

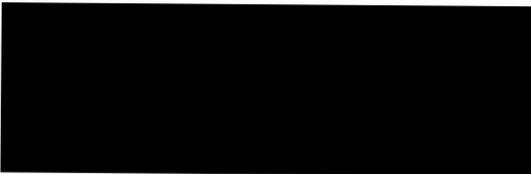
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U.S. Citizenship  
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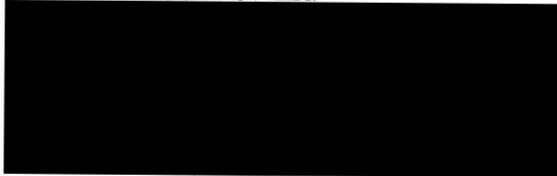
File: WAC-04-011-52798 Office: CALIFORNIA SERVICE CENTER Date: JUL 17 2006

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, Chief  
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 under the laws of the state of California and claims to be **engaged in the business of import/export and general trading**. The petitioner claims that it is the affiliate of [REDACTED] in Incheon, Korea. The beneficiary was initially granted L-1A classification 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 will be employed in the United States in a primarily managerial or executive capacity.

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's decision was in error and that the beneficiary is employed in a position that is primarily executive or managerial in nature. In support of this assertion, the petitioner submits a brief but no additional evidence.

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)(14) states that a petitioner seeking to extend the employment of an intracompany transferee is not required to submit supporting documentation unless requested by the director. In this case the director issued a request for additional evidence (RFE). In the RFE the director stated that the petitioner had not established that the beneficiary had been and would continue to be employed in a primarily managerial or executive capacity and gave the petitioner 12 weeks to submit additional information, evidence or arguments to support the petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the initial petition, the petitioner described the beneficiary's job duties as follows:

Formulating company operating policies and ensuring compliance by employees. E.g. Ensuring that the employees follow the company policies for maintaining company's reputation in the market, ensuring timely delivery of products;  
Sets company's projections and operating goals for the year & budgeting;  
Develop and implement Product Management Strategy to maximize different product lines to existing customers, client development to sell existing product lines to existing customers, product development to sell new product lines to existing customer base and working on diversification and expansion of both product lines and customer base;  
Evaluate execution of planning policies. Eg. Evaluate employees following the plan and the results to make modifications for the next year, evaluate success of various marketing techniques and success and popularity of products;  
Staying abreast of new developments for expansion of product lines;  
Attend trade shows, research new products, client development;  
Oversees marketing, promotion and delivery of products and services;  
Develop and execute company's continued growth strategy and expansion;  
Negotiating purchase contracts;

Reviewing financial operating conditions and modifying sales/purchasing objectives and quotas;

Authority to hire/fire personnel.

On December 16, 2003 the director requested additional evidence. Specifically, the director requested a copy of the original business plan submitted with the initial petition, evidence of business insurance, a more detailed description of the beneficiary's duties, and an organizational chart and corresponding list of employees, their position titles, position descriptions and duration of employment with the company.

In response, the petitioner submitted an organizational chart, a current business plan and copies of insurance. In addition, the petitioner provided the following description of the beneficiary's duties:

- Formulation of the company's operating policies and ensuring compliance by employees. EX: Ensuring that the employees follow company policies for maintaining company's reputation in the market, ensuring timely delivery of product, etc. Reviewing of reports on performance by contracted customs brokers to ensure timely delivery and allocation of customs broker contracts based upon past performance or price point. 70%
  - Setting company's projections and operating goals for the year & budgeting. EX: Revising the company's financial operating history for X year, figuring percentages of sales, costs, expenses, etc., and setting goals to be implemented by employees for the following year. Review bank line credit report summaries quarterly to determine which purchasers represent highest profit and most consistent financial pattern of sales. Based upon quarterly and yearly reports from employees, providing quarterly operational reports upon profit, loss, growth and capitalization requirements to the Korean affiliate. 80%
  - Development and implementation of Product Management Strategy to maximize different product lines to existing customers, client development to sell existing product lines to existing customers, product development to sell new products lines to existing customer base and working on diversification and expansion of both product lines and customer base. EX: Evaluating the new products on the market and advances in technology, selecting and adding new products to product line, developing marketing strategy to get repeat business and new business, developing plan for employees to follow up with existing customers to get them to purchase additional products, etc. Institute standard reporting requirements by employees regarding performance and feed back from customers regarding product lines; review the reports to determine whether company is properly servicing its customers and reviewing sales data to determine effectiveness of marketing and delivery and customer satisfaction to make modifications necessary. 75%
- Evaluate execution of planning policies. EX: Evaluate based upon reported performance the degree to which employees follow and execute the plan and the results to make modifications for the next year, evaluate success of various marketing techniques based upon sales reports and success and popularity of products, etc. 50%

- Develop and execute company's continued growth strategy and expansion in the market. EX: Researching feasibility of developing production facilities or new suppliers in third countries and analyzing feasibility against company's operating position. Analyzing based upon sales reports and wage summaries productivity of work force and setting objectives for increased staffing needs as necessary. Defining allocation of duties among existing employees. Oversees marketing, promotion and delivery of products and services by employees. EX: Review available tradeshows; oversee trade show exhibitions to maximize sales impact; assign research projects such as reviews, pricing and sourcing of new products, review reports and recommendations and then select new products; client development. 75%
- Negotiating distribution contracts with overseas suppliers. EX: Reviewing financial operating conditions and modifying sales/purchasing objectives and quotas. Utilizing his business network to negotiate more favorable contracts based upon his relationship and/or reputation with the executives of overseas distributors. 80% Authority to hire/fire personnel. As necessary.

