

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529

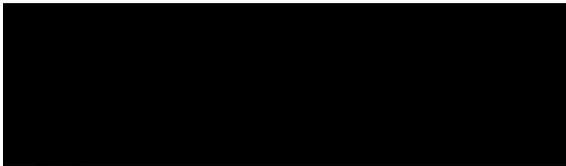
**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

D 7



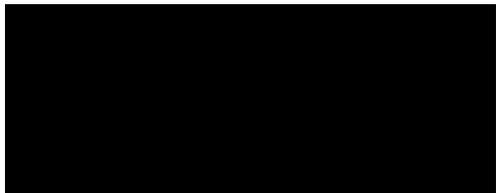
FILE: EAC 03 077 54044 Office: VERMONT SERVICE CENTER Date: JUN 10 2005

IN RE: Petitioner:
Beneficiary:



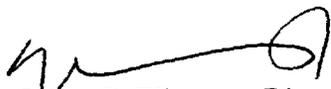
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON 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 nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was established in 2002 and claims to be a courier service business. The petitioner claims to be a subsidiary of [REDACTED], located in Seoul, Korea. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as a business development manager for an additional two years, at an annual salary of \$45,000.00. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The beneficiary was initially granted a one-year period of its stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

On appeal, counsel disagrees with the director's decision and asserts the evidence submitted is sufficient to demonstrate that the duties performed by the beneficiary will be managerial or executive in capacity.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary, or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(I)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(I)(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 (1)(I)(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 with 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 serves 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) states that a visa petition under section 101(a)(15)(L) 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 (1)(1)(ii)(G) of this section;
- B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);
- 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 issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity.

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.

Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101 (a)(44)(C), provides:

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization component, or function in light of the overall purpose and stage of development of the organization, component or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

In a letter of support, dated December 26, 2002, the petitioner described the beneficiary's duties as:

[The beneficiary] develops, formulates and implements all research and marketing strategies for the expansion of ██████████'s business in the United States, and directs the conduct of research on the East Coast of U.S. courier service market. The Business Development Manager exercises broad decision-making authority in formulation and implementing marketing strategies for our services and for establishing relationships with existing and potential clients, based on this intimate knowledge of our courier service business, together with our long-term corporate growth strategies.

The Business Development Manager directs and performs market research on the latest trends in the courier service business in the U.S. He will analyze industry publications and attend professional conferences to determine trends, and he keeps track of the technologies currently available in the market by attending trade shows. Additionally, he utilized

independent market consultants to provide reports on current development in the industry to forecast market changes that have not yet reached the market. He is responsible to analyze how the latest courier service has performed in the East Coast market and customer responses to these services, and makes recommendations for the use of such service in Korea. He also conducts research on the U.S. market, to assess the competition and identify potential clients. He establishes short-and long-term marketing objectives and develops and implements strategies to achieve those objectives. He meets with potential clients to discuss Korea Air Courier Service's specialized expertise and experience and meets with potential suppliers to discuss its needs.

[The beneficiary's] duties also includes [sic] the preparation of periodic progress reports relating to the U.S. subsidiary's business development activities for presentation to our Parent Company in Korea. He reports regularly to our Parent Company with respect to allocation of funds and development of long-and short-term business plans and objectives. Commensurate with his responsibilities, [the beneficiary] receives an annual salary of \$50,000.00, plus additional managerial benefits and compensations.

The petitioner submitted as evidence copies of the U.S. entity's IRS Form 940-EZ, Employer's Annual Federal Employment (FUTA) Tax Return for 2001, NYS-45, Quarterly Combined Withholding, Wage Report for July through September of 2001 and April through June of 2002, and IRS Form 941, Employer's Quarterly Federal Tax Return for the quarter ending December 31, 2001.

The director determined that insufficient evidence had been submitted to determine the beneficiary's eligibility for the continuation of the nonimmigrant status sought, and subsequently requested that the petitioner submit additional evidence. The director requested in part:

Submit additional evidence to establish that the beneficiary will be employed in a managerial capacity in the United States firm.

Submit a complete position description for all of your proposed employees in the United States, including one for the beneficiary's position. Submit a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis.

