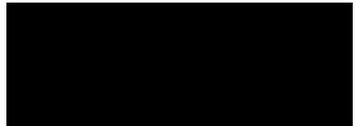


U.S. Department of Homeland Security
Citizenship and Immigration Services

D7

ADMINISTRATIVE APPEALS OFFICE
CIS AAO, 20 Mass, 3/F
425 Street N.W.
Washington, D.C. 20536

PUBLIC COPY



JAN 07 2004
Date:

FILE: LIN 01 257 52435 Office: NEBRASKA SERVICE CENTER

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:



Identifying information related to
this case has been redacted to
protect your privacy
Investigative Information

INSTRUCTIONS:

This is the decision 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.

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 that 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 Citizenship and Immigration Services (CIS) 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, Seo-Ah Corp. USA, claims to be a branch of Seo-Ah Corp., located in Korea. The petitioner is engaged in the export, import, and wholesale business and seeks to extend the beneficiary's stay temporarily in the United States. The petitioner intends to employ the beneficiary as its chairman and president for an unspecified period at a salary of \$42,000 per year. The petitioner was incorporated in Wisconsin on October 19, 1998 and claims to have two employees.

Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant manager or executive pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). On June 3, 2002, the director denied the petition and determined that the petitioner had not established that the beneficiary will be performing primarily executive or managerial duties for the U.S. entity.

On appeal, the petitioner's counsel asserts that the petitioning entity's organizational structure evidences a need for the beneficiary's executive position. Counsel requests that the appeal first be considered as a motion for reconsideration or a motion to reopen, and in the alternative as an appeal to the AAO.

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 meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. Furthermore, 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.

Pursuant to 8 C.F.R. § 214.2(1)(3), 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 within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad 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.

(v) 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;

(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.

Further, if the petitioner is filing a petition to extend the beneficiary's stay for L-1 classification, the regulation at 8 C.F.R. § 214.2(1)(14)(i)&(ii) requires that:

(i) *Individual Petition.* The petitioner shall file a petition extension on Form I-129 to extend an individual petition under section 101(a)(15)(L). Except for those petitions involving new offices, supporting documentation is not required, unless requested by the director. A petition may be filed only if the validity of the original petition has not expired.

(ii) *New offices.* 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 the beneficiary will be primarily performing managerial or executive duties for the United States entity. Section 101(a)(44)(A) of 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.

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(1)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A 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.* Therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of either capacity.

On September 6, 2001, the petitioner filed Form I-129 for L-1A classification to extend the beneficiary's stay. Counsel, on behalf of the petitioner, described the beneficiary's proposed U.S. duties as:

- Directs the Supply of wooden products such as ice cream sticks, spoons, coffee stirrers . . . to the U.S. markets as a wholesaler.

- Manages to make new buyers especially in East of USA such as New York and to accomplish a sales goal; 2 million dollars a year for gross sales.
- Hires 5 to 10 local prospective employees to extend the market share within a year.
- Ensures that Seo-Ah Corp. USA imports the wooden products on time.
- Coordinates overseas relationship among China, Korea and USA.
- Conducts the exporting of items; walnut, peanut, cheese. . . .
- Communicates with exporter of manufacturer of those items to establish a business relationship.

On February 26, 2002, the director requested that the petitioner submit additional evidence to assist in determining whether the beneficiary will be primarily employed in a qualifying managerial or executive capacity. In particular, the director requested that the petitioner submit the U.S. entity's organizational chart, a list of all employees, and more detailed descriptions of the beneficiary's and other employees' duties in the United States. In addition, the director requested that the petitioner submit a description of the beneficiary's employment abroad and evidence that the beneficiary's services are to be utilized for a temporary period.

On April 11, 2002, the petitioner responded to the director's request by submitting evidence describing the beneficiary's U.S. duties. However, this description was practically identical to the description submitted with Form I-129 on September 6, 2001. The petitioner described the beneficiary's U.S. duties as follows:

- Directs the supply of wooden products. . . .
- Researches the market and accomplishes the sales goal. . . .

- Hires 5 to 8 local prospective employees to extend the market share until the end of the year.
- Coordinates the overseas relationship among China, Korea, and the USA ensuring that the wooden products are imported on time. . . .
- Conducts the exporting of items. . . .
- Communicates with the manufacturers of these exporting items to open a business relationship.

