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File: WAC 04 130 50691 Office: CALIFORNIA SERVICE CENTER Date:

NOV 10 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, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to 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 is a corporation organized in the State of California that operates a franchised learning center and a karaoke music studio. The petitioner claims that it is the subsidiary of Yong Kang Ryu Tong Co., Ltd. located in Seoul, Korea. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and was subsequently granted two extensions of status. The petitioner now seeks to extend the beneficiary's stay for an additional two-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director noted that the petitioner did not show that the beneficiary will be supervising professional, managerial or supervisory personnel, or that it otherwise employs a staff sufficient to relieve the beneficiary from performing non-qualifying duties.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director : (1) provided no basis for concluding that the petitioner did not have sufficient staff to relieve the beneficiary from performing non-qualifying duties; (2) erroneously stated that the petitioner employs only five employees when it showed ten employees on its organizational chart; and (3) ignored the fact that six of the beneficiary's subordinates have college degrees. Counsel briefly re-states the beneficiary's job description and claims that it is consistent with the duties of a president of "any company."

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The primary issue in 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 a March 30, 2004 letter submitted in support of the petition, the petitioner described the beneficiary's duties as:

As President of the company, [the beneficiary] has set up the U.S. subsidiary and will have full responsibility for the direction, coordination, and operations of the corporation. He will be responsible for planning, formulating and implementing administrative and operational policies and procedures. He will use his independent discretion and authority in identifying and cultivating new projects and investments. [The beneficiary] will also oversee the day to day operations of the business and will have authority to hire, fire, and take other personnel actions with respect to the company employees. He will exercise wide latitude of discretionary powers, receiving direction only from the parent company....

* * *

In addition to the duties described above, [the beneficiary] directs JEI Learning Center through his managing teacher, [REDACTED] who has a Bachelor's degree in English. [The beneficiary] regularly meets with Ms. [REDACTED] who reports to him with company matters and issues, including curriculum development, business management, financial matters, and student relations. [The beneficiary] regularly makes decisions and directs Ms. [REDACTED] to execute those decisions.

[The beneficiary] also directs and operates Muse Karaoke through a manager, Hong Suk Jun, who is responsible for general supervision of the business, bookkeeping, and maintenance of the karaoke machines. The manager also supervises the customer service representative who services the customers, receives payments, and reports to the manager.

On Form I-129, the petitioner indicated that it employed nine individuals as of April 1, 2004. The petitioner submitted an organizational chart depicting a total of eight employees. The chart lists the beneficiary in three positions as president, director of the learning center, and director of the music studio. The chart indicates that the music studio employs a manager and a customer service employee, and that the learning center employs a manager/teacher and four additional teachers. The petitioner also submitted its California Forms DE-6, Employer's Quarterly Wage Report, for all four quarters of 2003, showing that the company employed no more than six individuals in any month during the year. As of December 31, 2003, the company had five employees on its payroll, including the beneficiary and one of the individuals identified as a teacher. The employee identified as a teacher/manager received wages during the first two quarters of 2003, and another employee identified as a teacher received wages during the second and third quarters of 2003. The remaining four employees shown on the petitioner's organizational chart do not appear on the Forms DE-6 for 2003.

On April 13, 2004, the director requested additional evidence. In part, the director instructed the petitioner to submit: (1) a more detailed description of the beneficiary's duties and the percentage of time he devotes to each task; and (2) an organizational chart for the U.S. entity which lists all employees under the beneficiary's supervision, including a brief description of duties, educational level, annual salaries/wages, and immigration status for each employee.

In response, the petitioner submitted a letter dated June 19, 2004. The petitioner indicated that as president of the company, the beneficiary will be responsible for "organizing, expanding, directing, and developing of the business." The petitioner re-stated the job description submitted with the initial petition, and added:

As far as the percentage of time spent on each duty, it is impossible to say and depends on a myriad of things. For example, sometimes reviewing and analyzing financial reports may require more attention than actual meeting with managers. Time spent on each duty varies by day. The amount of time spent on any given duty will depend on what priority is assigned to those duties which in turn depends on numerous factors such as meeting a particular deadline or urgency of the problem.

