



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: WAC 03 108 54245 Office: CALIFORNIA SERVICE CENTER Date: *[Handwritten date]*

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.

[Signature]
Robert P. Wiemann, Director
Administrative Appeals Office

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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 employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that is operating as a wholesale and retail jeweler. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Daegu, Korea. The petitioner now seeks to employ the beneficiary as its general manager for one year.

The director denied the petition concluding that the petitioner had failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity and would be employed in the United States in a qualifying capacity. The director noted that the beneficiary was not supervising managerial or professional employees in either organization and did not have the authority to fire workers employed in the foreign corporation.

On appeal, counsel claims that Citizenship and Immigration Services (CIS) arbitrarily denied the petition because the beneficiary's job description did not address the beneficiary's authority to fire employees. Counsel also contends that the director's finding that the beneficiary did not supervise professional or managerial employees is not supported by the record. Counsel submits a brief in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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. 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(I)(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 (I)(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.

Pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or 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 (l)(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.

The first issue in the instant proceeding is whether the beneficiary was employed abroad in a primarily managerial or executive capacity.

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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner filed the nonimmigrant petition on February 21, 2003. The petitioner noted that since 1992 the beneficiary has been employed in the foreign corporation as its managing director and has been responsible for the company's human resources, for developing the business, planning and carrying out management policies, organizing export procedures, and coordinating international affairs. In an attached letter from the beneficiary's foreign employer, dated January 27, 2003, the company's chief executive officer noted that the beneficiary is also in charge of managing the export of the company's products to the Middle East, Asia, Europe and the United States. The corporate officer explained that the beneficiary has acquired valuable managerial skills and knowledge of overseas markets while working in the foreign corporation.

In an attached organizational chart of the foreign corporation, the petitioner noted the foreign entity employs 162 workers. The beneficiary was subordinate to the company's chief executive officer and its vice-president. The beneficiary was identified as supervising the following four departments: general affairs; overseas sales; purchasing; and computerization. The petitioner noted that the four departments were comprised of fifteen workers.

In a request for evidence issued on March 6, 2003, the director asked that the petitioner submit a detailed description of the beneficiary's job duties abroad that would demonstrate the beneficiary's employment in a primarily managerial or executive capacity. The director noted that the description should include whom the beneficiary directs including each employee's job title and position description, and indicate the percentage of time that the beneficiary spends on his specific tasks. The director also requested copies of the foreign company's payroll records as evidence of the beneficiary's employment for the year preceding the filing of the nonimmigrant petition.

The beneficiary's foreign employer responded in a letter dated March 31, 2003. In the letter, the chief executive officer explained that the beneficiary began working for the foreign corporation in 1993 as its manager for general affairs and was promoted to director of overseas sales in 1998. The officer noted that in the position of director, the beneficiary has been in charge of managing the export of jewelry, and has been responsible for the management of the four above-named departments. The corporate officer indicated that the beneficiary spends approximately 40% of his time managing the overseas business team, 30% of his time managing the purchasing team, 20% of his time managing the administrative team, and the remainder of time

on the management of the computerization team. The corporate officer also provided the name of each individual employed in the four departments.

In his decision dated April 23, 2003, the director concluded that the petitioner had failed to establish that the beneficiary has been employed abroad in a primarily managerial or executive capacity. The director outlined the beneficiary's job responsibilities as managing director, including the supervision of four departments, but noted that the petitioner had neglected to provide a description of each subordinate employee's position. The director stated that it appears that the beneficiary is supervising both managerial and non-managerial employees, and noted that the supervision of non-managerial and non-professional employees is not considered a managerial responsibility. The director further stated that the petitioner had not demonstrated that the beneficiary has the managerial authority to hire and fire personnel. The director determined that the record does not show that the beneficiary has been employed in a qualifying capacity. Accordingly, the director denied the petition.

On appeal, counsel claims that the director's finding that the beneficiary directs non-professional personnel is unsupported by the record, and contends that the director "can point to no specific instance of such direction." Counsel also contends that the director's denial is based on the omission of the word "fire" from the description of the beneficiary's job responsibilities. Counsel states that "[i]f reason were employed, it stands to reason that someone who can 'hire' personnel and 'manages the entire organization' can also fire those he hires." Counsel contends that to deny the present petition based on "the lack of a magic word is arbitrary, capricious and violates the spirit of the new office regulations as they have been interpreted in favor of the newly arrived businessperson for many years."

On review, the petitioner has failed to demonstrate that the beneficiary has been employed abroad in a primarily managerial or executive capacity. 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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

In the present matter, the petitioner failed to specifically describe the managerial and executive tasks performed by the beneficiary during his employment abroad. The foreign company's brief description that the beneficiary develops the business, plans and carries out the management policies, organizes export procedures, and coordinates international affairs is not sufficient to satisfy the regulatory requirements for managerial capacity. Specifically, the petitioner is required to explain what tasks the beneficiary performs in developing the foreign company's business, what particular procedures are involved in the export process, and how the beneficiary organizes these export procedures. Also relevant to this issue is what specific actions the beneficiary performs in order to coordinate the company's international affairs. The record is clearly deficient in demonstrating that the beneficiary's position in the foreign company involves primarily managerial or executive tasks. The AAO is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. 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).

