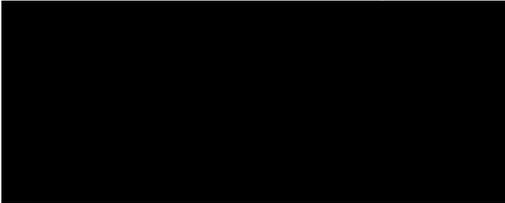




U.S. Citizenship
and Immigration
Services

07



File: WAC 03 004 50576 Office: CALIFORNIA SERVICE CENTER Date: **OCT 25 2004**

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

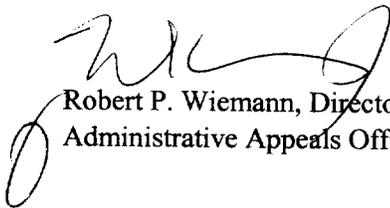
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



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

identifying data deleted to
prevent [Redacted] invasion of personal privacy

PHOTOCOPY

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

The petitioner is a corporation organized in the State of California in March 1999. It markets and sells light bulbs and packing materials made by its parent company. It seeks to extend the temporary employment of the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as a 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 claims that it is a wholly owned subsidiary of Cho Kwang Light Bulbs Ind., Co., located in Daegu City, Korea.

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

On appeal, counsel for the petitioner asserts that there has been a continuous flux in the petitioner's work force since the beginning of its operations. Counsel requests a review of the evidence regarding its work force and an understanding of the petitioner's need for the beneficiary.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). 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) further 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 issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity 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.

In an attachment to the petition, the petitioner outlined the beneficiary's duties:

[T]he alien has been responsible for the management of the company and overseeing all business activities including planning, budgeting, staffing and direction; establish the goals and policies of the organization; direct company staffs including general manager who hires, trains and directs staffs, employees and sales representatives as well as leading a [sic] successful sales representatives and developing new product lines; assume the leadership role in the company's strategic and business planning process and retain the ultimate authority over and responsibilities of the company. The alien will continue to be responsible for the duties as above.

The petitioner claimed on the Form I-129, Petition for a Nonimmigrant Worker, that it employed six individuals including the beneficiary. In a September 22, 2002 letter appended to the petition, the petitioner claimed that it employed eight individuals, including the beneficiary, as well as two commission-based sales representatives. The petitioner also included its organizational chart showing the beneficiary as president and a general manager and unfilled financial position(s) reporting directly to the beneficiary as president. The chart also included a light products division, a packaging box division, and an outdoor garden furniture division. Two of the divisions, the packaging box division and the outdoor garden furniture division, identified individuals as division managers. The third division manager position, the lights products division, was shown as unfilled. The organizational chart also identified four sales representatives reporting to the division manager positions.

The petitioner also provided brief job descriptions for each of the filled positions. The petitioner repeated the description for the beneficiary's position as submitted on the attachment to the petition. The petitioner indicated that the general manager's responsibilities included directing and coordinating general affairs, administration, and major sub-division operation, and conferring with the president to review business progress and discuss required changes in goals or objectives. The petitioner stated that both the packaging box manager and the outdoor garden furniture division manager directed and managed the activities and general administration of their divisions; monitored, reviewed, and analyzed market trends, client preferences, and price schedules; evaluated activities and workflow of the divisions; and conferred with the president to review achievements and discuss required changes. The petitioner's commissioned sales representatives solicited orders, negotiated and consulted with customers, prepared sales reports, and consulted with division managers.

On February 12, 2003, the director requested: (1) a more detailed description of the beneficiary's duties in the United States including the percentage of time spent on each listed duty; (2) the petitioner's California Forms DE-6, Employer's Quarterly Wage Report, for the last four quarters; (3) the total number of employees at the location where the beneficiary would be employed; (4) copies of payroll summaries; (5) a specific day-to-day description of the beneficiary's duties and goals and policies established by the beneficiary the previous six months; and, (6) Internal Revenue Service (IRS) Forms 1120 for 2001 and 2002.

In response, the petitioner indicated that the beneficiary spent: (1) 10 percent of his time on organizational planning and development and division operation management, internal procedures control, personnel

management, fiscal management, and marketing/sales strategy establishment; (2) 10 percent of his time directing and coordinating promotion of products, overseeing division activities concerned with sales/marketing plans; (3) 15 percent of his time directing and coordinating fiscal and accounting management performed by general manager, including analyzing division budget requests and reviewing reports and statements; (4) 5 percent of his time directing the preparation of "directives" to the general manager and division managers; (5) 10 percent of his time conferring periodically with the general manager and division managers; (6) 5 percent of his time coordinating organizational development and overseeing activities across division lines; (7) 10 percent of his time presiding over company-wide employee meetings and formal strategic meetings with the general manager and division managers; (8) 10 percent of his time reviewing activity reports prepared by the general manager and division managers; (9) 10 percent of his time planning and developing industrial, labor, and public relations policies; (10) 5 percent of his time meeting employees to communicate performance expectations, productivity, and accountability, and provide technical assistance and consulting; (11) 5 percent of his time in liaison with the parent company; and, (12) 5 percent of his time directing and coordinating personnel management performed by the general manager. The petitioner noted other duties that the beneficiary performed as needed.

