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U.S. Citizenship
and Immigration
Services

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File: LIN 05 193 54404 Office: NEBRASKA SERVICE CENTER Date: JUL 03 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its sales 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 claims to be a corporation organized in the State of Michigan that is engaged in the manufacturing and distribution of auto parts. The petitioner claims that it is the wholly owned subsidiary of Suntech Co. Ltd., located in Kyungki-do, Korea. The beneficiary was initially granted a one-year period of stay to open a new office 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 petitioner has been doing business as defined at 8 C.F.R. § 214.2(l)(1)(ii)(H) for the year preceding the application for extension, or 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 concedes that the petitioner had failed to submit sufficient evidence to prove that the petitioner has been doing business in the United States on a regular, systematic, and continuous basis by providing either goods or services. However, counsel submits new evidence that counsel claims would demonstrate that such requirement has been met. Counsel appears to interpret the director's decision to state that the beneficiary meets the requirement that the beneficiary would be employed in the United States in a managerial 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 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.

In an undated letter accompanying the initial petition, the petitioner stated that the foreign entity established its U.S. subsidiary in the form of a Michigan corporation in April 2004.¹ The petitioner further indicated that the beneficiary was transferred to the U.S. office in September 2004. An organizational plan submitted with the initial petition shows that in addition to the beneficiary, the U.S. office has two employees, the beneficiary and an individual with the title of assistant manager, quality control and technical support.

As evidence that the petitioner was conducting regular, systematic, and continuous business activity, the petitioner initially provided: (1) an addendum to the lease for the premises at 6111 Jackson Road, Suite 107, Ann Arbor, MI 48103, extending the lease term to August 31, 2005; (2) a purchase and supply agreement between Suntech Co. Ltd. as seller and the Magna Donnelly Group as purchaser with signature dates of August 24, 2004 and September 14, 2004; (3) Magna Donnelly purchase schedules, showing Suntech Co. Ltd.

¹ The legal and corporate status of the U.S. entity is actually unclear, as discussed *infra*.

as supplier, dated from September 2004 to April 2005; and (4) copies of a number of business email correspondences to and from the beneficiary dated between February 2004 and May 2005.²

On June 17, 2005, the director issued a request for further evidence (RFE). In the RFE, the director noted that the petitioner's initial evidence indicates that it is an agent for the parent company in that the evidence shows that the petitioner merely takes purchase orders and answers customer inquiries rather than manufactures, handles, or services the parent company's products. The director then requested evidence which demonstrates that the petitioner is other than an agent or office of the parent company. In connection with the beneficiary's executive or managerial capacity, the director requested (1) a list of all of the beneficiary's employees and documentary evidence of wages paid to the employees in the United States as of June 2005, (2) a description of the beneficiary's duties other than providing services to a customer as a sales manager, (3) an explanation of what proportion of her duties is managerial or executive and what proportion is non-managerial or non-executive, and (4) a list of duties that the petitioner's other employees perform to relieve the beneficiary from performing non-managerial or non-executive duties.

The petitioner responded to the RFE on July 21, 2005. In the response letter, the petitioner again states that the U.S. office is a subsidiary office of the Korean company, that the beneficiary currently holds a managerial position in the U.S. office, and that she is not an agent of the Korean office. The petitioner submitted no additional documentation that might be construed as evidence showing that the U.S. office is not merely an agent of the foreign company. The petitioner indicated that the beneficiary manages and directs "about 7 employees" in Korea via email and teleconferencing, but provided no information relating to any other employee in the U.S. office. The petitioner did submit a document listing paychecks received on June 30, 2005 by the beneficiary and one other individual, presumably the two persons employed in the U.S. office at the time. The petitioner provided no apportionment of the beneficiary's executive/managerial and non-executive/non-managerial duties, but maintains that when viewed as a whole, the beneficiary's position in the U.S. office is managerial/executive. The petitioner stated the following as the beneficiary's job duties other than providing services to customers:

- Direct and commend [sic] our administrative & accounting personnel and engineers in Korean Headquarter Office to obtain support for US sales and to meet customer's needs related with sales with time constraints [sic]
- Provide launch and on-going marketing plans and budget for new networks. Work with US networks' senior management to hire key marketing and personnel [sic].
- Provide marketing strategies and help to execute launch activities in order to reduce lead-time up to launch and initial investment and infrastructure [sic].
- Manage marketing efforts related to building international market and networks, which includes plan network expansion, initiate US production, and organize special events;
- Establish and track our marketing goals, develop products marketing strategies, define marketing budget, and other broad marketing activities such as advertisements, press releases,

² The AAO notes that it cannot be determined based on these emails whether the beneficiary was sending and receiving such correspondence, and conducting the business referenced therein, from the U.S. or Korean office.

marketing collateral, publications, etc. and communicate this strategy to the marketing team in Korea and ensure implementation of the marketing strategies;

- Formulate product business and marketing strategies, assess the business environment in automotive industry, research the needs of customers in automotive industry, analyze products and strategies of competitors, track trends in technology and research and development, form and maintain partnerships and alliances beneficial to the company; define short, medium and long term vision for products and defining positioning of products in terms of target market, target users and pricing;
- Lead industry conferences that all appropriate network manager attends, and conduct adjunct meetings for creative brainstorming and idea-sharing among all engineering managers in our Korean office
- Review quality standards according to the US automotive market, ensuring the quality of the products, defining and developing quality metrics and implementing test processes;
- Manage cross-functional teams and supervise application specialists and quality control engineers; [r]eview their job performance with the Human Resource Manager in Korean Headquarter.

The petitioner further states that the beneficiary is expected to manage the future expansion and employees of the U.S. office over the next two years. Finally, the petitioner enclosed two letters from current customers purporting to attest that the beneficiary has been acting in a managerial or executive capacity in the U.S. office.

On August 5, 2005, the director denied the petition. The director found that the evidence does not establish that the petitioner is more than an agent of its parent company and thus cannot be considered to be doing business in the United States. The director noted the petitioner claims that the U.S. office is in the process of being expanded, and that a duty of the beneficiary is to work with U.S senior management and hire key personnel. However, the director observed, there is no senior management or key personnel in place other than the beneficiary, and thus the petitioner has failed to establish eligibility as of the filing of the request for extension. The director further observed that the beneficiary fills a qualifying capacity as a manager, but for the foreign entity, not for the U.S. entity. The director found that since the beneficiary is supervising and being supported by staff located in and employed by the Korean office and not the U.S. office, it has not been established that the U.S. operation would support an executive or managerial position within one year of approval of the new office petition, an obligation the petitioner assumed under 8 C.F.R. § 214.2(l)(3)(v)(C) when its initial new office petition was approved.

On appeal, counsel for the petitioner concedes that the petitioner failed to submit additional evidence to show that the petitioner has been doing business in the United States on a regular, systematic, and continuous basis by providing either goods or services. However, the petitioner seeks to introduce new evidence to show that it has met this requirement. Counsel further asserts that the Citizenship and Immigration Services (CIS) unduly emphasized the size of the company in denying the petition. The petitioner also appears to have misconstrued the director's decision to mean that the beneficiary "fills a qualifying capacity as a manager," and therefore concludes that the issue of the beneficiary's executive or managerial capacity need not be addressed.

The first issue in this proceeding is whether the petitioner established that it was doing business for the year prior to filing the request for extension.

The regulation at 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 establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). There is no provision in the regulations governing the CIS 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.

The AAO finds the evidence of record insufficient to show that the U.S. entity has been doing business in the United States for the year prior to filing the request for extension, as required by the regulations at 8 C.F.R. § 214.2(l)(14)(ii). The instant petition was filed on June 13, 2005. The documents initially submitted by the petitioner to show that it has been doing business in the United States, such as the purchase and supply agreement with its main client and subsequent purchase schedules, only date back as far as August 2004. In fact, the beneficiary, who was apparently the first employee in the U.S. office, was not transferred to the U.S. office until September 2004, according to the petitioner. As noted earlier, while the record contains copies of business correspondences to and from the beneficiary dating back to February 2004, there is no proof that such correspondence relates to the business of the U.S. office rather than to that of the Korean parent company. As such, the petitioner has only documented at most ten months – from August 2004 through June 2005 – of the U.S. entity "doing business" prior to the filing of the request for extension.

Furthermore, the director had requested additional evidence to demonstrate that the petitioner is other than an agent of the parent company. Other than stating in its response letter that the U.S. office is not just an agent of the parent company, the petitioner submitted no supporting documentation to that effect. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The petitioner acknowledges its failure to provide the necessary documentation, but seeks to introduce further evidence on appeal. 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). Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO needs not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the AAO finds that the petitioner has failed to establish that the U.S. entity has been doing business in the United States during the year preceding the filing of the petition, as required by the regulations at 8 C.F.R. § 214.2(l)(14)(ii).

The second issue in the present matter is whether the petitioner has established that the beneficiary would be employed in the United States 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 record is not persuasive in demonstrating that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. 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.*

In this instance, the petitioner did provide a fairly detailed description of the beneficiary's job duties in response to the director's request. However, it is unclear based on that job description the extent to which those duties relate to the Korean entity, and involve management of the Korean staff, rather than the U.S. office and its staff. For example, the beneficiary is said to "[d]irect and [command the] administrative & accounting personnel and engineers in the Korean [h]eadquarter [o]ffice to obtain support for US sales," "communicate [marketing] strategy to the marketing team in Korea and ensure implementation of the marketing strategies," "conduct adjunct meetings for creative brainstorming and idea-sharing among all engineering managers in our Korean office," and "[m]anage cross-functional teams and supervise application specialists and quality control engineers [and] [r]eview their job performance with the [h]uman [r]esource [m]anager in [the] Korean [h]eadquarter." Moreover, as the petitioner explained, the beneficiary is supported by personnel located in Korea, and while there appears to be one other employee in the U.S. office, the petitioner has provided no information whatsoever relating to this employee's role or duties within the company. In fact, the petitioner has failed to provide crucial evidence that the director had specifically requested, including an explanation of what proportion of the beneficiary's duties is managerial or executive and what proportion is non-managerial or non-executive, and a description of duties that the petitioner's other employees perform to relieve the beneficiary from performing non-managerial or non-executive duties. Such information is material to the determination of whether or not the beneficiary would be working in a qualifying capacity within the U.S. entity. 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 petitioner indicates that it plans to expand the U.S. office and hire additional personnel 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, as the director concluded, the petitioner has not shown that it has reached the point where it can employ the beneficiary in a predominantly managerial or executive position in the United States office.

Accordingly, the petitioner has not established that the beneficiary would be employed in the United States 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 AAO finds that the record is insufficient to establish that a qualifying relationship exists between the foreign and U.S. entities as required under 8 C.F.R. § 214.2(l)(3)(i). The petitioner has provided conflicting information regarding the relationship between the foreign entity and the U.S. entity. In the L supplement to Form I-129, the petitioner stated that "Suntech Co. Ltd. is a [wholly owned] subsidiary of Suntech Co. Ltd. in Korea." In addition, in the letter of support accompanying the I-129, the petitioner stated, "Suntech established its US subsidiary in the form of a Michigan Corporation on

April 2004." The petitioner has submitted no documentation whatsoever to substantiate the claim that the U.S. entity is incorporated in Michigan, or that it is a wholly owned subsidiary of the foreign entity. The only corporate documentation from the State of Michigan in the record is a certificate dated April 8, 2004 authorizing the Korean entity to transact business in the State of Michigan. Moreover, the business plan submitted with the initial petition refers to a "branch office" in the United States and makes no mention of a U.S. subsidiary to be formed. Those documents suggest that the U.S. operation may be a "branch office" rather than a "subsidiary" of the foreign entity, as the petitioner claimed. The petitioner does not clarify or explain these discrepancies regarding the legal status of the U.S. office and its relationship to the foreign entity. 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 the record as it currently exists, CIS is unable to determine the nature of the relationship between the U.S. and foreign entities, and therefore cannot conclude that a qualifying relationship exists between the two entities as claimed.

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 shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.