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File: WAC-04-006-50769 Office: CALIFORNIA SERVICE CENTER Date: **APR 04 2005**

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 General Manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized under the laws of the State of California and is engaged in the manufacture and distribution of retail merchandise. The petitioner claims that it is the branch of Il Woo Korea Co., located in Seoul, Republic of 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.

On December 7, 2003, the director issued a Notice of Intent to Deny. After considering the petitioner's response, the director denied the petition concluding that (1) the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity, and (2) that there was no qualifying relationship with the foreign entity. In support of these conclusions the director noted inconsistencies and omissions in the record that undermined the credibility of petitioner's claims.

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 Citizenship and Immigration Services (CIS) erred in determining that the beneficiary's duties not were executive in nature; that a qualifying relationship did not exist; and that no evidence was submitted to show amended tax returns were filed. In support of this assertion, the petitioner submits 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 first 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.

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.

In the initial petition, petitioner's counsel described the beneficiary's job duties as follows:

[The beneficiary] is president and chief executive officer of both Il Woo., Co. and Il Woo (USA) . . . . [The beneficiary] is the president and CEO; he will direct the manager and the administrative assistant. [The beneficiary] develops and expand[s] the current U.S. base. In his capacity as president, he will analyze the current U.S. market and direct all marketing efforts. He is the sole contact to the parent company, Il Woo Co. [.]. As president and CEO, [the beneficiary] directs marketing efforts, project management and sales. [The beneficiary] continues to analyze the sales statistics and monitor the "best sells" and customer preferences for the parent company's products. [The beneficiary] analyzes the potential territories researched by Steven Rhee, and direct[s] whether the preliminary contacts should be made, introduction to the products, etc..

On December 7, 2003, the director issued a notice of intent to deny. Specifically, the director noted that there was insufficient evidence to demonstrate that the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees who will relieve the beneficiary from performing non-

qualifying duties. In addition, the director found that the beneficiary appeared to have been performing the routine non-qualifying duties of the day-to-day operations of the business, rather than directing activities through executives or managers, or other professionals.

In response, counsel responded with vague assertions that the beneficiary's duties were executive in nature and "would in North America require either an MBA or equivalent experience." Counsel did not detail any of beneficiary's actual duties, instead relying on explanations of retail economics to qualify the assertion that beneficiary was and would be employed in an executive capacity.

On January 16, 2004, the director denied the petition concluding that (1) the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity, and (2) that there was no qualifying relationship with the foreign entity. In support of these conclusions the director noted inconsistencies and omissions in the record that undermined the credibility of petitioner's claims.

On appeal, counsel for petitioner stated that beneficiary's duties were as follows:

[The beneficiary]'s specific executive and managerial authority here includes (in order of the sales cycle):

- a) approving approaches to potential clients targeted by the Manager;
- b) oversight of sales presentations; oversight of sales training for wholesalers' and distributors' reps[;]
- c) communicating with Korea (and in the future, China) on
  - i) production capacity
  - ii) cost
  - iii) scheduling
- d) based on the above, [the beneficiary] would then approve the terms and conditions of each sale. His considerations in approving prices must include allowances for forecasting currency fluctuations, review of clients' credit worthiness (i.e[.] international letters of credit and banking arrangements) and importantly his own experience and knowledge of the production status and capabilities of the factory[ies]. His discretion in such matters is critical given the tight margins and competitive environment.

Upon review, counsel's assertions are not persuasive. The vague job description provided by counsel is not adequate to illustrate that beneficiary would be performing primarily executive duties. Assertions such as "[h]is discretion in such matter is critical given the tight margins and competitive environment" and "Communicating with Korea (and in the future, China) on i) production capacity ii) cost iii) scheduling" are not specific enough to prove that the beneficiary's duties are executive in nature. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co.*,

*Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.*

Even though the petitioner claims that the beneficiary directs and manages sales and marketing activities, it does not credibly claim to have anyone on its staff to actually perform the marketing and sales functions in order to relieve beneficiary of performing such day-to-day activities. Petitioner claims three employees, including the beneficiary, however the fact that no labor costs are reported on the IRS Form 1120 and that no state taxes were withheld calls into question whether or not these individuals are employees or subcontractors. On appeal counsel asserts that they qualify as employees under California law but submits no documentary evidence to support these assertions. Assertions of counsel do not constitute evidence, thus the director's reasoning has not been effectively rebutted. Counsel does not explain the discrepancy with regard to having no labor costs. No further documentary evidence on the alleged employees and their duties was submitted, thus, either the beneficiary himself is performing the sales and marketing functions or he does not actually manage the sales and marketing functions as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of beneficiary's claimed duties. Doubt cast on any aspect of petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of a visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the beneficiary is performing sales and marketing functions, the AAO notes that 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).

Counsel states that the beneficiary would allegedly act in an executive capacity, but makes several assertions concerning the duties of beneficiary that indicate reliance on the criteria for employment in a managerial capacity. For instance counsel claims that "[t]he functionality of selecting (and de-selecting) sub-distributors and wholesalers is arguably no different from hiring and firing sales people" This is presumably a reference to section 101(a)(44)(A)(iii) of the Act, which defines an element of managerial capacity in part as "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) . . . ." Counsel should note that a petitioner may not analogously comply with the statutory requirements, but must actually comply with statute. In order to comply with the statute, the beneficiary must be primarily employed in a managerial or executive capacity as they are defined by the Act. The petitioner's counsel repeatedly stated that beneficiary would be employed as an executive, and yet has failed to illustrate how beneficiary's actual day-to-day duties would satisfy the elements of executive capacity as defined by regulation. The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity, and may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. In the instant case, as petitioner is claiming that beneficiary will be the chief executive, thus the petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive capacity. However, the petitioner also refers to beneficiary's as General Manager makes numerous claims that beneficiary acts in a managerial capacity. Therefore, the petitioner must additionally establish that beneficiary's employment will meet the four criteria for the definition of managerial capacity as well. Petitioner has not satisfied the burden for either, much less both.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The regulation 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 or managerial capacity, as required by 8 C.F.R. section 214.2(l)(3).

