

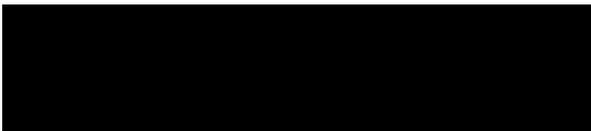
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U.S. Citizenship
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Services

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File: SRC 03 202 51835 Office: TEXAS SERVICE CENTER Date: JUN 02 2005

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

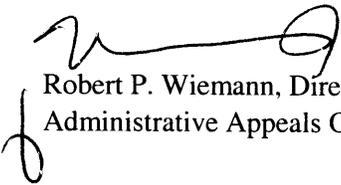
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

DISCUSSION: The Director, Texas 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 extend the employment of its vice-president 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 corporation organized in the State of Georgia that is engaged in the manufacturing, distribution and sales of herbal/health products. The petitioner claims that it is the subsidiary of [REDACTED] Ltd., located in [REDACTED] Korea. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for two more years.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary has been and will continue to be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner contends that the director erred by ignoring the evidence submitted, and contends that the evidence contained in the record clearly established that the beneficiary qualified as both a manager and an executive. In support of these contentions, counsel submits a detailed brief.

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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (a) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (b) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (c) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (d) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The primary issue in this matter is whether the beneficiary will be employed by the United States entity 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.

In the initial petition, counsel for the petitioner submitted a letter dated July 1, 2003, in which he discussed the beneficiary's role in the U.S. petitioner's organization. Counsel stated that the beneficiary's role was as follows:

To set up operations here in the United States, [the beneficiary] has the sole responsibility and absolute discretion to negotiate all contractual agreements, retain and consult with legal representation, and engage banking and other financial resources. The beneficiary is also solely responsible for recruiting, interviewing, hiring, and training all personnel in the immediate future and all managerial and executive-level employees in the long-term.

In addition, in a letter from the petitioner dated July 2, 2003, the petitioner stated:

As well as continuing to oversee the operations of [the petitioner], [the beneficiary] is responsible for establishing the goals and policies of the business, procuring office space, hiring and training new personnel, developing new products and marketing strategies, establishing business contacts in the United States, and be responsible for the overall growth of the branch office.

The petitioner further stated that the beneficiary hired three new employees, namely, a sales representative, a general manager, and a marketing director, to assist him in carrying out the objectives of the company.

The director found the initial evidence submitted to be insufficient, and consequently issued a request for additional evidence on August 26, 2003. In the request, the director required counsel to submit a specific statement describing the U.S. employment of the beneficiary, including his position title, a list of all duties, the percentage of time devoted to each duty, the number of subordinate managers/supervisors or other employees who report directly to him, and a brief description of the job titles and duties of these employees. In the event that the beneficiary did not supervise other employees, the director requested details regarding the essential function the beneficiary managed. Furthermore, the director requested the qualifications

required to fill the beneficiary's position, his level of authority, and his position in the organizational hierarchy of the company.

In a response dated October 13, 2002, the petitioner, through counsel, addressed the director's query. Counsel stated that the beneficiary served as the vice president and treasurer, and provided the following breakdown of the beneficiary's duties:

- <i>Make decisions on accounting and financial matters</i>	30%
- <i>Make plans for marketing and advertising</i>	30%
- <i>Prioritize tasks and coordinate duties of employees</i>	30%
- <i>Purchasing inventory</i>	5%
- <i>Training, hiring, and dismissing employees</i>	5%

Counsel further indicated that the beneficiary oversaw four subordinate managers or supervisors, namely, an officer manager, a marketing manager, a sales person, and a marketing consultant.

On March 19, 2004, the director denied the petition. The director, who reviewed the record to determine eligibility under both managerial and executive capacity, found that the evidence in the record failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary would be performing the day-to-day tasks of the organization, and further concluded that the beneficiary would not be supervising subordinate managers or supervisors. On appeal, counsel asserts that he "plainly mentioned" the beneficiary's qualifications, and that contrary to the director's findings, the beneficiary in fact functions in a primarily managerial and executive capacity.

Upon review, counsel's assertions are not persuasive. Whether the beneficiary is a manager 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. In this case, the initial description of duties was insufficient. The director consequently requested a more detailed list of all of the beneficiary's duties in the request for evidence. The petitioner's response, set forth above, provided a generalized and vague description of the beneficiary's duties, and failed to sufficiently address the director's specific request for a listing of *all* the beneficiary's duties. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *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).

