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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

D3

[redacted]

FILE: WAC 02 197 53679 Office: CALIFORNIA SERVICE CENTER Date: APR 4 2005

IN RE: Petitioner: [redacted]
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)

ON BEHALF OF PETITIONER:

[redacted]

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 appeal will be dismissed.

The petitioner is described as a bakery and confectioner. It seeks authorization to employ the beneficiary temporarily in the United States as its auditor. The director determined that the petitioner had not demonstrated that the beneficiary will be employed in a primarily executive or managerial capacity.

On appeal, counsel asserts that the director misread the evidence provided by the petitioner and that the beneficiary will establish a management department.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 United States petitioner was incorporated in January 2001 and stated that it is a 51 percent owned subsidiary of Sung Sim Dang located in Taejon, Korea. On the Form I-129, the petitioner stated that it has 3 employees and its gross annual income was $280,000. The petitioner seeks to employ the beneficiary at an annual salary of $36,000.

The only issue in this proceeding is whether the beneficiary has been and will be primarily performing managerial or executive duties.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means 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), provides:

> The term "executive capacity" means 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.

When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2 (l) (3) (ii). In this instance, the petitioner stated that the beneficiary will be employed in the position of auditor.

The petitioner stated the beneficiary's position is an executive management position and her responsibilities are:

- Examine and analyze accounting records to determine financial status of establishment;
- Prepare financial reports concerning operating procedures;

- Reviewing data regarding material assets, net worth, liabilities, surplus, income and expenditures;
- Direct financial activities of organization, planning, procurement, and determination to capital assets, expenses and preparation of budgets.

The petitioner also stated that the beneficiary would make frequent trips to Korea to report on the U.S. operation's progress and to coordinate the implementation of the parent company's operational standards in the U.S. The petitioner provided the foreign company's organizational chart indicating the beneficiary holding the position of auditor. The petitioner also submitted the U.S. company's organizational chart showing the position of auditor below the position of president.

On July 19, 2002, the director issued an extensive request for evidence, which in pertinent part requested the following:

- Payroll Records: Present copies of the foreign company's payroll record pertaining to the beneficiary for the year preceding the filing of the first petition for L-1 status. Specify when the beneficiary was hired, the positions that were held and why the beneficiary was selected for the position in the U.S.
- Foreign Company's Organizational Chart: Submit a copy of the foreign company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current names of all executives, managers, supervisors and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also, include a brief description of job duties, education level and annual salaries (in U.S. Dollar equivalents) for all employees under the beneficiary's supervision. The chart submitted is vague in nature.
- Duties abroad: Submit a more detailed description of the beneficiary's duties abroad. Be specific. Indicate exactly whom the beneficiary directs including their job title and position description. List all employees under the beneficiary's direction. Also, indicate percentage of time the beneficiary spends in each of the listed duties.
- Manager or Executive: Submit the following evidence to establish that the beneficiary has been or will be performing the duties of a manager or executive with the U.S. company:
- Employees in the U.S.: Indicate the total number of employees at U.S. location where the beneficiary will be employed.
- U.S. Business Organizational Chart: Submit a copy of the U.S. Company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current names of all executives, managers, supervisors and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties, educational level, annual salaries/wages (in U.S. Dollar equivalents), and immigration status for all employees under the beneficiary's supervision. Finally, explain the source of remuneration of all employees and explain if the employees are on salary, wage, or paid by commission.
- Duties in the U.S.: Submit a more detailed description of the beneficiary's duties in the U.S. Be specific. List education and employment qualifications for the position in the U.S. Company. Include evidence that the beneficiary meets the petitioner's qualifications and, if required, that

> the beneficiary has the ability to speak, read, and write English. Indicate exactly whom the beneficiary directs including their job title and position description. List all employees under the beneficiary's direction. Also indicate percentage of time spent in each of the listed duties.