The second issue in this proceeding is whether a qualifying relationship exists with a qualifying foreign organization as defined by 8 C.F.R. 214.2(l)(1)(ii)(G). Upon review, the petitioner has failed to establish a qualifying relationship on three grounds: first, the petitioner failed to clarify whether it was seeking to qualify as a branch or subsidiary of the overseas entity; second, the petitioner failed to provide adequate independent and objective evidence of its ownership and control; and third, the petitioner failed to establish that it is a qualifying organization.

In the denial the director pointed out that there were discrepancies in who actually owned and controlled petitioner because IRS Form 1120, U.S. Corporation Income Tax Return, submitted by the petitioner showed beneficiary, not Il Woo Co., as 100% owner. See petitioner's exhibit 10. For this reason the director based his denial in part on the lack of a qualifying relationship and noted that no corrective action had been taken with regard to IRS Form 1120. On appeal, counsel claimed that the tax forms that list the beneficiary as having ownership have been corrected by a filing with the IRS and rely on stock issued to Il Yoo Co. as evidence of control and ownership by the foreign parent. Counsel notes that the amended tax returns were filed on January 2, 2004, after the director denied the petition.

Upon review counsel's assertions are not persuasive. Filing amended tax returns a year after the claimed transaction raise serious questions regarding the truth of the facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997). The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply asserting that the reported ownership was a clerical error does not qualify as independent and objective evidence. Evidence that the petitioner creates after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice. While the AAO acknowledges that an amended tax return have been filed, it has still not been proven that such designation was a clerical error, merely that it has been changed. Coupled with little additional evidence of ownership and control or evidence that either company is doing business, an amended tax return carries little weight. In the instant case petitioner should have adequately responded to director's Notice of Intent to Deny by providing additional evidence of ownership and control and clarifying whether petitioner was attempting to qualify as a branch office or a subsidiary of Il Woo Co.. Instead, the petitioner relies solely on the issuance of a stock certificate to Il Woo Co. as evidence of control and ownership and thus a qualifying relationship.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1988). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. The petitioner's sole piece of evidence on ownership and control – a stock certificate – was called in to serious doubt by the fact that IRS Form 1120 showed beneficiary as owner. Petitioner had the opportunity to provide additional evidence of ownership and control and failed to do so.

Petitioner was made aware of the discrepancies concerning the qualifying relationship and their impact on the petition in the director's Notice of Intent to Deny. The director stated in the Notice of Intent to Deny that "[o]wnership and control are the determinative factors for establishing a qualifying relationship between the United States and foreign entities for purposes of establishing a qualifying relationship." Further, the director's line of analysis was in lieu of the petitioner's claim that petitioner was a subsidiary of the foreign entity and not a branch office, as originally claimed by petitioner. *See* letter, Il Woo (USA) corporation, October 3, 2003. Petitioner's counsel did not clarify on appeal whether petitioner was seeking to qualify as a branch office or subsidiary of the foreign parent company.

A branch means an operating division or office of the same organization housed in a different location. 8 C.F.R. § 214.2(l)(ii)(J). If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*; 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer.

The regulation at 8 C.F.R. section 214.2(l)(i)(ii)(L) defines an affiliate, in part, as "[o]ne of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity." In the instant case the petitioner is allegedly owned by Il Woo Co., and Il Woo Co. is owned by an entity other than itself, thus it does not qualify as one of two legal entities owned and controlled by the same group of individuals. The regulation at 8 C.F.R. section 214.2(l)(1)(K) defines a subsidiary, in part, as "a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity . . . ." Petitioner's only evidence of control is called in to question by the fact that it filed an IRS Form 1120 showing beneficiary as 100% owner. Thus, petitioner might qualify as a subsidiary had it submitted additional proof of actual control and ownership as requested by the director. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

Counsel either did not understand or chose not to respond to the issue of qualifying relationship except to assert that an amended tax return had been filed. If the petitioner elected - as presumed by director - to qualify the relationship with the foreign company as that of a subsidiary then evidence should have been submitted which would have conclusively established such relationship existed. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Accordingly, the petitioner has not established that there is a qualifying relationship with a qualified organization as defined by 8 C.F.R. section 214.2(l)(1)(ii).

For the foregoing reasons, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has failed to prove that it has been continuously and systematically doing business. While not directly addressed by the director, the minimal documentation of the petitioner's business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States. Specifically, under the regulation at 8 C.F.R. 214.2(l)(1)(ii)(G)(2), a petitioner must demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States. The regulation at 8 C.F.R. section 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. 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. While the petitioner did submit some bills of lading for items such as blankets and cups, the evidence covers a three to four month period and not the "previous year" prior to filing the petition. The AAO finds that the burden for proving regular, systematic and continuous business is far from met. For this additional reason, the appeal will be dismissed.

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 appeal will be dismissed.

ORDER:        The appeal is dismissed