On April 12, 2004, the director denied the petition. The director determined that the beneficiary would not be employed primarily in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director's conclusions are erroneous.

Upon review, counsel's assertions are not persuasive and the decision of the director will be upheld. 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, and in detailed manner, describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The primary deficiency in this matter is the failure of the petitioner to document its assertions of the beneficiary's 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)). The director specifically requested certain evidence and the petitioner failed to provide it or explain why it was not available. In this case the director failed to document the beneficiary's duties and failed to provide the original business plan submitted with the initial petition. 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). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). In this case the requested evidence was a material line of inquiry as it relates to the assertions of the beneficiary's duties.

The job description provided by the petitioner is repetitious, ambiguous, and unrealistic. The duties listed are not specific to the beneficiary, and the record contains no evidence that any of these activities have or will actually occur. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). In this case there are no copies of operating policies, employee correspondence, market analysis reports, budgeting or financing reports, contract negotiations, performance reports, examples of or details or even explanations of what the petitioner's product lines are, no documentation of any marketing strategies or feasibility reports, or any documentation evidencing these activities. The percentages of time spent on each of these alleged duties equal 430% of the beneficiary's time, further confusing the facts surrounding the beneficiary's employment. This classification is not based on characterizations or a legal fiction; the petitioner must establish that the beneficiary is or will *actually* be employed in a primarily managerial or executive capacity. The job description is ambiguous and unsupported, and the AAO rejects that these are the duties the beneficiary has been performing or will perform in the future. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

On appeal counsel for the petitioner says it is reasonable for the petitioner to be focused on sales at its current level of operations, and that the Iraq war and SARS epidemic prevented it from hiring additional sales staff. Counsel admits that the two remaining employees handle the sales of petitioner's product, so that the beneficiary can allegedly concentrate on its executive duties. This establishes by admission that the beneficiary is not managing professionals, supervisors or managerial personnel. Thus, the record does not support that the beneficiary is directing the management of the organization but may instead be acting as a first line supervisor over two non-professional sales personnel. Although counsel for petitioner subsequently asserted that the beneficiary is overseeing the growth and expansion of the business, this assertion is too broad and aspirational in nature to qualify as a major function. Assuming *arguendo* that such an amorphous duty qualified as a major function, the petitioner has been in operation for several years and has only three employees and \$73,000 in reported profit for 2002. Thus, it would appear that the petitioner has still not reached the level where it can support a primarily managerial or executive position.

The current level of operations presented by the record does not suggest that the petitioner can support a non-revenue producing executive position at this time. Assertions by the petitioner that the only other two employees perform all of the sales in addition to all other non-managerial duties is not supported by the record and thus not credible. The record contains no evidence, and in fact the petitioner has not even articulated, that the remaining two employees are producing the "wage summaries, sales reports, performance reports, review reports," or "quarterly and annual reports" which are all referenced in the petitioner's description of the beneficiary's duties. This failure to document the assertions of activities performed by the company's employees are crucial because such evidence would have corroborated the petitioner's verbose description of the beneficiary's duties. Thus, the petitioner has not provided any documentary evidence of the beneficiary's alleged duties nor corroborated the asserted duties of the petitioner's remaining two employees.

On appeal counsel makes reference to unrelated immigration petitions and cites various Citizenship and Immigration Services (CIS) case numbers. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions and internal CIS case number cites are not similarly binding. Unrelated immigration petitions are not a source of authority in these proceedings. Each immigration petition is a separate record of proceeding and must meet its own burden of establishing eligibility. Contrary to counsel's assertion the AAO has no set policy with regard to determining whether a beneficiary is performing tasks necessary to produce a product or service. The statutes and regulations defining managerial and executive capacity are clear and well established. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In this case, the record does not support that the beneficiary is primarily acting in an executive or managerial capacity, and the AAO is left to assume that the beneficiary must be performing routine duties associated with providing the petitioner's product or service, especially as the petitioner has failed to show that it has sufficient staff to relieve the beneficiary from having to perform these non-qualifying tasks.

On appeal counsel also cited an internal memo and stated that the director should have granted deference to prior approvals. Such memos as the one cited by counsel are for internal guidance only, and do not supersede statute, regulation and case law. These memos have not been promulgated through the notice and comment procedures used to establish regulations, and thus are not a source of authority to be cited by petitioners. In addition, contrary to counsel's assertion, the facts have changed as the beneficiary was originally titled a branch manager but was subsequently "promoted" to the position of president. Regardless, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. at 597. It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

Counsel for petitioner also incorrectly characterizes the director's denial as being based solely on the number of employees. It is appropriate for 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, the absence of employees which are referred to in a petitioner's description of the beneficiary's duties, whether or not the beneficiary is acting as a first line supervisor, if the petitioner's description of duties is reasonable given the staffing of the organization, or if the petitioner is operating as 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.* In this case the petitioner has been in operation for several years, has only three employees, has only lightly documented the record with regard to its conduct of business, and has failed to provide any documentary evidence that the duties listed for the beneficiary have actually been or will be

performed or that the remaining employees of the company are performing the duties referenced in the beneficiary's alleged duties.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position even though it was provided a total of three years to do so.

While not directly addressed by the director, the minimal documentation of the petitioner's business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States. Specifically, under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) a petitioner must demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States. In this case, invoices for the petitioner covering only a five month period in 2003 are insufficient to show that the petitioner is regularly, systematically, and continuously providing goods or services in the United States. See 8 C.F.R. § 214.2(l)(1)(ii)(H). In addition, of the invoices provided, none cover September or October 2003, the time immediately preceding and covering the date the instant petition was filed. For this additional reason, the petition must be denied.

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.