The petitioner also submitted an organizational chart listing the following employees:

- [REDACTED] (the beneficiary): president, board of directors, and overseas coordinator.
- [REDACTED] vice-president and sales department
- [REDACTED] treasurer and secretary

The petitioner claims that the beneficiary will supervise the vice-president, secretary, treasurer, sales staff, and prospective employees. The beneficiary will also control and oversee the expenses and revenues of the company.

On June 3, 2002, the director determined that the record was insufficient to demonstrate that the beneficiary will be employed primarily in an executive or managerial capacity. The director stated that the petitioner had indicated that there were two employees. However, the organizational chart indicated that there were three employees. The director focused on the organizational chart. The director found that the beneficiary "must be doing the hands-on running of the business, as opposed to directing other professional employees." The director also found that the petitioner had upgraded it's operational space from 2488 square feet to 5600 square feet and could not, after four years of operation, support the regulatory requirements of an executive position.

On appeal, counsel, on behalf of the petitioner, alleges that the denial was based upon the fact that the petitioning entity is a small business entity that cannot support the regulatory requirements of an executive position. Counsel asserts that:

- The U.S. entity has shown substantial growth through increased annual sales and customer base to support an executive position.
- The organizational structure of the U.S. entity supports the "executive management" position of the beneficiary.
- The beneficiary has established organizational policies and manages and directs the distribution, marketing, and promotion of the product line for the U.S. and foreign entities.
- The beneficiary's management in his executive capacity has been key to a growing and successful U.S. market as can be seen by the growing annual U.S. sales figures and growing customer base.

Upon review, the beneficiary's title and duties are described utilizing phrases as "established organizational policies," "coordinates the overseas relationship," and "directs the supply." These phrases are vague and general. The petitioner fails to enumerate any concrete policies that the beneficiary will establish. The petitioner also fails to elaborate how the beneficiary will coordinate the overseas relationship and direct the supply. In addition, the petitioner claims that the "beneficiary's management in his executive capacity has been key to a growing and successful U.S. market as can be seen by the growing annual U.S. sales figures and growing customer base." However, it fails to identify how the beneficiary, as a key member, specifically contributed to the success of the U.S. sales figures and growing customer base.

Further, it appears that a significant portion of the beneficiary's duties will be directly providing the services of the United States entity as indicated in the record that the beneficiary "communicates with the manufacturers of exporting items to open a business relationship," "coordinates overseas relationship among China, Korea, and the USA," "manages to make new buyers

especially in the East of the USA," and "researches the market and accomplishes the sales goal." These duties primarily appear to comprise marketing tasks. Since marketing duties qualify as performing a task necessary to provide a service or product, 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).

In addition, the beneficiary appears to be primarily involved in the daily operations of the United States entity. The petitioner asserted that the beneficiary "conducts the exporting of items." This assertion indicates that the preponderance of the beneficiary's duties will be directly performing the non-managerial day-to-day operations in an effort to procure business. However, it must be evident from the documentation submitted that the majority of the beneficiary's actual daily activities are managerial or executive in nature. The petitioner submitted no information to establish the percentage of time the beneficiary actually performs the claimed managerial or executive duties. Since the beneficiary is responsible for daily activities then it appears, at most, the beneficiary performs operational rather than managerial or executive duties. Also, the description of the beneficiary's duties does not persuasively demonstrate that the beneficiary has managerial control and authority over a function, department, subdivision, or component of the company.

In relation to the number of workers employed by the petitioning entity, the AAO notes that there are some discrepancies in the record. The petitioner claims that there were two employees of the U.S. entity's import, export, and wholesale business. However, the U.S. entity's organizational chart indicated that there were three employees consisting of the beneficiary, [REDACTED] and [REDACTED].