The petitioner provided an organizational chart that describes the same structure indicated in the previous chart. The petitioner added the following information: the "manager" of the learning center is responsible for curriculum development and receives \$25.00 per hour; all of the teachers have a "college degree" and earn between \$9.00 and \$10.00 per hour; the music studio manager has a college degree and earns \$15.00 per hour; and the "customer service" employee is a college student earning \$9.00 per hour.

The director denied the petition on July 14, 2004 concluding that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. The director noted the beneficiary's supervision of the learning center manager, the music studio manager, and the customer service representative, and concluded that the petitioner had not established that the beneficiary would supervise professional, managerial or supervisory personnel. The director also determined that the petitioner did not establish that it had sufficient staff to relieve the beneficiary from performing non-qualifying duties. Accordingly, the director concluded that the beneficiary would primarily be directly providing the services of the business and supervising three non-professional employees.

On appeal, counsel for the petitioner asserts that the director provided no basis for his "arbitrary conclusion" that the petitioner does not have sufficient staff to carry out the petitioner's daily operational tasks, and further misstated the number of employees working for the petitioner. Counsel claims that the organizational chart clearly showed ten employees working for the petitioner, and asserts that the staff is sufficient to relieve the beneficiary from performing operational duties. Counsel also contends that the director "conveniently ignored" that "at least six" of the beneficiary's subordinates have college degrees. Finally, counsel re-states the beneficiary's job description and asserts that his duties "are completely consistent with the duties of a president of any company." Counsel asserts that a company operating two businesses with ten employees has a reasonable need for an 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(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.*

Rather than providing a specific description of the beneficiary's duties, the petitioner has consistently provided a vague description that generally paraphrases the statutory definitions of managerial and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B). For instance, the petitioner depicted the beneficiary as "directing...the operations of the corporation," "formulating and implementing . . . policies and procedures," "receiving direction only from the parent company," and "overseeing the day-to-day operations," and indicated that he would "have authority to hire and fire, and take other personnel actions," and "exercise wide latitude of discretionary powers." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. 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.).

After reviewing the vague job description submitted with the initial petition, the director requested that the petitioner submit a detailed job description listing specific duties performed by the beneficiary and indicating the percentage of time the beneficiary would spend on each task. In response, the petitioner reiterated the same inadequate job description. Instead of providing the requesting breakdown of how the beneficiary divides his time, the petitioner ambiguously stated: "The amount of time spent on any given duty will depend on what priority is assigned to those duties which in turn depends on numerous factors such as meeting a particular deadline or urgency of the problem." As the petitioner has not described any actual duties performed by the beneficiary, this statement is not helpful in determining whether the beneficiary is primarily engaged in managerial or executive duties. 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).

Although the director did not specifically reference the beneficiary's job description in his decision, counsel notes on appeal that the described duties "are completely consistent with the duties of a president of any company. To require any further specificity would be redundant and mere surplusage." The AAO is not required to conclude that the beneficiary serves as a manager or executive pursuant to section 101(a)(44) of the Act merely because he has been given the title of "president" and has been attributed with performing "the duties of any president." The regulations require the petitioner to submit a detailed description of the specific duties to be performed by this individual beneficiary within the scope of the business operated by this petitioning company. 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)).

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). As the petitioner has neither described the actual duties to be performed by the beneficiary nor indicated what percentage of time he devotes to managerial or executive duties, it is impossible to conclude that his duties are primarily managerial or executive.

As noted by counsel, the director focused on the petitioner's staffing levels in determining whether the beneficiary would be employed in a managerial or executive capacity. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Counsel asserts that the director provided no basis for concluding that the petitioner's organizational structure is insufficient to support a managerial or executive position. Counsel further states his belief that the director did not review the organizational chart carefully, noting that the chart clearly shows ten employees, while the director appears to only acknowledge a total of five employees in his decision. Counsel states that the petitioner's ten employees are sufficient to relieve the beneficiary from performing non-qualifying duties. Counsel cites *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1573 (N.D. Ga. 1988) in support of his assertion that the statute was not intended to limit the term "executive" to those beneficiaries who supervise large businesses.

