

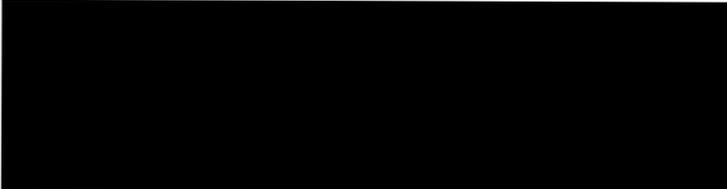


U.S. Citizenship
and Immigration
Services

D7.

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



File: WAC 04 191 51689 Office: CALIFORNIA SERVICE CENTER Date: **MAR 07 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, 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 withdraw the director's decision and remand the petition to the director for further consideration and entry of a new decision.

The petitioner filed this nonimmigrant petition 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 claims to be engaged in **wholesale trade and web site development services**. The petitioner claims that it is the subsidiary of [REDACTED], located in Seoul, Korea. The beneficiary was previously granted a one-year period in 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 two-year period.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary would 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 contends that the director abused his discretion in finding the beneficiary ineligible for the benefit sought, claiming that the beneficiary qualifies as both a manager and an executive pursuant to the statutory definitions. Counsel further elaborates on the duties to be performed by the beneficiary, and contends that the director's decision "is contrary to the great weight of the evidence." Counsel also asserts that the director abused his discretion by denying the petitioner without issuing a request for additional evidence. Counsel submits a brief, but no additional evidence, in support of the appeal.

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

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

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

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

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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

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

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

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

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

The nonimmigrant petition was filed on June 23, 2004. In an undated letter, the petitioner provided the following description of the beneficiary's duties as president of the U.S. company:

[H]e will be in overall control of the development and production of the business. He will be the individual responsible for establishing, organizing and promoting the business on a day-to-day basis.

He will and has been responsible for ensuring the start up of the business and adhering to the production schedules, deadlines, setting production goals and working to implement all corporate decision, strategy and policies in regards to production.

[The beneficiary] gives instruction and direction and instruction to all managers and workers involved with the projects where necessary as regards to operations and development, methods and strategies. He is responsible for ensuring that productions are met at the most effective and efficient pace available.

The petitioner indicated on Form I-129 that it employs four individuals, and submitted an employee list identifying the beneficiary and his spouse as full-time employees of the company, receiving monthly payments of \$3,000 and \$2,000, respectively. The petitioner indicated that another individual, Simon Hahn,

was employed part-time and received two payments totaling \$1,100 in March 2004, and that a fourth individual [REDACTED] was employed part-time and received a payment for \$50 in March 2004. The petitioner did not provide an organizational chart or provide job titles for the employees listed. The petitioner's 2003 IRS Form 1120, U.S. Corporation Income Tax Return, for the tax year ending March 31, 2004 indicates that the petitioner paid \$8,000 in salaries and wages and \$21,000 to the beneficiary in officer's compensation.

The petitioner submitted supporting documentation, including copies of five exclusive distribution agreements signed with Korean companies, proposals for website consulting and related services, and a business plan describing the company's areas of business as: general merchandise, wholesale trading, supply to grocery, web site building, online promotion, online marketing, online branding, and consulting services.

On July 15, 2004, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director observed that "the petitioner has not described the employer's business activities in a manner that allows for a clear understanding of the products and services that are provided by the employer to its customers and how the beneficiary's position fits into the organizational hierarchy." Specifically, the director noted that the petitioner did not provide information regarding its employees or otherwise indicate who is performing the "non-managerial operational duties of the business." The director concluded that the beneficiary would be providing the services of the organization and supervising four non-professional employees.

On appeal, counsel for the petitioner asserts that the director abused his discretion by failing to issue a request for evidence before denying the petition. Counsel contends that the director erred in determining that the beneficiary is merely a first-line supervisor, and asserts that the beneficiary qualifies as both a manager and an executive with the petitioning company. Counsel further describes the beneficiary's proposed duties in general terms and concludes that the evidence of record is sufficient to establish the beneficiary's employment in a managerial or executive capacity. As counsel's brief is incorporated into the record, the job description contained therein will not be repeated here.

Upon review, the AAO will withdraw the director's decision and remand the petition to the director for further consideration and entry of a new decision.

The regulation at 8 C.F.R. § 103.2(b)(8) states the following:

If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence [I]n other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence

As the present petition is a request for an extension of the beneficiary's L-1A status following the opening of a "new office" in the United States, the petitioner was required to submit initial required evidence pursuant to 8 C.F.R. § 214.2(l)(14)(ii). The director examined the petitioner's evidence and determined that the petitioner failed to establish eligibility. The director's decision was based in part on a finding that the petitioner did not submit sufficient documentation regarding the beneficiary's actual job duties, or the petitioner's organizational structure, evidence which is specifically required by 8 C.F.R. §§ 214.2(l)(14)(ii) and (iii). However the director did not point to any evidence of clear ineligibility that would justify his decision to deny the petition without first requesting additional evidence or issuing a notice of intent to deny the petition. *See* 8 C.F.R. § 103.2(b)(8); *see also* Memo. of William R. Yates, Associate Director, Operations, USCIS, to Regional Directors, et al, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)*, HQOPRD 70/2 (February 16, 2005).

Accordingly, as the evidence of record does not directly reflect that the petitioner or beneficiary is ineligible, the director should not have denied the petition based on a lack of required initial evidence without first requesting additional explanation and documentation. *See* 8 C.F.R. § 103.2(b)(8); 8 C.F.R. § 214.2(l)(14)(ii). The AAO agrees that the evidence of record raises underlying questions regarding eligibility. In such an instance, the director "shall request the missing initial evidence, and may request additional evidence" 8 C.F.R. § 103.2(b)(8).

