

U.S. Department of Homeland Security

Citizenship and Immigration Services

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**DO**

ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 30 Mass, 3/F  
251 Street, N.W.  
Washington, D.C. 20536

[Redacted]

FILE: EAC 02 075 50731 Office: VERMONT SERVICE CENTER

Date: JAN 07 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).

IN BEHALF OF PETITIONER:

[Redacted]

**PUBLIC COPY**

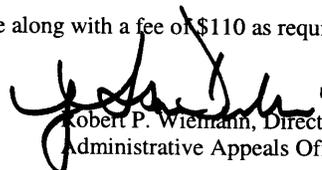
INSTRUCTIONS:

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

The petitioner, Hwa Lim Industries, Inc., claims to be an affiliate of Hwa Lim Machinery Co. Ltd. located in South Korea. The petitioner is engaged in the import and distribution of commercial pad and screen printing machines and seeks to extend the beneficiary's stay for a third time as its president in the United States for a period of three years at \$432.69 per week. The petitioner was incorporated in the State of Pennsylvania in June 1998 and has claims to have two full-time employees and two commissioned 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 May 17, 2002, the director denied the petition and determined that the petitioner had not established that the beneficiary will be employed in an executive capacity for the United States entity.

On appeal, counsel, on behalf of the petitioner, asserts that the beneficiary is primarily engaged in an executive capacity as president and qualifies as an L-1 Intracompany Transferee.

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.

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(l)(14)(ii) requires that the petitioner file a petition extension on Form I-129 and except in those

petitions involving new offices, supporting documentation is not required, unless requested by the director. A petition extension may be filed only if the validity of the original petition has not expired. *Id.*

The issue in this proceeding is whether the beneficiary will be primarily performing managerial or executive duties. 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(l)(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 January 2, 2002 the director received Form I-129 from the petitioning entity to extend the beneficiary's stay in the United States as its president. On Form I-129, the petitioner described the beneficiary's duties for the U.S. entity as:

Direct and manage corporate import pad and screen printing machines from South Korea, obtain customers, and negotiate sales, service machines through sales representatives, supply parts and service when needed.

On January 2, 2002, the director requested that the petitioner submit additional evidence to assist in determining whether the beneficiary will be primarily employed in an executive or managerial capacity. In particular, the director requested that the petitioner submit the following evidence:

- Sufficiently describe the beneficiary's U.S. duties.

- Staffing of the U.S. organization, indicating the number of employees, duties performed by each employee, and management and personnel structures of the United States firm.
- If the company uses contractors, submit evidence documenting the number of contractors utilized and the duties performed.
- The duties performed by the beneficiary in the past year and the duties he will perform if the petition is extended.

On February 27, 2002, the petitioner responded to the director's request by submitting job descriptions of the beneficiary's duties as an executive. In a letter submitted on behalf of the petitioner, counsel stated that the beneficiary "must engage in complicated economic analyses and then must negotiate sales, as well as having complete discretion over day-to-day activities of his corporation." In addition, the petitioner described the beneficiary's duties as:

- Develop the market in the United States and after a sale is made the company provides customers with parts and service as needed.
- Direct and controls the entire operation.
- Establish goals and policies of the company.
- Planning where the company will go.
- Searches the customers who might have interest.
- If there are complaints, goes to his customer to after-service no matter where they [sic] are.
- Plans to hire more employees in the first half of the year of 2002.
- Receives phone call reports regularly from the foreign organization abroad.

In addition, the petitioner submitted the following job description for the U.S. entity's secretary, Kyung Namking:

- Receives phone calls from the buyers and other business managers and reports the matters to the president.

On May 17, 2002, the director determined that the record was insufficient to demonstrate that the beneficiary will be employed primarily in an executive capacity. The director found that the beneficiary is the person who repairs the products when problems arise and searches out the customers. The director also found that he was unable to determine if the majority of the beneficiary's duties were executive in nature. The petitioner did not submit the percentages of time performing executive duties versus other duties.

On appeal, counsel, on behalf of the petitioner, asserts that the beneficiary is primarily engaged in an executive capacity as president. Counsel also asserts that the full-time secretary performs all the clerical work and secretarial work required by the corporation allowing the beneficiary to spend more time in an executive capacity. In addition, counsel submits a list of the hours of executive and non-executive duties that the beneficiary performs.

Upon review, the beneficiary's title and duties are described utilizing phrases as "establish goals and policies" and "direct the entire operation." These phrases are vague and general. These duties are generalities that fail to enumerate any concrete goals or policies that the beneficiary will establish. The petitioner also fails to elaborate how the beneficiary will direct the entire operation.

In addition, it appears that a significant portion of the beneficiary's duties will be directly providing the services of the United States entity in an effort to procure business as indicated in the record that the beneficiary "develops the market in the United States" and "searches the customers who might have interest." These duties primarily appear to comprise marketing tasks that 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).

Moreover, the beneficiary appears to be primarily involved in the daily operations of the U.S. business. The record indicates that the beneficiary "provides customers with parts and service as needed [and] goes to his customer to after-service no matter where they [sic] are." 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 information to establish the hours the beneficiary actually performs executive duties. However, the evidence indicates that the beneficiary spends a majority of his time marketing the products, negotiating sales, dealing with customer satisfaction, ordering parts, and servicing machines. Since the beneficiary is responsible for daily activities then it appears, at most, that the beneficiary performs operational rather than executive duties. 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.

Moreover, the AAO notes that the petitioner claims that the beneficiary plans to hire more employees in the first half of the year of 2002. 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).

Beyond the decision of the director, the AAO is not persuaded that the employment offered to the beneficiary is temporary in nature. 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). The beneficiary's stay in the United States does not appear to be temporary. The record indicates that the beneficiary is the sole stockholder of the U.S. entity and majority stockholder of the foreign entity. As the appeal will be dismissed on the grounds discussed, this issue need not be examined further.

Beyond the decision of the director, the record also contains insufficient evidence to persuade the AAO 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.

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.