Additionally, the petitioner neglected to submit additional evidence requested by the director. Although the director asked that the petitioner provide "a more detailed description of the beneficiary's duties abroad," and submit a list of the job titles and position descriptions of all employees under the beneficiary's supervision,

the petitioner submitted essentially the same job description for the beneficiary as that outlined in its January 2003 letter. As correctly noted by the director, the petitioner also failed to provide a description of the positions held by the beneficiary's subordinates in each of the four departments. This information is relevant to determining whether the beneficiary is relieved from performing the non-qualifying job duties of the foreign corporation. It is also essential in establishing that the beneficiary is supervising supervisory, professional, or managerial employees. *See* 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). While the petitioner submitted an organizational chart that identifies four subordinate departments, it is impossible to ascertain without additional documentation in what capacity the beneficiary's subordinates are employed. The regulation at 8 C.F.R. § 214.2(l)(3)(viii) states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

For the foregoing reasons, the AAO cannot conclude that the beneficiary has been employed by the foreign corporation in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

The AAO will next address the issue of whether the beneficiary would be employed in the new United States office in a primarily managerial or executive capacity within one year of approval of the petition.

The petitioner indicated on the nonimmigrant petition that the beneficiary would be employed in the United States as its general manager and would be responsible for managing and directing the operations of the organization. The petitioner noted that the beneficiary would also hire and manage a sales manager.

In an attached letter from the foreign corporation, dated January 27, 2003, the chief executive officer stated that the beneficiary's position as the petitioner's general manager would include such additional responsibilities as making strategic decisions regarding the United States investment and managing all financial operations of the company. The chief executive officer outlined the beneficiary's specific job duties as: (1) setting the company's strategic policies and objectives; (2) hiring and directing a sales manager, salesman, and support personnel; (3) directing the expansion of the company; (4) overseeing all financial aspects of the company; and (5) analyzing market trends and economic conditions to forecast sales. The corporate officer also explained that the beneficiary was qualified for the proffered position as a result of his work experience in the foreign corporation and his knowledge of international jewelry market and products.

In the request for evidence, the director outlined the regulatory requirements for establishing eligibility as a manager or executive in a new United States office. The director requested that the petitioner submit the following documentation: (1) an original letter from the foreign company explaining the need for the United States office, and specifically identifying the petitioning organization's goals, the proposed number of employees, the positions to be held by each, the financial status of the foreign entity, and the petitioner's financial ability to commence doing business; (2) an explanation as to how the petitioner would support the beneficiary in a primarily managerial or executive capacity within one year of approval of the petition; and (3) a current and original business plan for the petitioning organization that specifically explains how the United States business would be conducted and identifies the petitioner's one, three, and five-year income and expense projections. The director also asked the petitioner to clarify what support personnel would be hired by the beneficiary.

In the petitioner's March 31, 2003 letter, the foreign corporation's chief executive officer explained that the establishment of the United States organization would enable the foreign corporation, which exports

approximately 60% of its products to the United States, to conduct a more accurately targeted marketing campaign as a result of its proximity to current and potential clients. The corporate officer stated that the petitioner anticipates hiring three or four workers shortly after opening, and estimates that one new employee would be hired for each increase in sales of \$200,000. The corporate officer noted that the beneficiary would be responsible for the "whole operation of the US subsidiary company," and would establish and direct the accounting, sales, marketing and clerical operations of the business.

In a revised business plan submitted in response to the director's request, the petitioner outlined its business plans for the United States entity for the first, third and fifth years. The petitioner noted that at the time of filing the nonimmigrant petition, the petitioner had achieved the following objectives: (1) issued employment contracts to hire three local employees; (2) entered into a lease agreement and contract for the design of the store's interior; (3) received inventory valuing approximately \$240,000; and (4) participated in a international jewelry show. The petitioner explained that during the first year of operation, it would participate in five jewelry shows and would publish a new catalog for marketing purposes. The petitioner indicated an anticipated \$9,000,000 in annual sales and a work force of eight or nine employees. The petitioner also outlined projected plans of establishing a second United States office in New York, hiring two additional employees for the new office, and expanding the current Los Angeles office to ten employees. The petitioner submitted projected profit and loss statements for the years 2003, 2005 and 2007, reflecting a profit in 2003 in the amount of \$240,000.

In his decision, the director concluded that the petitioner had failed to establish that the beneficiary would be employed in the United States in a qualifying capacity. The director outlined the beneficiary's proposed job duties and noted that the beneficiary would be supervising non-managerial and non-professional personnel, and would not have the authority to fire personnel. The director therefore determined that the record was insufficient to demonstrate that the beneficiary would function in a managerial or executive capacity. The director further concluded that the beneficiary would not exercise "significant authority over generalized policy." Accordingly, the director denied the petition.

