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**U.S. Citizenship
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FILE: LIN 04 174 52767

Office: NEBRASKA SERVICE CENTER

Date: **NOV 07 2005**

IN RE: Petitioner:
Beneficiary:



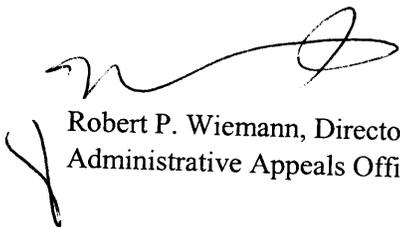
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 Director, Nebraska 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 seeks to extend its authorization to employ its manager temporarily in the United States 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 Ohio that claims to be engaged in the sourcing, treatment, processing and export of raw timber. It claims to be a subsidiary of Chung Song Industry Co., located in Inchon, Korea. The beneficiary was initially granted L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend his stay for a three-year period.

The director denied the petition concluding that the petitioner had not established that (1) the beneficiary would be employed in a managerial or executive capacity; or that (2) the U.S. company is "doing business" as the term is defined in the regulations at 8 C.F.R. § 214.2(l)(ii)(H).

On appeal, counsel for the petitioner asserts that the director erred in his decision and claims that the petitioner submitted sufficient evidence to establish that the beneficiary is employed in a managerial or executive capacity, and that the petitioner is doing business through the regular, systematic and continuous provision of goods and services as required by the regulations.

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(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 first 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.

The petition was submitted on May 28, 2004. In a May 18, 2004 letter, the petitioner indicated that the beneficiary performs the following duties as manager of the company:

His job duties entail him to be responsible for the management of all business operations of the company, including the purchase and sale of finished veneer logs from saw mills to be ultimately used in furniture manufacturing or residential construction; establishment of branch offices; staffing; identification of sources for the purchase of lumber such as quality oak, hard maple, cherry, and walnut from the eastern portion of the United States and quality soft maple from the western portion of the United States; conducting quality assurance examinations and tests of the various available products to select the appropriate sources, grades, quantities, and prices for purchase and shipment of quality wood products to the parent company; negotiation and execution of contracts and purchase orders for the purchase of quality timber; selection, cutting, and loading of the lumber; payment and shipment of the products to the Korean company; development and implementation of strategic marketing plans for the ongoing sourcing of quality timber products, and exploration of potential markets in the United States for the products of the Korean company for future export. In his employment, [the beneficiary] will have complete discretionary latitude in any necessary decision-making involved with the business with the ultimate goal to improve business operations and maximize revenues of the Korean and American companies.

On June 3, 2004, the director issued a request for evidence instructing the petitioner to submit, in part: (1) a statement of the specific duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition, including the routine day-to-day tasks performed by the beneficiary as well as the percentage of weekly hours expended in the performance of each task identified; and (2) a statement describing the staffing of the company, including the number of employees, their job titles, their specific job duties, and evidence of wages paid to each employee.

In response, the petitioner submitted a June 22, 2004 letter, signed by the beneficiary, which restated the job description provided with the initial petition, and included two additional duties: procurement of export certificates from the U.S. Department of Agriculture, and supervision of employees and independent contractors. The beneficiary further described his duties as follows:

Approximately 70% of my working time is dedicated to the identification of potential sources, negotiations for the purchase of lumber, and entering in final agreements. I visit many lumber mills around the country to examine their products. Another 5% of my working time is allocated to inspecting the lumber and conducting quality assurance tests. Another 20% of my working time is spent on arranging for the loading and transportation of the lumber to the Korean parent company. Lastly, the remaining 5% of my working time is dedicated to administrative duties such as entering logistical data, making reports and filing applications to the AES and the U.S. Department of Agriculture to comply with American law regarding the export of lumber products. In order to obtain final approval for shipment, we must obtain a Certificate from the U.S. Department of Agriculture.

Furthermore, I supervise our present staff of two employees and one independent contractor. Timothy Gates is our Driver and Assistant. He is responsible for preparing the Log List for purchases and operating small life machinery. John Shetler is our Purchaser. He identifies appropriate lumber for purchase and assists in negotiations. His vast knowledge and experience with lumber is integral to the success of our company. He cuts the lumber utilizing horses and operates high lift and small lift machinery for shipment loading. William Shetler is an independent contractor who also identifies appropriate lumber for purchase.

The petitioner submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, and Ohio Form UCO-2QR, Employer's Report of Wages, for the first quarter of 2004, confirming employment of the beneficiary, the purchaser and the driver/assistant.

