts that the beneficiary's job duties have been and will be primarily 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.
- (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 with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that 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 (1)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (1)(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 issue in this proceeding is whether there is sufficient evidence to establish that the beneficiary has been and will be employed by the U.S. entity primarily in an executive capacity.

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.

The petitioner initially described the beneficiary's job duties as:

Responsible for planning, developing, and implementing U.S. corporation's policy to achieve the parent company's goals and objectives; coordinating activities in complex contract negotiations; and analyzing financial position of the company.

In response to the director's request for additional evidence on the issue, the petitioner submitted a letter dated December 10, 2002, which described the beneficiary's job duties as follows:

As president, [the beneficiary] has been reviewing work of the branch manager, negotiating contracts with shippers and consignees, cargo inland trucking manager, negotiating contracts with shippers and consignees, cargo inland trucking companies, representatives of government agencies and various vendors.

...

[The beneficiary] will be responsible for the same duties stated above as well as for setting up the future branch offices. He will be developing and implementing new business plans for the branch, staffing the new offices, negotiating contracts, as well as acting as the liaison between the U.S. subsidiary and parent company to make sure the overall business strategies in the U.S. region coincide with the parent company standards.

The petitioner submitted as evidence copies of IRS Form 941, Employer's Quarterly Federal Tax Return for the quarters ending March 2002, June 2002, and September 2002. The records indicated that the petitioner employed two individuals. The petitioner also submitted an organizational chart depicting the U.S. entity's hierarchy. The chart listed the beneficiary as president, with the branch manager under his direction. The chart also lists other managerial and supervisory positions.

The director denied the petition after determining that the record did not establish that the beneficiary was or would be employed primarily in a managerial or executive capacity. The director stated that the evidence showed a lack of significant subordinate employees to relieve the beneficiary from performing day-to-day duties associated with running a business. The director further stated that based upon the size of the organization, it would appear that the majority of the beneficiary's time has been and would be spent performing non-qualifying duties.

On appeal, counsel disagrees with the director's decision and asserts that the evidence submitted is sufficient to establish that the beneficiary has been and will be employed primarily in an executive capacity as the company's president. Counsel also contends that the beneficiary's position as president of the U.S. entity is executive in nature because he controls and directs the management of the company and establishes company goals and policies. Counsel contends that the beneficiary is not engaged in the day-to-day operations of the U.S. entity, but rather supervises the work of the branch manager, who is responsible for the day-to-day operations of the organization. Counsel asserts that it is impossible for the beneficiary to engage in the day-to-day operations of the business where he travels abroad frequently as president of the company. Counsel further asserts that the beneficiary also supervises outside contractors.

Counsel describes the beneficiary's duties and the time spent performing such duties as:

50% Plan and develop sales and marketing strategies;

20% Set-up new offices, expand company, and implement a major transport network;

15% Negotiate contracts and maintain relationships with contractors;

5% Review marketing surveys and advise head office of major marketing information to expand new business;

5% Oversee cost management;

3% Supervise and control staff; and

2% Give final authorization on all personnel matters.

On appeal, the petitioner submits as evidence computer generated copies of the beneficiary's job description; a key personnel listing; an organizational chart; a description of the branch manager's duties; and a chart listing the dates of the beneficiary's business travel.

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. In evaluating whether the beneficiary is employed in a primarily managerial or executive capacity, the AAO will look first to the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 214.2(1)(3)(ii). The petitioner 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 show 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). In the instant matter, there is insufficient evidence to show that the beneficiary performs the high level responsibilities as defined, or that he primarily performs those duties rather than spending the majority of his time performing day-to-day functions of the organization.

Further, while company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other pertinent factors such as the nature of the petitioner's business. Together, these factors can be used as indicators which help determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. In the instant matter, the record demonstrates that the majority of the beneficiary's job duties entail marketing, sales, and service on behalf of the U.S. entity.

Although counsel contends that the beneficiary supervises the company's branch manager and a myriad of outside contractors, there has been no documentary evidence submitted detailing his supervisory responsibilities. The record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. A first-line supervisor is not acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. The petitioner has provided no comprehensive description of the beneficiary's or the subordinates' duties that would demonstrate that he will be primarily engaged in directing the management of the organization. The record does not establish the level of education required to perform the branch manager's duties, nor does it show that the manager manages or

supervises a subordinate staff. There is no evidence to show that the branch manager is a full-time worker. Based upon the evidence of record it appears that the beneficiary is primarily supervising a staff of non-professional employees. Therefore, the beneficiary cannot be deemed to be primarily acting in a managerial or executive capacity.

Although counsel contends on appeal that the beneficiary is responsible for retaining and overseeing the services of independent contractors such as truckers, freight forwarders, and warehousemen, the petitioner has neither presented evidence to document the existence of these employees nor identified in detail the services these individuals provide. The record does not demonstrate that the beneficiary exercises significant control over the manner in which the independent contractors perform their services. Neither does the record show that the independent contractors are employed full-time. Additionally, counsel has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. 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).

Moreover, the evidence of record demonstrates that the beneficiary continues to perform the services of the organization as sales and marketing agent, rather than directing the activities of the organization. As case law confirms, an employee who primarily performs the tasks necessary to produce a product or to provide a service 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). Based upon the evidence submitted, it does not appear that the reasonable needs of the petitioning company allow for the beneficiary to be employed in a primarily managerial or executive capacity.

The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he will be primarily engaged in directing the management of the organization or a major component or function of the organization, establishing goals and policies, exercising a wide latitude in discretionary decision-making, or that he would receive only general supervision or direction from higher level individuals.

There has been no evidence presented to demonstrate what goals and policies have been and will be established by the beneficiary in his capacity. Counsel contends that the evidence demonstrates that the beneficiary's subordinates carry out the day-to-day activities of the U.S. organization. However, the record does not support a finding that the subordinates are employed on a full-time basis by the U.S. entity. Nor is the record clear as to how much of the beneficiary's job activities involve non-executive duties in the absence of the subordinate workers. Counsel also asserts that the beneficiary, as president, exercises complete latitude in discretionary decision making such as staffing levels required to meet the goals of the organization. However, the record contains no indication that the beneficiary spends a considerable amount of time making such decisions.

Counsel refers to an unpublished decision involving an alien who met the requirements of serving in a managerial and executive capacity. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the cited case. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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. The petitioner indicates that it plans to hire additional managers and employees in the future. 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). Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible for an extension.

The record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed primarily in a managerial or executive capacity. Accordingly, the appeal will be dismissed.

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.