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File: WAC-02-057-51785 Office: CALIFORNIA SERVICE CENTER Date: APR 01 2005

IN RE: Petitioner:
Beneficiary:



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

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 its Chief Executive Officer (CEO) as an L-1A 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 is a Limited Liability Company organized in the State of New Jersey that is engaged in the manufacture and sale of sports bags. The petitioner claims that it is the subsidiary of Kunwoo & Co., located in Seoul, Korea. The petitioner seeks to change the beneficiary's status from B-1 to L-1A, and employ him for a two-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary has been employed abroad in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the record contains sufficient evidence to show that the beneficiary has been employed abroad in a primarily managerial capacity. In support of this assertion, counsel submits a brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. 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) 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 primary issue in the present matter is whether the beneficiary has been 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), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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.

With the initial petition filed on December 4, 2001, the petitioner provided a support letter that described the beneficiary's job duties abroad as follows:

[The beneficiary] has been employed by [the foreign entity] with the position of member of the board of directors and Manager of various divisions of [the foreign entity] since 1988. . . . [The beneficiary] also served as director of the Sales Department where his obligations included cultivating new markets in the United States, China and Australian markets; he also managed the manufacturing division of the company; he also directed the exporting of the products sold abroad; as an industrial engineer he also has been involved in developing and designing new products for the company; and he has participated in product exhibitions abroad.

In a separate letter from the foreign entity, the President stated that “[the beneficiary] knows throughout the business of our company because he has worked for our company since 1988. . . . [H]e has been in charge of the design division in [the foreign entity].” The petitioner submitted a third document that outlines the beneficiary’s career, including a list of his activities with the foreign entity that provides the following:

- Having served in [the foreign entity] from 1988.
- Director in charge of Sales Department
- Cultivating new markets – American, Chinese, and Australian Markets.
- Managing manufacturing products in Korea
- Sales directing – Exporting to Japan, America, and Australia.
- Designing and developing new items and models for bags.
- Participating [in] product exhibitions abroad.

On January 9, 2002, the director requested additional evidence. In part, the director requested evidence to establish that the beneficiary has the requisite one year of continuous employment abroad in a primarily managerial or executive capacity within the three years preceding the time of filing the present petition. Specifically, the director requested the foreign entity’s payroll records pertaining to the beneficiary for the year preceding the filing of the petition. The director instructed the petitioner to specify when the beneficiary was hired, the positions that he held, and why the beneficiary was selected for the position with the petitioner.

In a response dated March 25, 2002, the petitioner submitted: (1) a letter discussing the beneficiary’s duties abroad and his qualifications for his proposed job in the United States; and (2) a letter discussing the organization of the foreign entity. The petitioner did not provide the foreign entity’s payroll records regarding the beneficiary. The letter regarding the beneficiary’s duties abroad stated:

[The beneficiary] has been employed [with the foreign entity] since 1988. Currently he holds the position of director and owns 11.50% of our stock. His duties as a director are to manage the Sales Department. . . . [H]e has experience working in all of our departments [at the foreign entity]. Currently, he is managing the Sales Department. In this position he cultivates and develops new markets for the sale of our products. He has been instrumental in opening new markets for us in the United States, China, Australia and Europe. . . . Moreover, he has managed the manufacturing of our products. With his Bachelor’s Degree in Industrial Engineering he has directly assisted our design team in designing new products. Further, in this department he has implemented and managed quality control systems. Likewise, he was

the designer of our newest designs, the Skateboard Backpacks which he designed and we manufactured after he had performed market research in Extreme Sports in the United States. . . . [H]e has represented our company in many conventions where he marketed our products throughout the world.

The letter discussing the organization of the foreign entity provides:

Our Korean company has various departments including Trade, Design, Material, and Accounting. There are 13 employees working out of this office. The management team at the Seoul office is composed of Youngkyu Lee and Jeongae Park. Our Chinese subsidiary company which is managed by Changil Yang has 400 employees.

On May 2, 2002, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary has been employed abroad in a primarily managerial or executive capacity. Specifically, the director stated that:

The petitioner has provided no comprehensive description of the beneficiary's daily activities that shows that the beneficiary is primarily engaged in managing or directing the management of a function, department, subdivision, or component of the company. . . . The beneficiary is not at a senior level within an organizational hierarchy. The petitioner has not established that the beneficiary is managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him/her from performing nonqualifying duties.

On appeal, counsel for the petitioner asserts that the record contains sufficient evidence to show that the beneficiary has been employed abroad in a primarily managerial capacity. In support of this assertion, counsel submits a brief and additional evidence. In the brief, counsel provides that the beneficiary is one of four shareholders of the foreign entity, "which has between 380 – 400 employees and has offices located in Korea, China, and the United States." Counsel further states that the foreign entity's "manufacturing facility in Korea has 120 employees and its Chinese factory has 400 employees." Counsel provides that the foreign entity's website "states that the company has 380 employees" Counsel later states that the foreign entity's staff comprises "more than 500 employees."

