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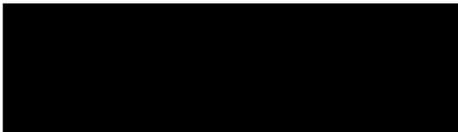
IN RE: Petitioner:

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 visa petition seeking to extend the employment of its president and general manager 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 is allegedly engaged in the business of operating retail clothing stores. The petitioner claims a qualifying relationship with Daewoo Motors Jisan Co., Ltd., located in South Korea. The beneficiary was granted a two-year period of stay in 2003. The petitioner now seeks to extend the beneficiary's stay for an additional three years.

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 filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the director erred and that the record establishes that the beneficiary will be primarily employed in a managerial or executive capacity.

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 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 petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act, and implies that the beneficiary may be acting in both capacities. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the

petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In a letter dated December 29, 2004 appended to the initial I-129 petition, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] oversees and directs all company operations and personnel. He works with prospective partners and customers to ensure the full and proper use of our resources and assets; he negotiates contracts and acts as a liaison with the parent company. Moreover, he sets the objectives and policies for our U.S. operations and is engaged in investigating and developing new and increased business operations in the United States. [The beneficiary] has full authority to direct and implement company goals and objectives, hire and dismiss personnel, and to carry out the general activities of the company. Thus, he oversees, manages, and controls the purchasing and sales activities of our two U.S. retail stores and is responsible to the board of directors and shareholder in Korea to pursue additional business activities and to ensure that we have a profitable and long term commitment to the United States.

On January 31, 2005, the director requested additional evidence. Specifically, the director requested an organizational chart describing the petitioner's managerial hierarchy and staffing levels including a job description for all employees under the beneficiary's supervision; wage reports; and a description of the beneficiary's day-to-day duties for the past six months.

In response, counsel to the petitioner submitted a letter dated April 12, 2005 providing the following additional information regarding the beneficiary's job duties:

Executive Capacity: [The petitioner] is a small business development company currently with two small retail clothing stores. The principal, [the beneficiary], is the president of [the petitioner] and works closely with the parent company in Korea to investigate and develop new business opportunities in the United States. In addition to his role as president, he works [as] the general manager over the operations and employees of the two retail stores. So far, over the past three years, [the beneficiary], through [the petitioner], has established and operated these two stores and is actively investigating additional retail and trade ventures. Therefore, he directs the entire operations of the corporation, sets its policies and objectives, investigates and makes decisions regarding investments and business ventures, represents and acts on behalf of the parent company in the United States, and manages the operations/personnel of the two retail stores. Additionally, [the beneficiary is on the board of directors of the parent company and possesses authority to act on its behalf in the U.S.

Specifically, [the beneficiary] has taken steps to establish goals and policies by determining the investment into the two retail stores. Moreover, he is currently reviewing additional trade opportunities in the automotive industry, after the integration of General Motors and Daewoo

Motors. He is authorized to dedicate foreign capital to worthy ventures and, with regard to the two retail stores, has used his discretion and authority to dedicate over \$100,000 worth of overseas funds to the U.S. operations and is able to use [the petitioner's] assets and/or additional foreign capital to fund any new ventures. [The beneficiary's] decisions have been ratified by the parent company and he has full discretion and authority to oversee, direct, and manage the U.S. operations and is responsible for its success.

* * *

In addition to executive duties as described above, [the beneficiary] oversees the operation of the two retail stores; he supervises a store manager and workers and determines the inventory budget, hiring, merchandise, and sales/marketing strategies of the stores. He oversees or directs the placement of advertisements, makes final decisions regarding the types and quantities of merchandise, hires professions [sic] in the legal and accounting areas, and supervises the actions of his employees. He is responsible for the overall operation of the stores and ensures their profitability through assignment to subordinates and by making decisions and by overseeing and controlling the financial and control systems, as well as the sales and marketing efforts.

Approximately ½ of [the beneficiary's] time is spent in an executive capacity, evaluating policies, objectives, goals, new ventures, and coordination with the parent company. The other half of [the beneficiary's] time is spent as the overall manager of two retail stores, supervising the stores [sic] operations, functions, employees, and methods of revenue. Over the past year, [the beneficiary] has set goals to improve revenues by determining marketing strategies, merchandise type and quantity, and hiring needs. He has made decisions to pursue new business options related to the merchandising of automobile accessories and products, and spends a portion of his work week meeting with new business clients, vendors, and in coordinating U.S. efforts with Korea. Additionally, he is physically present at the two retail stores on a regular basis, reviewing merchandise quality, consulting with personnel, and negotiating with vendors, etc. He reviews and makes decisions regarding general business activities, including administration, sales, and logistics, and possesses general decision making authority over the day to day activities and over all long term issues related to the retail stores.