The petitioner indicated that the general manager's duties, in addition to those previously described, included handling the most difficult projects, monitoring the divisions' budget, evaluating and training subordinate staff, making recommendations on hiring, terminating, and promoting subordinates, and maintaining records. The petitioner also added that the packing box division manager and the outdoor garden furniture manager assigned tasks to sales staff and evaluated their activities.

The petitioner included its California Form DE-6 for the quarter ending December 31, 2002. The California Form DE-6 showed four employees in October, the month the petition was filed. Based on the petitioner's statements on appeal and on payroll records submitted, the petitioner employed the beneficiary, a packing box division manager, an outdoor garden furniture manager, and a sales representative. The record does not clearly establish whether [REDACTED] an independent contractor, worked for the petitioner in 2002.

The director observed that the petitioner had identified different employees in the various positions outlined on its organizational chart submitted with the petition and the list of employees submitted in response to the request for evidence. The director also assumed that several individuals were working either part-time or for below minimum wage. The director determined that the evidence submitted did not establish that the beneficiary's duties were executive or managerial. The director concluded that the petitioner had not provided a comprehensive description of the beneficiary's duties and had not shown that the beneficiary would manage a staff that would relieve him from performing non-qualifying duties.

On appeal, counsel for the petitioner states that the petitioner has undergone managerial changes but that a general manager had been hired in November 2002, that the packaging box division manager had been hired in October 2002, and that the outdoor garden furniture manager had been hired in September 2002. Counsel asserts that the beneficiary is needed to formulate corporate policies and marketing strategies, and to manage and supervise the managers.

Counsel's assertion is 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 petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. The petitioner's description of the beneficiary's actual duties does not establish that the beneficiary meets each of the criteria in one or the other or both of the statutory definitions

The petitioner prepared a lengthy description of the beneficiary's duties in response to the director's request for evidence. The petitioner's description shows that the beneficiary spends 30 percent of his time conferring with employees, preparing directives, and presiding over meetings with the petitioner's employees. In addition, the petitioner claims that the beneficiary spends 50 percent of his time on organizational planning and policies and overseeing activities of the company's divisions, fiscal management and general accounting, and promotion and sales. Although the petitioner indicated that its general manager performed many of the actual operational duties associated with fiscal management and general accounting and overseeing staff, the record indicates that the petitioner did not employ this individual when the petition was filed.

The petitioner's payroll summary, its explanation on appeal, and its California Forms DE-6 substantiate that when the petition was filed, the petitioner employed the beneficiary, the packaging box division manager, the outdoor furniture division manager, and a staff sales representative.¹ The petitioner did not submit evidence showing when the sole commissioned sales representative worked for the petitioner in 2002. The petitioner did not employ a general manager from August 2002 through October 2002. When reviewing the record, the AAO will examine the petitioner's organizational circumstances when the petition is filed. A 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).

¹ The petitioner initially presented inconsistent information regarding its number of employees by stating that it employed six individuals on the Form I-129 and stating that it employed eight individuals in the letter accompanying the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not substantiated with documentary evidence that it employed either six or eight individuals when the petition was filed. 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).

In this matter, the record does not show who in the petitioner's organization performed the fiscal, budgetary, and accounting functions when the petition was filed, except for the beneficiary. 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). Similarly, the record does not substantiate who in the petitioner's organization supervised the staff when the petition was filed, except for the beneficiary. 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. *See* section 101(a)(44)(A)(iv) of the Act.²

In sum, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions and must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The AAO acknowledges the vagaries of employing staff continuously; however, on review of the totality of the record, and even including the petitioner's staff for the year previous to filing the petition, the petitioner has not employed sufficient staff to relieve the beneficiary from performing primarily operational, administrative, and first-line supervisory duties for the petitioner. The petitioner has not provided sufficient evidence to establish that the beneficiary's assignment for the petitioner is primarily managerial or executive. The record does not contain sufficient evidence to overcome the director's decision on this issue.

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.

ORDER: The appeal is dismissed.

² The petitioner presents no evidence that the position of either the packaging box division employee or the outdoor garden furniture employee is a professional, supervisory, or managerial position. The duties of both employees are indicative of individuals performing operational tasks; as the record shows that the petitioner employed only one sales representative, the task of assigning duties to a sales representative cannot amount to either of these individuals' primary task.