The beneficiary's duties, as described in the record, do not appear to relate primarily to policy and general operations oversight. Rather, the beneficiary's duties appear to relate to the day-to-day operation involved in producing a product or providing a service as well as the supervision of non-qualifying employees.

Submit a comprehensive description of the beneficiary's proposed duties. Also indicate how the beneficiary's duties will be managerial or executive in nature....

The United States office is not a new office. Therefore, it must be established that it can currently support a managerial level position. With only two employees it does not appear that it can.

If the company has used contractors rather than employees to perform any functions, submit evidence documenting the number of contractors utilized and the duties performed.

In response to the director's request for evidence, counsel stated that the U.S. entity employed two individuals in addition to the beneficiary in 2002, and hired three couriers in 2003. Counsel further stated that Citizenship and Immigration Services (CIS) and the U.S. Embassy in Korea had previously approved the beneficiary's L-1A nonimmigrant status using the same job description as is used in the instant petition. The petitioner submitted as evidence a staff chart, which listed the beneficiary as business development manager and chief operating officer, with a supervisor, and four delivery persons under his direction. The petitioner reiterated the beneficiary's proposed job duties and asserted that the job description was defined as "D.O.T. 183.117-010, SVP: 8" and was equal to the executive branch manager level found in the Directory of Occupational Titles published by the United States Department of Labor. The petitioner described the supervisor's job duties as:

Directs and coordinates through subordinate supervisory personnel, activities of delivery processing in industrial, business establishment and domestic clients, applying knowledge of delivery methods, processes, machines and equipment and layout, and delivery capabilities of each driver: Reviews pick-up and delivery order or schedules to ascertain delivery data, such as types, quantities, and specifications of goods and scheduled delivery dates in order to plan courier service operations. Plans service operations, establishing priorities and sequences of delivering goods, utilizing and knowledge of delivery process and methods and capabilities, and to ensure delivery qualification meets the specifications. Reviews delivery and operating reports and resolves operational, delivery, and maintenance problems. Develops and revises standard operational and working practices and observes workers to ensure compliance with standards.

The petitioner described the delivery person's job duties as: "Drive commercial van or other vehicles over established routes or within an established territory and deliver goods of any legal products as courier service. May also take orders and collect payments. Keep records and report to the main office of what has been picked up and delivered."

The petitioner submitted as evidence a copy of the petitioner's IRS Form 1120-A, U.S. Corporation Short-Form Income Tax Return for 2002 and a copy of the job description of Branch Manager as defined at "D.O.T. 183.117-010, SVP: 8" in the Directory of Occupational Titles published by the United States Department of Labor. The petitioner submitted copies of three IRS W-2 forms listing the beneficiary, [REDACTED] and Sang C. Shin as employees of the petitioning entity for 2002. The petitioner also submitted three copies of IRS W-4 forms, Employee's Withholding Allowance Certificate listing [REDACTED] and Seong Ju Kang as company applicants for 2003.

The director subsequently denied the petition after determining that the record was insufficient to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The director noted that the petitioning entity was a courier and delivery service that employed six workers. The director also noted that in review of the evidence submitted the subordinate employees were non-professional and non-supervisory, and that the employee listed as company supervisor was only such in name. The director further noted that the U.S. entity had not yet reached a level where it would be able to support a managerial or executive position although it had been in business for more than one year. The director concluded by noting that the emphasis placed on the beneficiary's marketing duties coupled with the small staff that would need to be supervised demonstrated that the majority of the beneficiary's time would be spent performing non-managerial duties. The director stated that a review of the record showed that the beneficiary

was primarily performing non-managerial market research analyst duties, and that the petitioner only briefly discussed the beneficiary's duties at the managerial level.

On appeal, counsel disagrees with the director's decision and asserts that CIS erred in finding that the U.S. entity had not grown to a size sufficient to justify a managerial level position and that the beneficiary's position did not qualify as managerial or executive in nature. Counsel also asserts that the U.S. entity was one-year old and that the primary objective initially was to research courier market trends in the United States, and to promote and develop the foreign entity's business. Counsel further asserts that realizing a gross income of \$221,300.00, as envisioned in the company's business plan, and hiring five additional employees within the first year of operation is proof that the U.S. entity has grown sufficient to justify a managerial level position within the company. Counsel reiterates the beneficiary's job duties described in the petitioner's letter of support, dated December 26, 2002, and again contends that the duties described are equivalent to that of an executive branch manager as described in the Directory of Occupational Titles (DOT). Counsel also contends that the nature of the courier business itself makes the employment of five delivery persons common within the industry.