Also noted is the petitioner's 2001 corporate income tax return (Form 1120), which does not indicate any salaries or wages paid (Line 13). As a result, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Moreover, the U.S. entity's organizational chart indicated that the beneficiary serves as the president and overseas coordinator, [REDACTED] serves as vice-president and is responsible for the sales department, and [REDACTED] serves as treasurer and secretary. Counsel asserted that the "beneficiary will supervise the vice-president, secretary, treasurer, sales staff, and prospective employees." As previously stated, in 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(1)(3)(ii). In the instant case, the beneficiary's job description suggests that a majority of his time is spent overseeing the tasks of his subordinate employees. 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 § 101(a)(44)(A)(ii) of the Act. According to the petitioner's description of the beneficiary's job duties, the beneficiary supervises subordinate employees. Based on the beneficiary's subordinates, it is apparent that the beneficiary's subordinates are not managerial nor supervisory as they have no subordinates to manage or supervise.

In addition, section 101(a)(32) of the Act states that the term "profession" includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teachers of elementary or secondary schools, colleges, academies, or seminaries. Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term "profession" includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. The petitioner has not established that those subordinates are professional employees within the statutory and regulatory definitions. Therefore, the description of the beneficiary's job duties and the job duties of his subordinates lead the AAO to conclude that the beneficiary is performing as a first-line supervisor of non-professional employees, rather than as a manager or executive. As stated in the Act, "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)(A)(iv) of the Act. Therefore, the petitioner

has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve the beneficiary from performing nonqualifying duties.

Further, the petitioner claims that the beneficiary will supervise "a sales staff and prospective employees." When the petitioner submitted Form I-129 to extend the beneficiary's stay, the petitioner claimed that it will hire five to ten local prospective employees to extend the market share within a year. However, in response to the director's request for additional evidence, the petitioner claimed that it will hire five to eight local prospective employees to extend the market share until the end of the year. Regardless of how many prospective employees the petitioner plans to hire, 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 AAO notes that counsel alleges that the director's denial was based upon the fact that the petitioning entity is a small business entity that cannot support the regulatory requirements of an executive position. However, it has been judicially determined that the small size of a petitioning entity does not disqualify an employee from qualifying for L1-A classification. See *Mars Jewelers Inc. v. INS*, 537 F. Supp. 1570, 1574 (N.D. Ga. 1988); *Johnson-Laird, Inc. v. INS*, 537 F.Supp. 52, 54 (D.C. Ore. 1981). Upon review, the director did not appear to base his decision on the size of the U.S. entity. Rather, the director stated, that after four years of operation and an expansion of office space, the U.S. entity could not support the regulatory requirements of an executive position. The director also stated that the beneficiary was running the business, as opposed to directing other professional employees. Therefore, the fact the petitioner is a small business was not the basis for the director's decision.

Moreover, the AAO notes that the petitioner, on appeal, asserted that the organizational structure of the U.S. entity supports the "executive management" position of the beneficiary and that the "beneficiary's management in his executive capacity" has been key to a growing and

successful U.S. market. These assertions indicate that the petitioner never effectively clarified whether the beneficiary is claiming to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. Regardless, the petitioner must establish that the beneficiary is acting primarily in an executive capacity or in a managerial capacity by providing evidence that the beneficiary's duties are either primarily executive or primarily managerial. A beneficiary may not claim to be employed as a hybrid "executive-manager" and rely on partial sections of the two statutory definitions. Therefore, after careful consideration of the evidence, the AAO must conclude that the beneficiary will not be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Although the director requested information concerning the beneficiary's duties abroad, the issue was not explicitly addressed in his decision. The AAO is not persuaded that the beneficiary has been employed in a managerial or executive capacity abroad as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44). As previously stated 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 submit evidence that within three years preceding the beneficiary's application for admission into the United States, the foreign entity employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. See *id.* As the appeal will be dismissed, this issue need not be examined further.

Beyond the decision of the director, the regulation at 8 C.F.R. § 214.2(1)(3)(vii) provides 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. *Id.* While the petitioner for an L classification is required to submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily, where the beneficiary is claimed to be the owner or majority stockholder of the petitioning company, a greater degree of proof is required. *Matter of Isovich*, 18

I&N Dec. 361 (Comm. 1982). In this case, the beneficiary owns 100% of the U.S. entity. The petitioner has not furnished sufficient evidence that the beneficiary's services are to be utilized for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. As previously stated, since the appeal will be dismissed, this issue need not be examined further.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.