U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

File: WAC 02 210 51400 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

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

IN BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to extend the employment of its Chief Executive Officer as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Nevada, and is engaged in the import and export business. The petitioner claims that it is the subsidiary of Shin Chang Trading, located in Seoul, South 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 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 asserts that the director's decision was erroneous, and contends that the director's narrow review of the evidence submitted precluded a favorable finding on behalf of the petitioner. In support of this assertion, the petitioner submits a brief and additional evidence.

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 management or executive capacity; and

(e) Evidence of the financial status of the United States operation.

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

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

(i) manages the organization, or a department, subdivision, function, or component of the organization;

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

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

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

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

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the initial petition, counsel for the petitioner alleged that the beneficiary has been employed by the U.S. entity in a primarily executive capacity. In lieu of providing an initial description of the beneficiary's duties for the past year, counsel instead provided a description of the beneficiary's intended duties for the next three years. A letter from the petitioner dated June 6, 2002 stated:

> As a CEO, [the beneficiary] is mainly to run the company and his main duty is to promote corporate sales and to manage personnel. He is also expected to build up [a] good working relationship with a network of potential clienteles [sic]. [The beneficiary] must make this corporation profitable by the end of [the] year 2003. He will also manage [the] company's policies. Furthermore, his task will also include taking care of the financing of the company.

In addition, a letter prepared by the president of the foreign entity dated May 31, 2002 provided:

> As CEO of our United States whole subsidiary, [the beneficiary] will keep running the company for [the] next three years. . . .

and

> [The beneficiary], an expert in the field of foreign trade, was involved in developing our business strategy at [redacted] Surely, with such experience and education, he is well qualified to lead our United States subsidiary . . . efficiently in [the] next three years.

On July 18, 2002, the director requested additional evidence establishing that the beneficiary was employed in a capacity that was primarily managerial or executive in nature. Additionally, the director requested specific documentation for the record, including:

(1) Evidence that the foreign entity was doing business abroad;
(2) Evidence that the beneficiary had been employed in a primarily managerial or executive capacity for the previous year;
(3) Evidence that the U.S. entity had been doing business during the previous year; and
(4) Documentation establishing that the beneficiary had secured a commercial lease.

In a response dated September 30, 2002, the petitioner, through counsel, submitted a detailed response accompanied by the documentation requested by the director. Counsel's response, which provided a detailed overview of the beneficiary's duties, also included a breakdown of the percentages of time the beneficiary spent working on each task. In addition to addressing the points raised by the director, counsel provided a description of the title and duties of the beneficiary's sole subordinate employee, an organizational chart for the U.S. entity, and photographs of the petitioner's place of business.

On January 16, 2003, 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, stating that "the record does not establish that the U.S. entity contains the organizational complexity to support a managerial or executive position." Specifically, the director focused on the lack of evidence to support the petitioner's claim that the beneficiary in fact supervised two employees and was therefore a manager or executive.

On appeal, counsel for the petitioner asserts that the director's decision was unwarranted and unsupported, and alleges that the director disregarded the recent documentary evidence provided as evidence of the petitioner's current status. Specifically, counsel alleges that the director limited his review of the petitioner's performance and thus the beneficiary's position by looking solely to the documentary evidence from the year 2001. Counsel concluded that this error resulted in an unfavorable decision for the petitioner. Counsel's main assertion on appeal is that Citizenship and Immigration Services should review the entire scope of the petitioner's performance in the U.S. from its inception up to its most recent point.

Upon review, counsel'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. 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.

Prior to adjudication of the petition, counsel contended that the beneficiary has been employed in a capacity that was primarily executive in nature. In support of these contentions, counsel submitted a detailed response

to the director's request for evidence, which established that the beneficiary holds a Bachelor of Science degree in chemical engineering. In addition, counsel provided a breakdown of the beneficiary's duties while employed by the U.S. entity during the previous year, accompanied by the percentages of time he spent performing each task. In Exhibit 7 of the petitioner's response to the request for evidence, the beneficiary's duties were described in part as follows:

- Making and Executing Corporate Policies and Strategies (20%)
- Daily Managing of Company (40%)
- Corporate Financing (10%)
- Technical Sales Services (20%)
- Supervising Employee (10%)

Under each of the above headings, counsel provided additional detail with regard to the nature of the tasks required. The organizational chart provided indicated that the beneficiary employed one other employee, as Secretary of the company, who in turn possessed a business degree.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the beneficiary was not employed in a primarily managerial or executive capacity. In both the initial petition and in response to the request for evidence, counsel for the petitioner indicates that the U.S. entity was still "taking off," thus explaining the reasons for the small number of employees. On appeal, counsel alleges repeatedly that Citizenship and Immigration Services (CIS) should look at the performance and expansion of the U.S. entity after the filing of the petition and up to the present time, and alleges that the director's failure to do so prior to adjudication was erroneous. The AAO disagrees for several reasons.

First, the record indicates that the beneficiary's initial visa was granted on July 31, 2001, and was valid through July 30, 2002. According to the record, the beneficiary did not arrive in the United States until September 19, 2001.[1] Counsel and the petitioner both state repeatedly that the beneficiary worked alone until March of 2003, when the U.S. entity hired a second employee to serve as Secretary for the entity. Counsel, however, alleges that although the beneficiary was working alone in the United States for approximately six months, he still functioned in a capacity that was primarily managerial or executive. This position is not persuasive, because it is clear that for the first six months of the operation, the beneficiary was performing all