Upon review, the AAO finds insufficient evidence in the record to establish the number of employees actually working for the petitioner at the time the petition was filed. While counsel claims that the petitioner employs ten employees, the petitioner stated on Form I-129 that it employed nine employees as of April 1, 2004, and has twice submitted an organizational chart depicting eight employees, including the beneficiary. As noted above, the petitioner submitted its Forms DE-6, Employer's Quarterly Wage Report, for all four quarters of 2003. The petitioner claimed to employ Vesna Barrett as the manager of its learning center at the time the petition was filed. The petitioner's Forms DE-6 show that she did not receive wages from the petitioner after May or June 2003. Similarly, the petitioner claims to employ [REDACTED] as a teacher, but its Forms DE-6 shows that he received wages only in the second and third quarters of 2003. Absent additional evidence, the AAO cannot conclude that these employees worked for the petitioner as of April 1, 2004. Four of the petitioner's other claimed employees did not receive wages in 2003. While it is possible that they these individuals were all hired during the first quarter of 2004, the petitioner has not submitted evidence to establish this fact. An organizational chart prepared by the petitioner is insufficient evidence of the company's actual staffing levels, particularly when there are discrepancies in the record, such as the evidence that two of the petitioner's claimed employees stopped receiving wages in 2003. Again, 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.

Since the AAO is unable to determine the petitioner's actual staffing levels, it cannot be concluded that the petitioner employs sufficient employees to relieve the beneficiary from performing the day-to-day administrative and operational functions of operating two service-oriented businesses. Regardless, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be primarily

employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). As discussed above, the petitioner has not established this essential element of eligibility.

Counsel cites *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily executive capacity. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks.

Furthermore, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Mars Jewelers, Inc. v. INS*. Additionally, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. As counsel has not discussed the facts of the cited matter, it will not be considered in this proceeding.

Counsel further asserts that the director "conveniently ignored" the fact that six of the beneficiary's claimed subordinates have college degrees. Counsel appears to be arguing that the beneficiary qualifies as a manager pursuant to section 101(a)(44)(A)(ii) of the Act, as an employee who supervises and controls the work of professional employees.

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).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not established that a bachelor's degree is actually necessary, for example, to serve as a reading or math instructor in a learning center or to operate a karaoke music studio.

Nor has the petitioner shown that the beneficiary manages subordinates who 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. As discussed above, the petitioner has not adequately documented that it employed its claimed staff at the time of filing, and therefore the AAO cannot conclude that it employs the two claimed managers. 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.

The petitioner's claims in this matter are hindered by a lack of evidence. As the petitioner has neither provided the comprehensive job description requested by the director, nor provided sufficient documentation of its actual staffing levels, the AAO cannot conclude that the beneficiary will be performing in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it maintains a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(3)(i). The petitioner claims to be a subsidiary of the beneficiary's foreign employer, Yong Kang Ryu Tong Co. Ltd. The petitioner submitted the minutes of a special meeting of the board of directors dated December 1, 1999, which indicate that the company issued 1,000 shares of stock to Yong Kang, Inc., a Korean corporation, for consideration of \$50,000 in cash. The petitioner also submitted a stock certificate number one issued to Yong Kang, Inc. The petitioner has not, however, established that "Yong Kang, Inc." and "Yong Kang Ryu Tong Co., Ltd." are the same company. The petitioner also submitted its 2003 IRS Form 1120, U.S. Corporation Income Tax Return, which indicates on Schedule K that no corporation owns 50 percent or more of its stock. Finally, the petitioner submitted its 2003 Form 100, California Corporation Franchise or Income Tax Return, which indicates that the beneficiary owns 100 percent of the petitioner's stock. 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). Based on this conflicting information, the AAO cannot conclude that the petitioner has a qualifying relationship with the beneficiary's foreign employer. For this additional reason, the appeal will be dismissed.

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.