On appeal, the petitioner submits a copy of the U.S. entity's business plan. The petitioner resubmits copies of the petitioner's letter of support, staff chart, description of the employees' job duties, IRS Form 1120-A, Corporate Income Tax Return for 2002, company financial statement and balance sheet for 2002, and the beneficiary's IRS W-2 form for 2002.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity. 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.* 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 in nature. Although specifically requested by the director in the request for evidence, the petitioner failed to submit evidence indicating how the beneficiary's duties would be managerial or executive in nature.

The petitioner has not shown that the Department of Labor's description of an executive branch manager in the DOT has any bearing on this proceeding. The petitioner has not shown that the Department of Labor reserves the title of manager to those working in a managerial capacity as defined at section 101(c)(44)(A) of the Act. The petitioner states that the beneficiary will be employed as the U.S. entity's business development manager and will be responsible for conducting market research on the latest trends in the courier service business in the United States, establishing short-term and long-term marketing objectives and developing and implementing strategies to achieve objectives, and that he will exercise broad decision-making authority. However, the petitioner has failed to demonstrate how these duties are managerial or executive in nature and how much time the beneficiary will spend performing each duty.

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). In the instant matter, there has been insufficient evidence and/or

explanation given to establish that the beneficiary has and will perform high-level responsibilities conducive to a managerial or executive position. To the contrary, it appears that the beneficiary has been and will continue to be primarily performing the marketing research necessary to develop the petitioner's business and supervise non-professional employees.

Although specifically requested by the director in the request for evidence, the petitioner has failed to submit a comprehensive description of the beneficiary's proposed job duties that demonstrates what the beneficiary does on a day-to-day 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 petitioner fails to document what portion of the beneficiary's duties would be managerial functions and what portion would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as performing marketing research, are not traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In the request for evidence, the director requested that the petitioner submit a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis. The petitioner failed to submit this evidence in response. Although the petitioner listed the hours of employment for each employee, such as "9:00 A.M - 6:00 P.M.," this information is insufficient to determine how much time the employee spends performing each task. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The 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).

In addition, the petitioner describes the beneficiary as conducting market research on the latest trends in the courier service business in the United States. Since the beneficiary actually conducts the marketing research, he is performing a task necessary to provide a service or product and this duty will not be considered managerial or executive in nature. 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).

The petitioner has failed to overcome the objections made by the director with regard to the U.S. entity's ability to support a managerial or executive position. The evidence shows that the petitioner is an established entity in that it has been doing business for one year. The evidence also shows that the company employed four individuals at the time the petition was initially filed, and hired three additional drivers in 2003. The evidence further demonstrates that the beneficiary spent his first year of employment in the U.S. entity primarily conducting marketing research, and that it is proposed he will be performing the same duties in the future. The petitioner infers 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. As noted by the director, although it appears that the beneficiary and ██████████ hold managerial and supervisory titles, there is insufficient evidence contained in the record to demonstrate that the actual duties performed are managerial or supervisory in nature. Further, the delivery persons are employed in non-qualifying positions, thus bringing into question the availability of a subordinate staff composed of supervisory, professional, or managerial employees who can relieve the beneficiary from performing non-qualifying duties. See section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

Beyond the decision of the director, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides strict evidentiary requirements that the petitioner must satisfy prior to the approval of this extension petition. The petitioner has not satisfied all of the enumerated evidentiary requirements. The minimal documentation submitted of the foreign entity's business operations raises the issue of whether the foreign entity has been and will continue to be engaged in the regular, systematic, and continuous provision of goods and/or services pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G)(2), during the beneficiary's temporary stay in the United States. The petitioner submitted copies of the foreign entity's statement of profit and loss for the years 1999 and 2000, statement of income surplus disposal for 1999, 2000, and 2001, and a Certificate of Taxation for 2001. There is no evidence that the foreign entity has been doing business during the 2002 tax year. This in turn brings into question the issue of whether there remains a qualifying relationship between the U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). 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.2nd 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.