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[1]The AAO notes that there are several discrepancies in the record with regard to the beneficiary's arrival in the United States. Counsel's letter dated June 13, 2002, the U.S. entity's letter dated June 6, 2002, and the foreign entity's letter dated May 31, 2002 state that the beneficiary arrived in the United States in August of 2001. Exhibit 7 of the response to the request for evidence, however, alleges that the beneficiary arrived in the United States in late October of 2001. Finally, counsel's letter dated January 21, 2003 states that the beneficiary arrived in the United States on September 19, 2001. 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). For purposes of this analysis, the AAO will refer to the most recent statement in discussing the beneficiary's employment in the United States.

tasks necessary to operate the business. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner alleges that after the arrival of the Secretary in March of 2003, the beneficiary continued to primarily function in a managerial or executive capacity, and supervised the Secretary with regard to day-to-day operations. This contention, however, is unsupported by persuasive evidence. As previously discussed, Exhibit 6 of the response to the director's request for evidence broke down the beneficiary's duties into percentages. Included in this breakdown was an allocation of 20% of his time to providing technical support to customers, in addition to 40% of his time being devoted to the corporate books and to tax-related affairs. Clearly, these duties are not managerial or executive in nature. Additionally, the organizational chart provided indicates that an accountant has been retained on a contractual basis. If this is the case, it is unclear why the beneficiary would be devoting 40% of his time to tax-related affairs. Finally, the overview states that only 10% of his time is spent supervising the one other employee of the U.S. entity. Based on the evidence provided, the AAO is not convinced that the beneficiary has been acting in a primarily managerial or executive capacity.

Counsel alleges that the director erroneously relied solely on the small number of staff employed by the U.S. entity as a means for determining that the beneficiary's position was not primarily managerial or executive, and should have looked to the totality of the circumstances. Citing *Mars Jewelers, Inc. v. Immigration and Naturalization Services*, 702 F. Supp. 1570 (ND GA 1988),[2] counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See also* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, contrary to counsel's allegations, it is appropriate for 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, counsel for the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Going on record

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[2]The AAO acknowledges that counsel also cites two unpublished decisions. Counsel fails to equate the holdings and facts of these particular cases with the facts at hand, and therefore the AAO finds them unpersuasive for purposes of this decision. Additionally, since unpublished decisions do not serve as binding precedent upon the AAO, these decisions will not be considered during this analysis.

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).

Specifically, the staffing level of the U.S. petitioner, namely, a company with only two executive positions and no subordinates to perform the sales, marketing, and administrative functions, raises doubts with regard to the petitioner's claim that the beneficiary has been performing duties that are primarily managerial or executive in nature. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a one-year-old import and export company. The firm employed the beneficiary as Chief Executive Officer, plus a Secretary.[3] The AAO notes that both of the employees have managerial or executive titles. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as Chief Executive Officer and one other employee as Secretary of the company. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary has been employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Finally, counsel's main assertion on appeal is that since the filing of the petition, the U.S. entity has hired additional employees and plans to hire more subordinates as part of its business expansion, and relies on this business plan as a basis to justify the employment of the beneficiary in an executive or managerial capacity. Counsel provides on appeal a copy of the U.S. entity's annual report for 2002, and urges the AAO to consider the petitioner's current expansion and viability as a factor for reconsideration. Specifically, counsel states that CIS should give weight to the new evidence submitted in October of 2002 in response to the request for evidence, and that CIS must look beyond the number of employees the U.S. entity employs to its "significant growth in cash flow and the presence of significant customers or clientele or similar elements." This argument is misplaced and erroneous. 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.

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[3] The organizational chart submitted in response to the request for evidence also indicates the employment on a contractual basis of an attorney and an accountant. Although the record indicates that the petitioner has contractual employees in the areas of accounting and legal services, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190.

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, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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

Beyond the decision of the director, the AAO notes several significant deficiencies in the record of proceeding that were not addressed by the director. First, the record contains insufficient evidence that the beneficiary was employed for at least one continuous year abroad with a qualifying organization within the three years preceding the filing of the petition. In this case, the qualifying organization is [redacted] Trading. The record states that the beneficiary was employed by [redacted] from 1996 to December 30, 2000. [redacted] Tech then merged with the parent company, [redacted] in January 2001, and in the same month the beneficiary began his employment with this entity. The initial visa petition was granted on July 31, 2001, and the beneficiary subsequently left for the United States shortly thereafter. Consequently, the beneficiary's employment with the parent company, Shin Chang Trading, lasted no more than nine months in 2001. Although he was previously employed for several years without interruption by the company which merged with the qualifying organization for several years without interruption, this entity ceased to exist with the completion of the merger. The company by which the beneficiary needed to be employed for one continuous year, in order to satisfy the regulatory requirements, is Shin Chang Trading. Since the petitioner was employed for less than one year by this entity, the petition will, for this additional reason, be denied.

Second, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. The petitioner submitted a total of six invoices for the period from January 2002 through April 2002. However, the petition was approved in July of 2001. Thus, pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), 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 July 2001 through January 2002, and no subsequent evidence that it conducted business after April of 2002.

Finally, beyond the decision of the director, the record reflects that the U.S. entity did not secure a commercial lease until April of 2002, nearly eight months after the approval of the original new office petition. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires a petitioner that seeks to open a new office to submit evidence that it has acquired sufficient physical premises to commence doing business. In the present matter, either the petitioner did not comply with this requirement , misrepresented that they had complied, or the director committed gross error in approving the petition without evidence of the petitioner's physical

premises. Regardless, the approval of the initial petition may be subject to revocation based on the evidence submitted with this petition. *See* 8 C.F.R. § 214.2(l)(9)(iii).

The AAO also notes that the photographs provided of the U.S. entity's business premises appear to be located in the bedroom and garage of a house. The lease does not indicate that the premises being leased is one of multiple units at that address, yet the only photographs of the "entrance" are those of interior double doors. The AAO notes that the double doors resemble the doors of a closet, as there appears to be no exterior lock on these doors. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). For this additional reason the petition may not be approved.

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.