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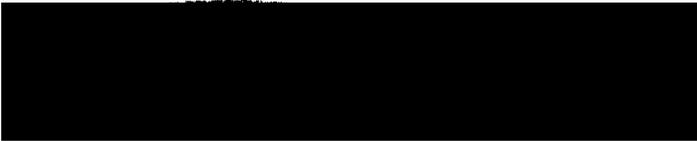
File: WAC 03 184 51625 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



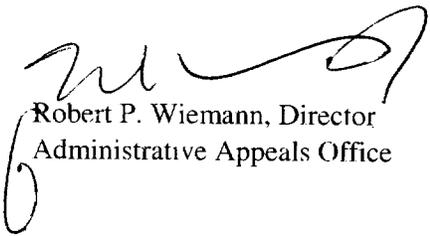
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



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 branch representative 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 branch office of Dongwoo Animation Co., Ltd. of Seoul, South Korea, which transacts intrastate business in the state of California in the field of animation production. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary had been and will continue to be employed in the United States in a primarily managerial or executive capacity.

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, counsel for the petitioner contends that the director erroneously denied the petition, and concludes that the level of the beneficiary's duties in the United States "requires significant authority over generalized policies which constitutes to the conclusion that the beneficiary's duties are primarily managerial in nature."

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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, 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 management or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The primary 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 the initial petition, counsel for the petitioner submitted a detailed letter from the foreign entity outlining the beneficiary's duties while employed by the U.S. entity. Specifically, the petitioner alleged that the beneficiary's duties were managerial and/or executive in nature, and described her duties as follows:

[The beneficiary] will continue to be employed as the U.S. Branch Representative of [the petitioner]. As such she will continue to function as the primary spokesperson for contracting and promoting new and existing animated motion picture projects in collaboration with major production companies. She will coordinate promotional meetings and presentations in coordination with the parent company in Korea and report meeting results and project processing status to the parent company to set up and initiate policies and goals for the U.S. branch office.

On June 10, 2003, the director requested additional evidence establishing that the beneficiary was employed in a capacity that was primarily managerial or executive in nature. In addition, the director requested a copy of the U.S. entity's hiring plan, evidence demonstrating that the U.S. entity was doing business, a copy of its commercial lease, and color photographs of the business.

On June 23, 2003, the petitioner, through counsel, submitted a detailed response accompanied by the documentation requested by the director. Counsel's response included an updated description of the beneficiary's duties, including the amount of time devoted to each duty, in addition to an explanation regarding the U.S. entity's hiring plan and evidence that the U.S. entity was doing business. Although requested by the director, the petitioner did not include an organizational chart as requested.

On July 9, 2003, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the director found that the beneficiary was not supervising any employees, and that the record

contained no indication that the beneficiary would exercise significant authority over the generalized policy of the U.S. organization.

On appeal, counsel for the petitioner asserts that the director's decision was erroneous, and states that although the beneficiary's duties "do not involve direct supervision of subordinate employees, the level of her duties require[s] significant authority over generalized policies which constitutes to the conclusion that the beneficiary's duties are primarily managerial in nature." Counsel further alleges that the fact that the U.S. entity is merely a liaison office of the foreign entity "validates the beneficiary's non-involvement with direct supervision of subordinate employees."

Upon review, 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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Prior to adjudication of the petition, counsel contended that the beneficiary had been employed in a capacity that was primarily managerial in nature. In support of these contentions, counsel submitted an updated description of the beneficiary's duties in response to the request for evidence, which provided the following:

The beneficiary coordinates and participates in meetings for co-production. Between presentations and pre-production meetings, the beneficiary devises and exchanges deal memos and memorandums. Currently, the beneficiary spends five (5) hours in each bi-weekly [meeting] with Warner Brothers, eight (8) hours in each bi-monthly [meeting] with [REDACTED] and three (3) hours in each daily [meeting] with Sony Pictures Family Entertainment. (50%)

