



U.S. Citizenship
and Immigration
Services

D7



File: WAC 02 289 51141 Office: CALIFORNIA SERVICE CENTER Date: SEP 02 2004

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

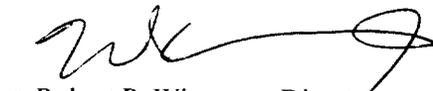
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 disclosure of unwarranted
invasion of personal privacy

PROBATION COPY

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 August 1997. It distributes its parent company's wireless communication products. It seeks to extend the temporary employment of the beneficiary as its technical department's executive/chief. 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 Wide Telecom, Inc., located in Seoul, Korea.

The director denied the petition concluding that the petitioner had not established that the beneficiary's assignment would be primarily managerial or executive.

On appeal, counsel for the petitioner challenges the director's grounds of denial.

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 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.

On the petitioner's I-129, Petition for Nonimmigrant Worker, the petitioner indicated that the beneficiary would: "Manage, direct, and supervise operation of technical department. Set company goals, policies. Customers support/services (technical)."

On January 22, 2003, the director requested: (1) the U.S. entity's organizational chart including the names of all executives, managers, supervisors, and number of employees within each department or subdivision; (2) that the petitioner identify the beneficiary's position on the organizational chart and all employees under the beneficiary's supervision by name, job title, and brief job description; (3) copies of the petitioner's California Forms DE-6 for the last three quarters; and, (4) copies of the U.S. company's payroll summary and IRS Forms W-2, Wage and Tax Statement.

In a February 21, 2003 response, counsel for the petitioner provided a copy of its organizational chart showing a president who directly supervised the beneficiary's position of executive/chief of technical department and two sales/customer service personnel who reported to the beneficiary. The petitioner also submitted its California Form DE-6 for the quarter ending September 30, 2002, the quarter in which the petition was filed. The California Form DE-6 listed the beneficiary and employees holding the positions of president and sales/customer service person. The petitioner's California Form DE-6 for the first quarter of 2003 depicted the same three individuals and an additional employee holding the position of sales/customer service person.

The director observed that the two individuals under the beneficiary's supervision were low-level staff employees and that the petitioner's president appeared to be in charge of the overall operation of the business. The director denied the petition concluding that the record did not establish that the beneficiary would supervise other supervisory, professional, or managerial employees who would relieve him from performing non-qualifying duties and that the petitioner had not demonstrated that it required a second position involving primarily managerial or executive duties. The director also noted an inconsistency between the officers of the corporation on the petitioner's 2000 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return and the petitioner's organizational chart and California Forms DE-6, Employer's Quarterly Report.

On appeal counsel for the petitioner asserts that the beneficiary is an executive in charge of the technical department, a major function/component of the company's business. Counsel asserts that this is the most important component of the company because after sales the department has to provide technical support and services. Counsel explains that the beneficiary is the only individual who knows the technology of the company's products and that is why his position is so important to the company. Counsel also contends that the beneficiary's duties are all executive duties because he has the authority to implement policies and he makes decisions to hire or fire for the department. Counsel also claims that the petitioner's two sales personnel are well-educated professionals and are not low-level employees.

Counsel takes issue with the director's determination that the petitioner did not require two executives explaining that the president handled paperwork not the technical aspect of the company. Counsel also notes that the inconsistency observed by the director resulted from the difference in company officers in 2000 and in 2002.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(I)(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.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include duties such as "Manage, direct, and supervise operation of technical department. Set company goals, policies. Customers support/services (technical)." This imprecise description does not provide an understanding of the beneficiary's daily duties. 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). 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Counsel's assertions on appeal that the beneficiary is in charge of the technical department and is the only individual who knows the technology of the company's products raises questions regarding who actually performs the technical services of the company. Counsel explains that the president performs the paperwork and the sales personnel sell the company's product and provide customer service; however counsel does not indicate who provides the company's technical services, if not 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 of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Even if the petitioner had adequately demonstrated that its technical department was its major function/component, the term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing or directing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing or directing an essential function, the petitioner must not only identify the function with specificity, but must also articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing or directing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. As observed above, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604. In this matter, the petitioner has not established the essential nature of the function with documentary evidence and

has not provided evidence that the beneficiary manages the function, rather than performs the duties relating to the function.

Of note in this matter, counsel's assertions that the beneficiary's duties are all executive duties because he has the authority to implement policies and he makes decisions to hire or fire for the department and that the petitioner's two sales personnel are well-educated professionals is not persuasive evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In sum, the petitioner has not provided a comprehensive description of the beneficiary's duties and has not provided sufficient evidence that the beneficiary will be relieved from performing primarily non-qualifying duties.

Finally, the AAO acknowledges that the director's observation that the record contained an inconsistency regarding the petitioner's corporate officers has been explained. The director's statement will be withdrawn as it relates to this purported inconsistency.

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.