The director denied the petition on June 30, 2004, determining that the petitioner had not established that the beneficiary will be employed in a managerial or executive capacity. The director noted that while the beneficiary has the authority to hire and fire employees and undertake other personnel actions, the petitioner failed to demonstrate that the beneficiary is supervising professional employees. The director also observed that the beneficiary exercises discretion over a function of the organization, but appears to be primarily performing rather than managing or directing the function. The director concluded that the beneficiary's duties would not be primarily managerial or executive.

On appeal, counsel for the petitioner claims that the beneficiary qualifies under the statutory definition of "managerial capacity" based on his management of the entire organization and management of the "major function" of the organization, namely the sourcing, negotiating, purchasing and shipping of lumber products to the claimed parent company.

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 job 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 in an executive or managerial capacity. *Id.*

Based on the job description provided by the petitioner, it is evident that the beneficiary devotes the majority of his time to performing non-qualifying duties related to the identification, purchase and export of lumber on behalf of the company, rather than performing primarily managerial or executive duties. For example, the beneficiary states that he spends 20 percent of his time "arranging for the loading and transportation of lumber to the Korean parent company," 5 percent of his time "entering logistical data, making reports and filing applications to the AES and the U.S. Department of Agriculture," and 5 percent of his time "inspecting the lumber and conducting quality assurance tests." These duties, which constitute 30 percent of the beneficiary's time, have not been shown to be managerial or executive duties as contemplated by the statutory definitions. *See* section 101(a)(44) of the Act.

The beneficiary states that he devotes the remaining 70 percent of his time to the broad responsibility of "identification of potential sources of lumber, negotiations for the purchase of lumber, and entering into final agreements." While the beneficiary's responsibility for entering into final agreements may be considered managerial, the duties he performs to locate sources of lumber and negotiate routine purchase agreements are more akin to an employee performing the petitioner's routine operational tasks, and in fact overlap with the duties performed by one of the beneficiary's subordinates. Although requested by the director, the petitioner did not provide the percentage of weekly hours expended in the performance of each identified task, and therefore did not adequately distinguish between the beneficiary's qualifying and non-qualifying duties. The beneficiary's other claimed managerial duties, including personnel supervision, development and implementation of a strategic marketing plan, and exploration of potential markets, have not been adequately described and are not included in the breakdown of the beneficiary's weekly duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Regardless, the petitioner's description of the beneficiary's duties depicts an employee who is directly involved in all of the day-to-day operations of the business. 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 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 show 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). Where an individual is primarily performing the tasks necessary to produce a product or to provide a service, that individual cannot also primarily perform managerial or executive duties. In the instant matter, the petitioner has failed to show that non-qualifying duties will not constitute the majority of the beneficiary's time. Although counsel claims that the beneficiary manages the entire organization, the evidence does not support a conclusion that the beneficiary will be employed in a managerial or executive capacity for immigration purposes. The unsupported 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). Rather, when determining whether a beneficiary is employed in a primarily managerial or executive capacity, the actual duties themselves 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). It is evident from the record that any managerial duties performed by the beneficiary at the time of filing were incidental to his responsibility for providing the petitioner's service of sourcing, inspecting, purchasing, transporting and exporting lumber for the petitioner's parent company.

Counsel claims that the beneficiary is a function manager and therefore qualified for an extension of his L-1A status. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must provide a detailed job description that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, while the beneficiary may exercise discretion over the petitioner's major function, the petitioner's description of his duties indicate that he also performs most of the administrative and operational duties associated with the function.

Finally, as noted by the director, the beneficiary serves as a first-line supervisor of two employees, a driver/assistant who operates small lift machinery and prepares lists for purchases, and a purchaser, who identifies lumber for purchase, cuts lumber, and operates machinery for shipment loading. The petitioner also claims to employ an independent contractor, but has not provided documentary evidence of any payments to him. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. 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). In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states: "The term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). The petitioner has not established that a bachelor's degree is necessary to perform the duties of a driver or

purchaser. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial under the statutory definition.

Finally, counsel notes that the petitioner's business had only been operational for a few months at the time the extension request was filed, but had achieved considerable success under the beneficiary's management within this short time period. The AAO notes that the initial new office petition (LIN 03 219 52391) was approved for a period of approximately nine months, from October 6, 2003 to June 30, 2004. If a beneficiary is coming to the United States to open a new office, the petition may be approved for a period "not to exceed one year." 8 C.F.R. § 214.2(l)(7)(i)(3). There is no indication in the current record of how much time the petitioner initially requested. Regardless, any request for an extension of a petition that was originally approved as a new office must be evaluated under the criteria set forth at 8 C.F.R. § 214.2(l)(14)(ii). 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 appeal will be dismissed.