The beneficiary contracts new projects or extend[s] existing projects after discussions with and approval from the parent company. The beneficiary negotiates terms and conditions of the contracts. functions as a communication channel between U.S. producers and the parent company and informs the parent company of local requirements and procedures. (25%)

The beneficiary spends about two (2) hours each day to report business activities performed and to receive instructions on upcoming events and activities. Because the petitioning company is a division of the parent company established to assist the parent company with U.S. customers and market information, all its business activities must comply with the parent company's business plan and policies. (25%)

The petitioner, through counsel, additionally provided an explanation regarding its hiring plan, and stated that the functions of the U.S. office will continue to be carried out solely by the beneficiary until the time comes for the U.S. entity to transition from a branch office into a subsidiary. Once a subsidiary, counsel asserted,

the U.S. entity will require an extended organizational structure and a large number of employees. Counsel further stated that since the U.S. entity was not an individual business entity and does not engage in any sales activities or generate any income in the U.S., it keeps its organization structure at a minimum.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the beneficiary was not employed in a primarily managerial or executive capacity. Specifically, the beneficiary's stated duties and the fact that the beneficiary is the only person employed by the U.S. entity do not support a finding that the beneficiary's duties are primarily managerial or executive. Nor does there appear to be significant evidence to establish that the beneficiary qualifies as a function manager.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner claims that her duties are exclusively managerial, yet the list of duties provided includes almost all non-managerial tasks. For example, the petitioner states that the beneficiary coordinates production meetings, contracts new projects, and provides daily reports to the parent company in Korea. There is no indication that any other employee is present to assist with the day-to-day duties of the organization. Consequently, it is evident that the beneficiary is performing all the required tasks associated with the successful operation 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).

Since the evidence confirms that the beneficiary does not supervise a subordinate staff nor does she have any coworkers, the AAO will examine the record to determine whether the beneficiary may be acting as a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. 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. at 604. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Specifically, the description of duties indicates that the beneficiary actively performs the duties relating to all functions of the U.S. entity. She actively coordinates and participates in production meetings, contracts new projects or extends existing contracts, and provides daily reports to the parent company in Korea. By affirming that the beneficiary performs all of these operational functions on a day-to-day basis, the petitioner has failed to establish that the beneficiary performs the *essential* functions of the business. To allow the broad application of the term "essential function" to include any minor or low-level function within a business would render the term meaningless. The term "essential" is defined as "inherent" or "indispensable."

Webster's II New College Dictionary 384 (2001). Accordingly, the petitioner must establish that the function is inherent and indispensable to the business rather than a low-level collateral task that is superfluous to the company's essential operations. This has not been established here, as the actual duties themselves reveal the true nature of the employment of the beneficiary's employment. *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).

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 employees in the future when the branch office transitions into a subsidiary of the foreign parent. However, 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 by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

Although not discussed by the director, the AAO notes that the record contains insufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. Pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is required to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is no evidence in the record that the petitioner has been doing business for the year prior to the filing of the request for extension. In fact, the petitioner repeatedly alleges that the U.S. entity is not engaged in the provision of goods and services, and that states that it is "not a separate business entity and cannot engage in any sales activities." In response to the director's request for copies of invoices, the petitioner stated that the U.S. entity does not engage in any sales activity and thus had no invoices to present. The fact that the U.S. entity is a branch office does not absolve the entity from complying with the regulatory requirements. Under 8 C.F.R. § 214.2(l)(14)(ii)(b), the petitioner must present evidence that the U.S. entity has been doing business for the previous year in order to be eligible for an extension. This requirement is not met by the mere presence of an agent or office of the qualifying organization in the United States. 8 C.F.R. § 214.2(l)(1)(ii)(H). The petitioner affirmatively denies doing business. Therefore, for this additional reason the petition may not be approved.

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. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

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ORDER: The appeal is dismissed.