Counsel discusses the beneficiary's educational background. Counsel further provides that the beneficiary "is not only a member of the board of directors . . . but he manages various divisions of the [foreign entity]." Counsel quotes previously submitted letters that discuss the beneficiary's duties abroad. Counsel states that "the beneficiary is not only the Manager (which the Koreans call Director) of the Sales Department, but he has in the past, also managed the Manufacturing Department. His department has been instrumental in opening markets for the Korean Company in the United States, China, Australia, and Europe. This cannot be done without having a department that studies the demographics, the market, the competitors, and then has a sales team that enters that country's markets to make the sales." Counsel states that "[t]he Sales Department, under the direction of the beneficiary put together a very comprehensive business plan for its Nevada operations. The beneficiary was provided with names of companies, contact names, research on these companies, etc. which he then reviewed, analyzed, interviewed and finally selected to be the Korean

company's sales representatives in three regions of North America. The beneficiary, through his Department from Korea, approached the appropriate person and achieved the signing of a contract which provides that their Backpack will be included as a product in its Christmas catalogue."

Counsel concludes by asserting that "[t]he documents leave no doubt that this beneficiary operates at a senior level within the company." Counsel references three provided contracts, signed by the beneficiary in 2002, reflecting that companies agreed to market the foreign entity's products. Counsel provides that "[a] low level executive or non-manager would not have the authority to enter into these contracts. Thus, it is obvious that the beneficiary has significant authority over the company's policy concerning the direction of its sales, both in terms of products to be sold and in terms of the markets to be targeted for the sales of its products." Counsel alleges that the beneficiary "has supervised and controlled the work of other supervisory, professional employees and has managed an essential function within the organization." Counsel finally asserts that the director "never reviewed any of the documents submitted with the initial L-1 visa packet"

Upon review, 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(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.* In the instant matter, the foreign job description submitted by the petitioner was vague, providing little insight into the true nature of the tasks the beneficiary performs with his employer abroad. For example, the petitioner states that the beneficiary "served as director of the Sales Department where his obligations included cultivating new markets in the United States, China and Australian markets," yet this statement does not indicate what actual tasks the beneficiary performs to carry out this goal. The petitioner provides that the beneficiary "managed the manufacturing division of the company" and "directed the exporting of the products sold abroad," yet these statements do not reflect what activities the beneficiary was involved in on a daily basis. 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). The actual duties themselves reveal the true nature of the employment. *Id.* The provided job description does not allow the AAO to determine the actual tasks that the beneficiary performed, such that they can be classified as managerial or executive in nature.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove 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). Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties abroad are managerial functions and what proportion are non-managerial. The petitioner indicates that the beneficiary's duties include non-managerial and non-executive tasks, such as "[d]esigning and developing new items and models for bags," "[p]articipating [in] product exhibitions abroad," and "directly assist[ing] our design team in designing new products." These tasks are

necessary to produce the foreign entity's products. 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). Though the petitioner lists the beneficiary's duties as including both managerial and operational tasks, it fails to quantify the time the beneficiary spends on them. This failure of documentation is important, as the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Further, the record contains inconsistencies regarding the number of individuals employed by the foreign entity. In the brief, counsel initially states that the foreign entity has "between 380 – 400 employees." Counsel then states that the foreign entity's "manufacturing facility in Korea has 120 employees and its Chinese factory has 400 employees," implying that the foreign entity has at least 520 employees. Counsel further asserts that the foreign entity's website "states that the company has 380 employees" Counsel finally states that the foreign entity has "more than 500 employees." Thus, the brief provides four separate and conflicting accounts of the number of individuals employed by the foreign entity. Further, in a letter submitted in response to the director's request for evidence, the petitioner stated that "[t]here are 13 employees working out of [the Korean] office." 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). This inconsistency is material, as the number of employees of the foreign entity has a bearing on the scope of the beneficiary's alleged managerial duties.

Counsel asserts that the beneficiary "has supervised and controlled the work of other supervisory, professional employees and has managed an essential function within the organization." Yet, the petitioner has provided no documentary evidence or explanation to show the number of subordinates the beneficiary manages, or their educational backgrounds, supervisory duties, or management responsibilities. The petitioner has not specifically identified any employees that the beneficiary supervises, either by name or 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). 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).

Further, in a letter submitted in response to the director's request for evidence, the petitioner stated that, "[t]he management team at the Seoul office is composed of Youngkyu Lee and Jeongae Park. Our Chinese subsidiary company which is managed by Changil Yang has 400 employees." As this letter does not mention the beneficiary as part of the management team, it calls into question the beneficiary's true management responsibilities.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and

employees in the future. 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). Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Given the lack of sufficient evidence in the record, the AAO notes that counsel's assertion that the director "never reviewed any of the documents submitted with the initial L-1 visa packet" is unfounded.

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3)(ii). For this reason, the appeal will be dismissed.

In visa 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 petition will be denied.

ORDER: The appeal is dismissed.