While the petitioner failed to provide an organizational chart or job descriptions for the subordinate employees, the petitioner did provide wage reports, which reveal that the petitioner employed and compensated three people, including the beneficiary, during the quarter immediately preceding the filing of the extension petition.

On or about July 8, 2005, the director denied the petition. The director determined that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the director erred and that the record establishes that the beneficiary will be primarily employed in a managerial or executive capacity.

Upon review, the petitioner'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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In this matter, the petitioner asserts that the beneficiary spends 50% of his time managing a two-location, three-employee retail business and the other 50% of his time focusing on his "executive duties." However, the petitioner has failed to establish that the beneficiary is, and will continue to be, primarily employed as a manager or as an executive.

As a threshold issue, the petitioner's description of the beneficiary's job duties renders him ineligible for the classification sought. The petitioner clearly describes the beneficiary as spending half of his time managing a retail business and half of his time focusing on "executive" duties. However, it must be established that a beneficiary is "primarily" employed either as an executive or as a manager (*see supra*). A beneficiary who splits his time between the two classifications is ineligible under the regulations. Moreover, the petitioner has not provided an organizational chart or job descriptions for the subordinate employees even though the director specifically requested this information in the Request for Evidence. 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). Therefore, for these reasons alone, the AAO will dismiss the appeal for failure to establish that the beneficiary will be primarily employed in an executive or managerial capacity.

Regardless, the petitioner has failed to establish that the beneficiary has been or will act in a "managerial" capacity. In support of its application, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include setting goals to improve revenues and negotiating with vendors. However, the petitioner does not explain its goals or reveal the substance of the negotiations. Equally importantly, other "management" duties ascribed to the beneficiary, such as reviewing merchandise quality and placing advertisements, likely involve the performance of administrative or operational tasks. As the petitioner only employs two subordinate employees, it has not been established that the petitioner has sufficient staff to relieve the beneficiary of the need to engage in performing non-qualifying tasks. 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 Intl.*, 19 I&N Dec. 593, 604 (Comm. 1988). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner also failed to establish that the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees, or manage an essential function within the organization. As explained above, the beneficiary appears to manage a two-location, three-employee retail business. While the petitioner has provided wage reports confirming its employment of other employees, the petitioner has not provided job descriptions or educational levels for these other employees nor has the petitioner provided an organizational chart. Given the lack of evidence, the beneficiary would appear, at most, to be a first-line supervisor, the provider of actual services, or a combination of both. 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. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Since the record fails to reveal the educational or skill level of the subordinate employees, it cannot be determined if they rise to the level of professional employees. Therefore, the record does not prove that the beneficiary will be acting in a managerial capacity.¹

Similarly, the petitioner has failed to prove that the beneficiary has been or will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a

¹While the petitioner has not specifically argued that the beneficiary manages an essential function of the organization, the record nevertheless does not support this position. 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. 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 furnish a written job offer that clearly describes the duties to be performed in managing the essential function, *i.e.*, identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(I)(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. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The beneficiary's job description is so vague that it is not possible to determine what proportion of his duties would be managerial and what proportion would be non-managerial. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary will be primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

As indicated above, the petitioner has provided a vague, nonspecific description of the beneficiary's duties which fails to explain what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's "executive" duties include directing the entire operation of the corporation; setting policies and objectives; investigating and making decisions regarding investments and business ventures; and representing and acting on behalf of the parent company in the United States. However, the petitioner failed to describe the petitioner's policies and objectives, its business ventures, and what the beneficiary must do to represent the parent company other than manage two retail clothing stores. While the petitioner did assert that the beneficiary has been investigating opportunities related to the merchandising of automobile accessories and products, the petitioner failed to provide any details regarding this investigation and did not reveal the amount of time the beneficiary devotes to this potential opportunity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. The petitioner has not established that the beneficiary, who apparently manages a two-location, three employee retail business, is employed as an executive. Without a subordinate staff to relieve the beneficiary of the need to perform the day-to-day operations of the enterprise so he may primarily focus on the broad goals and policies of the organization, it is not credible that the beneficiary would be employed primarily in an executive capacity.

It is appropriate for Citizenship and Immigration Services (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, or 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).

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary has been employed abroad full-time in a position that was managerial, executive, or involved specialized knowledge for at least one continuous year. 8 C.F.R. § 214.2(l)(3)(iii)-(iv). The record is devoid of any evidence that the beneficiary was employed abroad for the requisite time or, if so employed, that this employment was in a position that was managerial, executive, or involved specialized knowledge. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has failed to establish that it and the foreign entity have a

qualifying relationship because the petitioner has failed to establish that the foreign entity is currently doing business. See 8 C.F.R. § 214.2(l)(3)(i); 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). While the petitioner submitted evidence of business activity abroad, all of this evidence predates both the instant petition and the original L-1A petition approved for the beneficiary (WAC 03 078 50480). The record is devoid of any evidence of current business activity. 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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.