In addition to being too generalized, an additional problem is that the limited description of the beneficiary's duties identifies non-qualifying tasks that appear to constitute a majority of the beneficiary's duties. As discussed above, 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 states that the beneficiary will devote thirty percent of his time to "mak[ing] plans for marketing and advertising" and only five percent of his time to "training, hiring, and dismissing employees," which is, by definition, a managerial duty. In addition, the

petitioner fails to explain why thirty percent of the beneficiary's duties will be devoted to these marketing marketing functions when the petitioner clearly has two qualified employees, namely, a marketing manager and a marketing consultant, to perform these duties. 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). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner further asserts that the beneficiary is a manager and/or executive by virtue of his position title, experience, and associated duties, and his supervision of four subordinate managerial or supervisory employees. However, these claims cannot be substantiated for two reasons. First, the Quarterly Wage Reports for the period ending December 31, 2002 indicate that the beneficiary was the petitioner's sole employee during that time. By March 31, 2003, the petitioner employed the marketing consultant and the office manager. Since the beneficiary claims that 30% of his time is devoted to marketing activities, the role of the marketing consultant is somewhat uncertain.

For the quarter ending June 30, 2003, the petitioner added the sales person to the list of employees, for a total of three subordinates. The petition in this matter was prepared and signed on July 1, 2003, yet there is no evidence that the marketing manager was employed by the petitioner at the time of filing. Although the quarterly return for the quarter ending September 30, 2003 indicates that she began working for the petitioner during that quarter, it is unclear whether she was actually employed by the petitioner prior to filing the petition. Thus, in examining the employment records versus the claims of counsel, it appears that the petitioner employed only three other employees in addition to the petitioner at the time of filing: the office manager, the sales person, and the marketing consultant.

In Once again, upon review of the beneficiary's stated duties, it appears that a large portion of his time was devoted to making plans for marketing and advertising (30%), which appears to be the main task of the marketing consultant. Another large portion of the beneficiary's time was devoted to making decisions on accounting and financial matters (30%), another task seemingly delegated to the office manager. Apparently, since the sales person clearly was not employed on a full time basis during this period, it seems logical to conclude that the beneficiary was thus responsible for the sales in the store and organization of merchandise, particularly since he claimed to be responsible for purchasing inventory. 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.

More important, however, is the petitioner's claim that the beneficiary supervises subordinate managers or supervisors. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

The petitioner provided only minimal details with regard to the position titles and duties of the three employees listed in its quarterly return ending June 30, 2003. With regard to education, counsel's response to the director's request for evidence indicates that the office manager possesses a bachelor's degree in animal

science and an associate's degree in accounting, and it appears that the marketing consultant is a medical doctor. The sales person possesses a high school diploma. While such credentials are certainly impressive, the petitioner has not established that these employees actually require these advanced degrees to perform the duties of the positions they hold, such that they could be classified as professionals. Nor has the petitioner shown that any of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

In the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" 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 does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. Other than the allegations of counsel, there is no clear evidence establishing that these employees relieve the beneficiary from performing non-qualifying 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). Thus, in the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Although the petitioner alleges that it will be expanding its business and hiring new employees, and that the beneficiary would have done so earlier except that compliance with various FDA requirements had taken "longer than expected," this claim is not persuasive for purposes of overcoming this denial. 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).

For the reasons set forth above, the petitioner has failed to establish that the beneficiary's duties are primarily managerial or executive in nature. For this reason, the petition may not be approved.

Beyond the decision of the director, it remains to be determined that the beneficiary's services are for a temporary period since the petitioner contends that the beneficiary is the co-owner of the foreign entity and that he owns a significant share of the U.S. entity. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States. For this additional reason, the petition may not be approved.

In addition, the petitioner has not furnished a comprehensive description of its organizational structure or its physical space requirements. Furthermore, the office lease furnished in support of the petition indicates that

the petitioner did not secure the premises until February 1, 2003, nearly six months after the petition was approved. Consequently, there is also a question of whether the petitioner was doing business during the previous year as required by 8 C.F.R. §214.2(l)(14)(ii)(B). The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office abroad." 8 C.F.R. § 214.2(l)(1)(ii)(H). For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.