As noted by the director, the provided descriptions of the beneficiary's duties provide little insight into the true nature of the tasks he will perform in the United States. For example, the petitioner indicated that the beneficiary "will be in overall control of the development and production of the business," "ensuring the start up of the business and adhering to production schedules and deadlines," giving "instructions and direction to all managers and workers involved with the projects," and "working to implement all corporate decisions, strategy and policies in regards to production." However, the petitioner did not provide any information regarding its "managers and workers," identify what is meant by "the projects", or clarify what tasks are involved in "overall control of the development and production," or implementing "corporate decisions." Although the job description appears to be focused on "production," the petitioner claims to operate a service oriented business and does not claim to "produce" anything. Based on this position description, it is impossible to even speculate, much less determine, what duties the beneficiary performs on a day-to-day basis, such that they could be classified as managerial or executive.

Although counsel attempts to clarify the beneficiary's duties on appeal, counsel's language is vague and 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 example, counsel indicates that the beneficiary will "exercise discretion over the day to day activities," formulate . . . policies and procedures," have "authority to hire and fire senior level personnel" and have "wide latitude and discretion in exercising his decision making." 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). Counsel also refers to managerial, supervisory and other personnel who work under the beneficiary's direction, but offers no further explanation or evidence regarding these claimed subordinates. 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)).

Accordingly, considering the paucity of evidence in the record regarding the beneficiary's actual duties, the director is instructed to request that the petitioner provide a comprehensive, specific description of the duties performed by the beneficiary, including a breakdown of the percentage of time he will devote to those duties on a weekly basis, and a description of the duties he performs on a "typical day," as of the date the petition was filed. If the petitioner indicates that the beneficiary "oversees," "supervises," "directs" or "manages" an activity or function, the petitioner should clearly indicate who among its staff performs the routine duties associated with the particular activity or function. The AAO does not dispute that small companies require leaders or individuals who plan, formulate, direct, manage, oversee and coordinate activities; however the petitioner must establish with specificity that the beneficiary's duties comprise primarily managerial or executive responsibilities and not routine operational or administrative tasks.

In addition, pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(D), the petitioner is required to submit 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. Accordingly, the director is instructed to request a detailed organizational chart depicting all employees of the U.S. company by name and job title as of the date of filing the petition, and clearly showing the internal reporting structure of the entity. The petitioner should submit job descriptions, date of hire, educational background, and amount and source of remuneration for all employees who worked for the petitioner as of June 2004, and indicate whether each employee is employed on a full-time or part-time basis. The petitioner should also provide its state quarterly wage reports for the first and second quarters of 2004, along with evidence of payments made to any employees working on a commissioned or independent contract basis.

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The record as presently constituted contains confusing evidence regarding the location and nature of the petitioner's business.

The petitioner has indicated that it operates from an office in Los Angeles, California and has submitted a lease agreement for these premises. However, the petitioner's company letterhead, advertisements, bank statements and other documents submitted indicate that the company is located in Falls Church, Virginia. The petitioner should clarify the number of offices it operated as of the date the petition was filed, provide commercial lease agreements for all office and warehouse space it occupied during the relevant time period, and indicate the staffing and type of business conducted by each office. If applicable, the petitioner should submit evidence that it is qualified to do business outside of the State of California.

In addition, the petitioner is required to submit evidence that it has been doing business for the previous year. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The petitioner claims to operate two separate "divisions" that are engaged

in import/export and website development services, and reported income of \$476,508 for its first year of operations. Although the petitioner has submitted copies of distribution agreements for the import and distribution of various Korean products and several website development proposals, it is unclear how the petitioner is operating two divisions, possibly in two different states, and there is no supporting evidence to establish how the petitioner derived its income during the first year of operations. The petitioner should submit copies of major invoices to substantiate the source of its reported gross annual income, and clarify how each division operates.

Finally, the record contains inconsistent evidence regarding the petitioner's ownership that precludes a finding that the petitioner maintains a qualifying relationship with the foreign entity, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). The petitioner claims to be a wholly owned subsidiary of [REDACTED] a Korean company. The record contains the following evidence: (1) the minutes of the company's organizational meeting dated April 18, 2003, indicating that 10,000 shares of the company's 100,000 shares of common stock, valued at \$1.00 per share, would be issued to the beneficiary in exchange for consideration of \$10,000; (2) the petitioner's stock certificate number 2, issuing 51,000 shares to the foreign entity on April 18, 2003; and, (3) the petitioner's 2003 IRS Form 1120, U.S. Corporation Income Tax Return, which indicates at Schedule E that the beneficiary owns 16 percent of the company's stock, indicates at Schedule K that the beneficiary owns 84 percent of the company's stock, and indicates the value of the petitioner's common stock as \$38,570. 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 director should request additional documentary evidence to clarify these inconsistencies and to document the actual ownership and control of the U.S. company, including, but not limited to: copies of all stock certificates issued, the petitioner's stock transfer ledger, stock purchase agreements, Notices of Transaction pursuant to Corporations Code Section 25102(f) filed with the California Commissioner of Corporations, and evidence of consideration received in exchange for the petitioner's stock that is clearly traceable to the purported stockholder or stockholders.

It is emphasized that 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). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, June 23, 2004. Documentation of business activity and hiring that occurred after the date of filing is not probative of the petitioner's and beneficiary's eligibility and will not be considered.

In this matter, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the beneficiary meets the requirements for L-1A classification as of the date of filing the petition. The director's decision will be withdrawn and the matter remanded for further consideration and a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence he deems necessary.

ORDER: The decision of the director dated July 15, 2004 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.