The second issue in this proceeding is whether the petitioner is a qualifying organization doing business in the United States. Pursuant to the regulation at 8 C.F.R. § 214.2(l)(ii)(G)(2) in order for an entity to be considered a qualifying organization, the petitioner must show that it:

Is or will be doing business (engaging in international trade is not required) as an employer in the United States and at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee

The regulation at 8 C.F.R. § 214.2(l)(ii)(H) defines the term "doing business" as:

[T]he 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 of the qualifying organization in the United States and abroad.

The petitioner states that it sources and purchases raw timber and exports it to its claimed parent company in Korea. In support of the petition, the petitioner submitted: (1) its statement of revenues for the three months ended March 31, 2004, showing gross sales of \$358,366; (2) recent bank statements; and (3) purchase orders, commercial invoices, bills of lading, and packing lists for lumber purchased and sent to the parent company between December 2003 and April 2004.

In his June 3, 2004 request for evidence, the director instructed the petitioner to submit further evidence that the United States entity has been doing business for the previous year. The director requested evidence of corporate tax returns and active contractual or sales agreements between the petitioner and specific clients/customers that clearly indicate that the petitioning organization has been providing identifiable goods and/or services.

In response, the petitioner submitted its 2003 IRS Form 1120, U.S. Corporation Income Tax Return showing gross sales of \$90,534; copies of business cards from over 30 lumber companies contacted by the petitioner in the course of doing business; copies of four phytosanitary certificates issued by the U.S. Department of

Agriculture in connection with shipments of lumber exported to Korea by the petitioner; and copies of recent bank statements, purchase orders, commercial invoices, packing lists and bills of lading.

In his June 30, 2004 decision, the director acknowledged the evidence submitted by the petitioner but determined that the petitioner is not “doing business” as the term is defined at 8 C.F.R. § 214.2(l)(ii)(H). Specifically, the director concluded: “Instead of providing any goods and/or services, the petitioning entity appears to be simply acting as an “agent” or “administrative conduit” for arranging material transfers between U.S. suppliers and its parent organization abroad and therefore does not constitute a “qualifying organization....”

On appeal, counsel asserts that the petitioner submitted voluminous evidence of the petitioner’s business activities, noting that the company expected to purchase and export over \$1.4 million in lumber during its first twelve months of operations. Counsel asserts that this evidence was sufficient to establish that the petitioner has engaged in a “regular and systematic stream of transactions” and is clearly doing business in the United States.

Upon review, the AAO concurs with counsel’s arguments. The fact that the petitioner is engaged in purchasing and transporting raw materials to its parent company, or acting as a “conduit,” should not be the determinative factor in deciding whether the company is doing business. A representative office is not specifically excluded by the definition of “doing business,” provided that it shows that it is engaged in the provision of goods or services, albeit on behalf of a related foreign entity. The petitioner, to date, has been engaged in purchasing products from United States suppliers in order to export raw materials to Korea for use by the foreign entity. Although the foreign entity will actually manufacture the final product, the U.S. entity is engaged in the provision of services by facilitating the export of goods to the Korean market. Thus, under the business model adopted by the petitioner and its Korean parent company, the U.S. company would be deemed to be “doing business” pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H). The director’s comments with respect to this issue will therefore be withdrawn.

Beyond the decision of the director, the record contains conflicting information regarding the petitioner’s ownership which precludes a finding that the U.S. company maintains a qualifying relationship with the foreign entity pursuant to 8 C.F.R. § 214.2(l)(ii)(G). On the Form I-129, the petitioner indicated that it is the wholly owned subsidiary of the foreign entity, and that the foreign entity is wholly owned by an individual, [REDACTED]. The petitioner did not submit supporting documentation to substantiate the claimed qualifying relationship, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). Accordingly, the director instructed the petitioner to provide “specific evidence to establish that the United States firm and the foreign firm continue to be qualifying organizations” in his June 3, 2004 request for evidence. The petitioner did not submit any evidence in response to this request. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). 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). Furthermore, the petitioner’s 2003 Form 1120, U.S. Corporation Income Tax Return, at Schedule K indicates that the beneficiary owns 100 percent of the U.S. company. 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). The petitioner has not established that it maintains a qualifying relationship with the foreign entity. 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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.