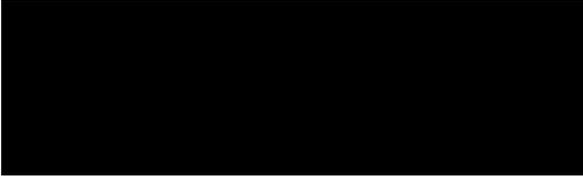




U.S. Citizenship  
and Immigration  
Services

DT



File: WAC 03 035 52305 Office: CALIFORNIA SERVICE CENTER Date: SEP 02 2004

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

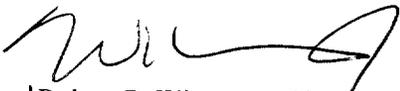
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

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prevent disclosure of unwarranted  
invasion of personal privacy

**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 foreign entity incorporated in the Republic of Korea in 1992 and is located in Seoul, Korea. It is involved in the development and commercialization of digital 3D technology. It seeks to have the beneficiary temporarily employed with its subsidiary in the United States as a director of entertainment strategies. 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 wholly owns the United States entity, Simworks Corp, located in Santa Clara, California.

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 the director misapplied the regulations and misunderstood the facts.

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 an executive capacity for the United States entity. Counsel makes clear on appeal that the petitioner requests consideration of the beneficiary's assignment only in an executive capacity.

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 initially stated that the beneficiary's responsibilities would include:

[The beneficiary] will be responsible for setting up, and managing and directing the entertainment division. [The beneficiary] will, over the next 2-3 years, oversee the entertainment division created, including its strategic direction and growth; he will be responsible for finding, recruiting and eventually putting in place a U.S. management and sales team to take over this division on his return to Korea.

As stated, [the beneficiary's] responsibilities will include: establish, direct, and implement goals and management policies relating to business development in line with [the petitioner's] overall direction (in the entertainment arena); direct and control all entertainment business plans by incorporating R&D, sales, and marketing strategies; and form and develop strategic business relationships and alliances with North American counterparts, i.e., executives and entertainment industry manager.

Of course, [the beneficiary] will perform all the above responsibilities while closely informing and consulting with the top executives of our Korean parent company [the petitioner] in order to create a coherent and well-informed roadmap for a successful expansion.

Please note that if our L-1A petition is approved, [the beneficiary] has been assigned the additional responsibility to timely develop and organize an entertainment division, which at present does not exist in our U.S. subsidiary. Although [the beneficiary] will not directly

manage subordinates at this stage, he has been given the full authority to recruit, hire, and terminate all new employees under his supervision over the next two to three years.

[The beneficiary] who reports directly to the founder and President of [the petitioner] exercises wide latitude in discretionary decision-making and receives only general supervision from higher-level executives.

The petitioner also included its organizational chart showing a president, an officer manager, the beneficiary's position of marketing and trade vice-president, and a sales representative who reported to the beneficiary.

On November 20, 2002, the director requested: (1) the U.S. entity's organizational chart showing the beneficiary's position and other named employees in the chart; (2) a detailed description of the beneficiary's job duties including the percentage of time spent on each duty; (3) that the petitioner clearly indicate whether the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees; (4) a list of other employees under the beneficiary's supervision including name, job title and duties, entry date of employment, and whether they are actually employees of the U.S. entity; and, (5) California Forms DE-6, Employer's Quarterly Wage Report, for the last four quarters, and Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, for all employees.

In response, counsel for the petitioner submitted the same description of the beneficiary's duties as submitted with the petition. The petitioner submitted the California Forms DE-6 for its United States subsidiary showing two employees in the last quarter of 2001 and the first and second quarters of 2002 and one employee in the third quarter of 2002.

The director observed that the United States entity was established in May 1999 and had engaged in market research analysis, opportunity identification, new business development, and brand marketing. The director also observed that for the purpose of this proceeding, the beneficiary must have been eligible for the benefit sought when the petition was filed. The director determined that the evidence did not show that the beneficiary would work through others to achieve the organization's goals and that there was insufficient evidence to establish that the beneficiary would be managing or directing the management of a department, a subdivision, or a function of the United States entity. The director concluded that the beneficiary would not be employed in a primarily executive of managerial capacity.

On appeal counsel for the petitioner asserts that the director improperly cited the regulation pertaining to the required evidence to open a new office. Counsel notes that the United States entity is not a new office. Counsel contends that the beneficiary's job duties do not encompass managing subordinate employees; rather the beneficiary's responsibility is "to change the strategic course and direction of the U.S. entity (according to the decision by the Board of Directors, Korea)."

Counsel's assertions are not persuasive. The director properly observed that 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 only evidence in the record regarding the beneficiary's

purported executive capacity is the petitioner's description of the beneficiary's duties. This description is inadequate.

The petitioner indicated that the beneficiary would be responsible for setting up and managing and directing an entertainment division within the United States entity. In addition, the petitioner noted that the beneficiary would "establish, direct, and implement goals and management policies relating to business development in line with [the petitioner's] overall direction (in the entertainment arena); direct and control all entertainment business plans by incorporating R&D, sales, and marketing strategies; and form and develop strategic business relationships and alliances with North American counterparts, i.e., executives and entertainment industry manager." The petitioner acknowledges that the beneficiary "will not directly manage subordinates at this stage." Thus, the United States entity has no one on its staff to develop and implement the business plans for its new subdivision and no one to carry out marketing strategies and form business relationships relating to the new business division, except for the beneficiary. The beneficiary will provide the necessary initial services for the United States entity's change in course and direction. 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). As counsel acknowledged the United States entity is not a new office; thus the United States entity must be sufficiently complex to support the beneficiary in an executive position when the petition was filed.

Moreover, rather than providing a specific description of the beneficiary's duties, although requested to do so by the director, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner indicated the beneficiary would "establish, direct, and implement goals and management policies," and "exercise(s) wide latitude in discretionary decision-making and receive(s) only general supervision from higher-level executives." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

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. 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. at 1108. The petitioner has failed to establish that the beneficiary's assignment will be to primarily perform in an executive capacity, rather than providing the necessary services to begin the operations of a new product or service line.

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.