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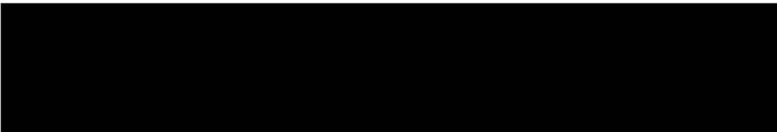


File: EAC 07 016 52539 Office: VERMONT SERVICE CENTER Date: JUL 03 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

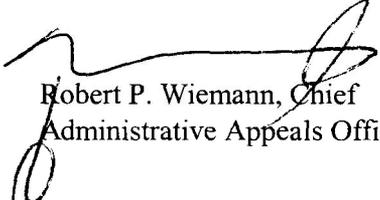
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is engaged in the design, manufacturing and sale of printed circuit boards, electronic and seeks to extend the employment of its president in the United States as an 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, a California corporation, claims to be the subsidiary of Golden Sum Co., Ltd., located in Taipei County, Taiwan. 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 for an additional two years.

The director denied the petition, finding that the petitioner had not demonstrated that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Specifically, the director noted that the petitioner's current organizational structure and proposed business plan would not be able to support the employment of the beneficiary in a primarily managerial or executive capacity.¹

On appeal, the petitioner asserts that the beneficiary was in fact acting in a primarily executive capacity, and submits a brief and additional evidence in support of this contention.

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.

¹ The AAO notes that the director incorrectly stated that the petitioner was established in 2004, not September 2005 as the record indicates. The AAO acknowledges counsel's contentions with regard to this error. As the AAO's review is conducted on a *de novo* basis, the AAO will herein address the petitioner's evidence and eligibility. See *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

- (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.

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

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

The nonimmigrant petition was filed on October 24, 2006. In a letter of support dated August 22, 2006, the petitioner alleged that the beneficiary is employed in the United States as its president, and claimed that his duties consisted of the following:

- Direct the hiring, firing, promoting of all employees including manager, professional engineer and staff;
- Direct business activities to plan procedures, establish responsibilities, and coordinate functions among departments;
- Analyze operations to evaluate performance of company and staff and to determine areas of cost reduction and program improvement;
- Establish internal control procedures;
- Negotiate and approve contracts with buyers and distributors;
- Direct manager(s) and employees to coordinate organization's financial and budget activities to fund operations, maximize investments, and increase efficiency;
- Establish and implement department policies, goals, objectives and procedures, conferring with board members, organization officials, and staff members as necessary;
- Manage staff, preparing work schedules and assigning specific duties;
- Review and monitor operations reports presented by manager to ensure that they efficiently and effectively provide needed services while staying within budgetary limits;
- Plan and direct employees to conduct activities such as sales promotion, trade shows;
- Review financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement;

Determine goods and services to be sold, and set prices and credit terms, based on forecasts of customer demand;
Develop and implement product marketing strategies including advertising campaigns and sales promotion and monitor the execution of said strategies by manager and staff;
Direct and coordinate activities of department concerned with the production, pricing, sales and distribution of products;
Direct purchasing and advertising activities.

The petitioner also submitted wage reports for the first and second quarters of 2006. The report for the quarter ending March 31, 2006 indicated that three persons were employed by the petitioner during this period: the beneficiary, [REDACTED], and [REDACTED], and that they earned total wages of \$27,800.00. The report also indicated that during the third month of the quarter, only two persons were on the petitioner's payroll.

With regard to the second quarter of 2006, the petitioner submitted two separate payrolls records. The first indicated that the California office of the petitioner employed three persons during this quarter. However, no names of the employees were provided. A second record indicated that the petitioner employed one person in the state of Michigan during this quarter. As with the California record, the name of this employee was not provided. The total wages paid to all four employees during the quarter was \$13,300.

The director found this evidence insufficient to warrant approval of the petition and consequently issued a request for evidence on October 31, 2006. The director requested a definitive statement describing the management and personnel structure of the U.S. entity, including an organizational chart, a complete description of the duties of all of the beneficiary's subordinate employees, and a comprehensive description of the beneficiary's actual duties. The director also requested a three-year business plan for the U.S. entity, as well as evidence of the company's financial status and evidence to show that it could support the beneficiary in a primarily managerial or executive position.

In response, the petitioner provided submitted a letter dated December 6, 2006 which addressed the director's request for more details regarding the beneficiary's duties. The petitioner claimed that the beneficiary's main duties included financial planning, marketing strategy set up and implementation, and personnel hiring and management. In addition, the petitioner resubmitted the previously submitted list of duties that the director had deemed insufficient.²

The petitioner also submitted an organizational chart, which indicated that the beneficiary was at the top of the petitioner's organizational hierarchy. The beneficiary oversaw [REDACTED], general manager, who in turn supervised [REDACTED], Sales & Assistant to General Manager, and [REDACTED], Inventory & Shipping

² The AAO notes that in the denial, the director stated that in response to the request for evidence, the petitioner submitted a more detailed description of the beneficiary's duties. This statement is erroneous, since the response contains the exact same list of duties submitted with the supporting documents initially submitted.

Control. Finally, the chart indicated that _____ oversaw _____ Accounting Clerk. On the bottom of the chart, the petitioner indicated that all four subordinate employees were college graduates.

The petitioner also submitted documents which it referred to as a business plan; however, the documents provided no detail or specific dates pertaining to the petitioner's goals and objectives.

On December 26, 2006, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity while in the United States. Specifically, the director concluded that many of the beneficiary's duties were duties that he should not be performing, but rather delegating to subordinates. In addition, the director found that given the petitioner's failure to expand on the duties of the beneficiary's subordinates, it appeared that the beneficiary was acting merely as a first-line supervisor. Finally, the director concluded that the petitioner's failure to submit a viable business plan indicated that the petitioner would not be able to support the beneficiary in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner alleges that the director's decision was erroneous, and contends that the beneficiary is in fact working in a qualifying capacity. Counsel asserts that the beneficiary's duties are similar to those indicated by the U.S. Labor Department Occupational Information Network, and points out that his qualifying duties, particularly with regard to managerial duties, will continue in the future with the hiring of new employees.

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties and the fact that the duties of his subordinates were not clearly defined, the petitioner has failed to establish that it will employ the beneficiary in a capacity that is primarily managerial or executive in nature. In addition, the AAO notes that the description of duties provided, both in the initial letter of support and in response to the request for evidence, was too vague to ascertain whether the beneficiary will be acting in a primarily managerial or executive capacity. While the beneficiary is the intended president of the company, there is insufficient evidence to show that he will be acting primarily in a managerial or executive capacity during his U.S. employment.

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). In this case, the petitioner vaguely described the beneficiary's duties but failed to provide a specific overview of how he will refrain from performing non-qualifying tasks. Despite the director's specific request for a definitive overview of the beneficiary's actual duties, the petitioner elected to submit a description of duties that was identical to the initial description of duties provided with the petition. The AAO notes that the list of duties relied upon by the petitioner summarizes the regulatory definitions of both managerial and executive capacity, and provides no insight on the nature of the beneficiary's daily tasks or his day-to-day duties. For example, the description of duties identifies tasks such as "direct the hiring, firing, promoting of all employees including manager, professional engineer and staff," "establish and implement department policies, goals, objectives and procedures," and "develop and implement product marketing," and these duties essentially quote key phrases from the regulatory definitions as opposed to expressly stating the exact nature of the beneficiary's day-to-day tasks. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner

has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Despite the director's specific request for a more specific overview of the beneficiary's day-to-day duties in the request for evidence, the petitioner failed to provide a detailed description. As noted above, the petitioner elected to submit the same list of duties previously determined to be insufficient by the director. 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). Instead of complying with the director's request, the petitioner, through counsel, merely concluded that the beneficiary was in fact performing the duties of a manager and/or executive.

Counsel continues this same line of reasoning on appeal, and instead of providing more details regarding the nature of the beneficiary's role in the petitioning enterprise, counsel merely concludes that ". . . [T]he beneficiary's job duties are executive or managerial in nature, especially with the hiring of additional employee(s) that will take place in 2007." Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In this matter, counsel claims that the beneficiary is the petitioner's sole hiring authority and thus a major part of the beneficiary's duties include overseeing staff. Although the beneficiary is not required to supervise personnel, if it is claimed that his managerial duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial for the purpose of determining whether he meets the alternative requirement for a managerial capacity position. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the duties of the general manager, assistant to the general manager, or the accounting clerk. In response to the director's request for additional details regarding the positions of these employees and their duties, the petitioner merely provided their job titles and stated that

each employee was a college graduate. Furthermore, no evidence pertaining to the educational credentials has been submitted.

The mere possession of a bachelor's degree does not automatically confer managerial or executive status upon an employee; the totality of the organizational hierarchy and the role and duties of each employee must be examined when determining if a beneficiary is primarily engaged in managerial or executive duties. Therefore, absent a more detailed description of the duties of the beneficiary's subordinates, and any educational qualifications needed to fill such positions, the AAO cannot determine whether the beneficiary is supervising professional employees.

Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. While the organizational chart does depict the beneficiary at the top of the hierarchy, with the general manager overseeing the assistant general manager and the inventory and shipping control employee, and the assistant general manager overseeing the accounting clerk, the record is complete devoid of details with regard to the duties and roles of these employees. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Most importantly, the petitioner has provided insufficient evidence to corroborate its claims. Although the petitioner submitted payroll records for the first two quarters of 2006, the records for the second quarter omit the names of the employees. Furthermore, no documentation has been submitted to support the claim that the petitioner employed four persons at the time the petition is filed, as there is no evidence of wages paid to employees after June 30, 2006. 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)). Moreover, without documentary evidence to support the claims, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record contains no evidence of the petitioner's employment of the general manager or the accounting clerk.

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. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As stated above, there is no evidence that the beneficiary oversees a staff of professional employees. In addition, there is no documentary evidence to support a finding that such subordinates are currently employed by the petitioner. As such, the AAO concurs with the director's finding that the petitioner has failed to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity.

The record as presently constituted 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, 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 submitted sufficient evidence to establish that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it is eligible for an extension of the initial one-year "new office" validity period for another reason not addressed in the denial. As previously noted, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides strict evidentiary requirements that the petitioner must satisfy prior to the approval of this extension petition. Upon review, the petitioner has not submitted evidence that the United States entity has been doing business for the previous year as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H). The record indicates that the petitioner was established in September 2005. The petitioner, therefore, is required to demonstrate that it has been doing business continually for the year preceding the filing of the instant extension.

The petitioner submitted a number of invoices and documents suggesting that it has been selling its goods on a regular basis. However, the earliest invoice documenting the sale of the petitioner's goods dates back to June 2006. Since the petition was approved in December 2005, the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is no evidence that the petitioner was doing business from December 2005 through May of 2006, as required by the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B). 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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she 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.

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.