On appeal, counsel claims that the record contains sufficient evidence to establish "the viability of the new US office to support a manager within a short period." Counsel challenges the director's denial of the petition based on the fact that the beneficiary would be supervising a nonprofessional in the United States organization. Counsel states that "[i]t is well established that a manager must employ or intend to employ a clerk/secretary in order to avoid a denial based on performance of non-managerial duties (phone answering, mail opening, etc.)." Counsel also questions the director's rationale of concluding that a beneficiary is not a manager or executive merely because he or she supervises a nonprofessional employee, and claims that the decision was denied for "arbitrary" reasons.

In addition, counsel addresses the "relaxed standard" applied to new offices, and states that in the past, a new office was given a period of time to become established. Counsel states that this standard should be applied to the instant petition, as "[t]he adjudicator here applied, instead, his own standard in reaching the denial decision."

On review, the petitioner has not demonstrated that the beneficiary would be employed within one year of approval of the petition in a primarily managerial or executive capacity.

As noted by counsel on appeal, when a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans, organizational structure, and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

In the present matter, despite the director's requests, the petitioner did not submit documentation regarding the beneficiary's proposed job duties or the petitioner's organizational structure sufficient to demonstrate the beneficiary's future employment in a qualifying capacity. The petitioner's limited job description fails to identify the specific tasks to be performed by the beneficiary. It is not enough to merely state that the beneficiary would set the objectives of the business, direct the company's expansion, oversee the corporate finances, and analyze market trends. The petitioner must provide a detailed description as to the tasks the beneficiary would perform when directing the company's expansion and setting its goals, and indicate how these job duties would change following the first year of operation in order to support the beneficiary in a primarily managerial or executive capacity. As determined by the Court in *Fedin Bros. Co., Ltd. v. Sava*, evidence submitted in support of a managerial or executive position should include specific situations, circumstances, or occurrences, and define how, when, where, and with whom the beneficiary's job duties occurred. 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.* at 1108. 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. at 193. The petitioner has failed to comply with the regulations requiring that it submit "a detailed description of the services to be performed" by the beneficiary. 8 C.F.R. § 214.2(l)(3)(ii).

Additionally, the record does not contain detailed information regarding the petitioner's proposed organizational structure that would establish the beneficiary's position as a manager or executive within one year of approval of the petition. Although counsel repeatedly states that the petitioner would hire three or four employees upon the commencement of operations, including an accountant, sales manager, salesman and support personnel, the record does not include an explanation as to how these employees would support the beneficiary in a primarily managerial or executive capacity. For example, the petitioner fails to document what employees would constitute "support personnel," and does not provide a description of the job duties to be performed by each named employee. The petitioner also fails to identify which "local employees" were hired by the petitioner on January 16, 2003, as claimed by the petitioner in its revised business plan. Additionally, counsel's account of the proposed personnel does not correspond with the petitioner's

organizational chart, which identifies two “sales team” employees and two “general affairs team” employees, but does not specifically reflect a sales manager or his or her position within the organizational hierarchy. Moreover, the record is ambiguous as to the personnel that the petitioner anticipates hiring following the first year of operation. The petitioner indicates in its revised business plan that one additional employee will be hired per increase of \$200,000 in sales, yet does not identify the positions to be held by each prospective employee. 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. at 193.

Furthermore, the limited amount of evidence in the record implies that the beneficiary would be performing non-qualifying job duties of the business. For example, counsel indicated in the petitioner’s response to the director’s request for evidence that the beneficiary would analyze market trends and economic conditions and oversee the investment planning and development of the U.S. organization. The beneficiary’s performance of market analysis in order to forecast sales suggests that the beneficiary is responsible for the finance or marketing function of the corporation rather than managing those who perform the business’ non-managerial or non-executive functions. Also, counsel’s failure to account for the employment of any workers who would perform the petitioner’s investment planning and development implies that the beneficiary is also performing this non-qualifying job duty. In addition, absent supplementary evidence explaining the responsibilities of the petitioner’s employees, it is reasonable to assume that the beneficiary would also be responsible for attending and selling products at the jewelry shows. 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).

For purposes of clarification, the AAO will address counsel’s claim on appeal that the director applied an arbitrary standard when determining that the beneficiary would not be employed in a qualifying capacity. The director noted in his decision that the beneficiary would be supervising non-managerial and non-professional personnel. The secretary’s non-managerial and non-professional status does not restrict the beneficiary from being deemed a manager or executive. Rather, it appears that the director was highlighting the petitioner’s failure to demonstrate that the beneficiary would be supervising the work of other supervisory, professional, or managerial employees as required in the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(B)(2).

Based on the foregoing discussion, the AAO cannot conclude that the petitioner established the beneficiary’s employment within one year of approval of the petition in a primarily managerial or executive capacity. For this additional reason, 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. Here, that burden has not been met. Accordingly, the director’s decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.