The petitioner submitted a certificate of employment signed by the president of the foreign company, [redacted] indicating that the beneficiary was employed as the auditor from October 18, 1994 until May 27, 2002 (present). It is noted that the president of the foreign company is also president of the U.S. company. The petitioner submitted a detailed organizational chart for the foreign company which clearly identified the beneficiary's position in the chart and listed all employees under the beneficiary's supervision by name and job title. It also included a brief description of job duties for each department, education level and annual salaries (in U.S. Dollar equivalents) for all employees under the beneficiary's supervision. It did not include the percentage of time the beneficiary spent in each of the listed duties.

The petitioner also submitted a more detailed organizational chart for the U.S. company which included a brief description for the beneficiary's position and the director of sales and marketing position. The petitioner augmented the beneficiary's position description by stating the beneficiary would be responsible for: "Financial Planning, Direct business activities, Control chain stores activities, Audit books and records, the duties she will perform will be a kin [sic] to those of a Chief Financial Officer. She will hold the title of 'Auditor.'"

This chart included the names, educational level, immigration status, dates of employment and salary for the four employees listed under the beneficiary's supervision. The petitioner did not indicate the percentage of time the beneficiary will spend in each of the listed duties.

On October 17, 2002 the director issued a decision denying the petition. The director stated the form provided by the petitioner to the California Employment Development Department showed the petitioner had four employees which include the president, another officer, and two employees who appear to be clerical part-time or contract workers, because no taxes were withheld from these two workers. Additionally, the director found this information conflicted with an organizational chart submitted by the petitioner that showed the beneficiary supervising thirteen employees.

In his decision, the director found the company already had two corporate officers who are in charge of the overall operation of the business. The director stated "[I]t appears at best, the beneficiary's duties, will be that of an auditor/bookkeeper as opposed to performing executive or managerial duties." The director concluded that in light of the overall purpose and stage of development of the organization, the petitioner has not demonstrated that the U.S. business "realistically requires another position involving primarily managerial or executive responsibilities within the meaning of 8 C.F.R. § 214.2 (l)(ii)(B)."

On appeal, counsel for the petitioner asserts that CIS erred in its analysis of the organizational chart of the parent company. Counsel explains that CIS requested the foreign company's organizational chart in its request for evidence. Counsel asserts that CIS compared the parent company's organizational chart with the Form DE-6 which reflects the U.S. company employees. The AAO agrees with counsel's explanation with regard to this inconsistency, however, the petitioner has not established that the beneficiary's duties will be in a primarily managerial or executive capacity.

On appeal, counsel emphasizes "the petitioner proposes to employ the beneficiary as an auditor/controller position for a period of three years." Counsel asserts that CIS incorrectly concluded that the petitioning company was not of sufficient size to support employment of the beneficiary. Counsel explains "the petitioner is expanding its business with the addition of chain stores in local and urban areas. The U.S. subsidiary was established and has been operated for only one year."

Counsel's arguments 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). Moreover, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A petitioner 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. Therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of either capacity.

Based on the current record, the AAO is unable to determine whether these duties listed by the petitioner constitute the majority of the beneficiary's duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties are managerial or executive in nature, and what proportion are actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The petitioner has failed to establish any clear distinctions between the proposed qualifying and nonqualifying duties of the beneficiary. Specifically, the petitioner submitted no information to establish the percentage of time the beneficiary actually performs or will perform the claimed managerial or executive duties. It has been noted in the record that there are only four employees working at the bakery, and that two of those employees are executives. Based on the Form DE-6 the remaining two workers are in part-time positions. The beneficiary's position would be the third managerial or executive position. There is no mention in the record of any bookkeeper working for the petitioning enterprise, therefore relieving the beneficiary from performing nonqualifying duties.
As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See s*ections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary will be managing the organization, or managing a department, subdivision, function, or component of the company. There are two other executives in the four-employee business. The petitioner has not shown that the beneficiary will be functioning at a senior level within an organizational hierarchy. Further, the petitioner's evidence is not persuasive in establishing that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing non-qualifying duties. Based on the evidence submitted, it cannot be found that the beneficiary has been employed in a primarily executive or managerial capacity.

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.