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U.S. