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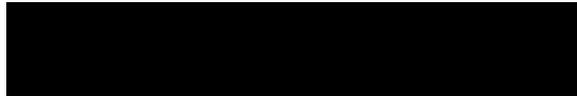


U.S. Citizenship
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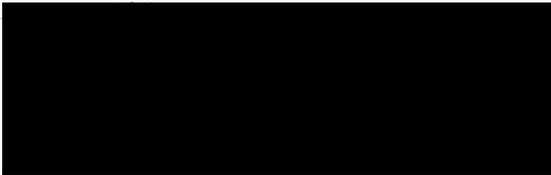
File: SRC 04 062 50298 Office: TEXAS SERVICE CENTER Date: JUN 06 2005

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, 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 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 claims to be the subsidiary of Kwang Jin Precision Co. Ltd., located in Seoul, Korea, and is engaged in the wholesale business. 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.

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

On appeal, counsel contends that the director erroneously denied the petition, and asserts that the decision is not in accordance with the law. Specifically, counsel avers that the director erroneously concluded that the petitioner's business had not expanded to the point where the services of a full time president were required. Counsel submits a brief and additional evidence in support of these contentions.

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 managerial or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The primary issue in the present 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.

With the initial petition, counsel submitted a letter from the U.S. petitioner, dated December 1, 2003, outlining the beneficiary's duties while employed in the United States. Specifically, the petitioner alleged that the beneficiary's duties were executive in nature, and described his duties as follows:

Based on his critical insight and executive skills as the President of our parent company, [the beneficiary's] services are deemed essential to provide a senior level of guidance and direction in regard to the successful operation of [the petitioner] in the U.S. [The beneficiary] is still the president of [the petitioner], a position involving executive functions. In this position, [the beneficiary] sets all corporate policies and is the final decision maker for the company. The Vice President as well as the Director are responsible to him as are an accountant and two other staff members, with the plan to hire additional personnel. During his time as President of [the petitioner], [the beneficiary] has

- Wide discretionary decision-making powers regarding the goals and policies of the U.S. company, and the directions and operations of it.
- Conducted general administration affairs
- Acted as a liaison for our parent company in the U.S.
- Directed the business activities, including the business expenditures, establishing the financial goals, and corporate planning and strategy
- Supervising other professionals and new hires of staff by the Vice President.
- Approve or disapprove contracts negotiated and entered into . . . by the Vice President and Director,
- Make decisions regarding management,
- Sets the prices of the company's products and can override product pricing made in negotiations by the Vice President

The petitioner further stated that the U.S. entity "is still a new start up company" and that it wished to retain the beneficiary's services for an additional three years to ensure that the business expands to the Western Hemisphere.

On January 7, 2004, the director requested additional evidence establishing that the beneficiary was employed in a capacity that was primarily managerial or executive in nature. Additionally, the director requested evidence of the staffing levels of the U.S. entity, including the position titles, duties, and educational levels of all other employees, and evidence that the U.S. entity had been doing business as defined by the regulations during the previous year. Finally, the director requested copies of the petitioner's State Quarterly Tax Returns for the last four quarters with all attachments, as evidence of wages paid to employees during the relevant period.

On February 6, 2004, the petitioner submitted various evidence in response to the director's request. With regard to the beneficiary's employment in a primarily managerial or executive capacity, the petitioner submitted an updated letter from the petitioner dated February 5, 2004 which outlined the beneficiary's duties in greater detail. Specifically, the petitioner provided the percentage of time the beneficiary devoted to each task, and stated that 90% of his time was devoted to wide discretionary decision-making regarding the goals and policies of the company. The petitioner continued by stating that 10% of his time was devoted to setting the prices of the company's products, and that the beneficiary further acted as a liaison for the parent company and engaged in long-range planning in accordance with all of his other stated duties.

In response to the director's query regarding the staffing levels of the U.S. entity, the petitioner submitted a two-page document which listed six employees: the beneficiary as president; [REDACTED] vice president; [REDACTED] administrative assistant and translator. The petitioner also submitted copies of its Texas Employer's Quarterly Reports for the previous four quarters. Finally, the petitioner submitted tax documents, balance sheets, shipping receipts, and other relevant documentation in support of the premise that the U.S. entity was doing business.

On February 21, 2004, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the director found that the evidence failed to establish that the beneficiary would be engaged *primarily* in managerial or executive tasks. Noting that the U.S. entity employed only three employees until October 2003, the director concluded that a majority of the beneficiary's time would be spent engaging in the non-executive day-to-day operations of the business.

Counsel for the petitioner subsequently filed an appeal on March 22, 2004, and provided evidence in the form of affidavits supporting the contention that the beneficiary functioned in a primarily executive capacity and that the beneficiary regularly supervised and interacted with the vice president. Counsel restates the definition of "executive capacity" as it pertains to the beneficiary's stated duties, and further concludes that the small staffing of the U.S. entity did not warrant a finding that the beneficiary was not primarily engaged in managerial or executive activities. The evidence on appeal also was offered in support of the petitioner's expanding business operations in an attempt to highlight its need for a full time executive.

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(1)(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.

Prior to adjudication of the petition, the petitioner contended that the beneficiary had been employed in a capacity that was primarily executive in nature. In support of these contentions, the petitioner submitted an updated description of the beneficiary's duties in response to the request for evidence with a precise breakdown of the percentages of time devoted to each type of duty. Specifically, the petitioner alleged that 90% of the beneficiary's time was devoted to decision-making regarding the goals and policies of the petitioner, general administration, establishing financial goals, corporate planning and strategy, and approving or disapproving contracts negotiated by the vice president and director.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the beneficiary has not been and will not be employed in a primarily managerial or executive capacity. Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner claims that the beneficiary's duties are exclusively executive, yet the list of duties provided in response to the director's request for evidence includes a significant number of non-executive tasks. For example, the petitioner states that the beneficiary conducts general administration affairs and sets the prices of the company's products. Clearly, the beneficiary is performing administrative and sales-related services that will create a basis for marketing the petitioner's product in the United States. 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).

In the appeal brief, counsel summarizes the regulatory definition of "executive capacity" in an attempt to demonstrate the executive nature of the beneficiary's duties. Counsel concludes that his duties are of an executive nature, and refers to the previously submitted statements from the petitioner outlining these duties. Although in this case the petitioner and counsel conclude that the beneficiary is employed in a capacity that is primarily executive, there is no independent evidence to support this claim. In fact, the petitioner's statements regarding the beneficiary's duties, and counsel's restatement of these duties on appeal appear to heavily paraphrase the regulatory definition of "executive capacity." Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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 actual duties themselves reveal the true nature of the employment. *Fedin Bros.*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990). As discussed above, the record contains insufficient evidence to support the assertion that the beneficiary is primarily employed in an executive or managerial capacity.

Since it does not appear from the beneficiary's duties that he will be functioning in a primarily executive capacity, the AAO will alternatively look for the beneficiary's qualifications in a managerial capacity. The petitioner claims that the beneficiary supervises the other employees in the U.S. company. 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.

Though the qualifications of each position were requested by the director in the request for evidence, the petitioner did not provide the qualifications or level of education required to perform the duties of its vice president, its director, its accountant, its secretary, and its administrative assistant. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Thus, the petitioner has not established that these employees possess or require a bachelor's degree, 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.

Finally on appeal, counsel alleges that the director erred by evaluating the size and operational status of the petitioner in determining whether the beneficiary was employed in a capacity that was primarily managerial or executive. Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* 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.

Based on the current record, the AAO is unable to determine whether the claimed managerial and/or executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Counsel's assertions on appeal merely restate the previously stated duties, which are minimal, non-descriptive, and heavily paraphrase the regulatory definitions. No independent evidence is provided which establishes the actual duties performed by the beneficiary, such that the AAO could conclude beyond a doubt that he was primarily employed in an executive capacity. 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).¹

Furthermore, the AAO notes that counsel relies heavily on *Mars Jewelers, Inc. v. Immigration and Naturalization Service*, 702 F. Supp. 1570 (N.D. Ga. 1988), in support of the premise that the director erred in examining the size of the petitioning entity in reaching the decision. However, counsel fails to recognize or discuss the subsequent holding in *Systronics*, which, as discussed above, permits CIS to examine an entity's size in relation to the reasonable needs of the entity. Consequently, counsel's reliance on *Mars Jewelers* is misplaced and will not be considered for purposes of this analysis.

As previously stated, the regulation at 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. Although counsel argues that the director penalized the petitioner for being in a start up phase and for making appropriate business decisions in light of its stage of development, counsel fails to acknowledge the regulations that strictly apply this one-year period. Furthermore, even though the petitioner hired new employees in the last quarter of 2003 and plans to hire additional employees in the future, it had not reached the point at the time of filing where it could employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

Furthermore, the petitioner's Internal Revenue Service (IRS) Form 1120 corporate tax return reveals that it is not a subsidiary and is not affiliated with any other entity. The tax return further indicates on Schedule K that the petitioner is wholly owned by the beneficiary, thus directly contradicting the claim that it is a subsidiary of a foreign entity. Consequently, it cannot be concluded that the petitioner is a qualifying organization doing business in the United States and at least one foreign country, or that it has a qualifying relationship with a foreign entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G). Although the petitioner claims on the L Supplement to Form I-129 that the beneficiary owns the foreign entity, this assertion is not supported by any documentary evidence of the foreign company's ownership. Furthermore, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the complete minutes of relevant annual shareholder meetings must be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. The petitioner has failed to provide sufficient evidence establishing the ownership composition of the U.S. and foreign entities. For this additional reason the petition may not be approved.

¹ The AAO acknowledges the receipt of an expert opinion, dated May 19, 2004, in support of the appeal. The opinion, prepared [REDACTED] management consultant, is provided in support of the contention that the beneficiary is employed in a primarily executive capacity. While the opinions expressed by Mr. Goodfriend are certainly respected, they are not persuasive in this matter as they do not address the context of the beneficiary's duties in light of the applicable regulations governing this visa petition. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

In addition, 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 this matter, the petitioner has not furnished evidence that the beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. As the appeal will be dismissed, these issues need not be examined further.

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.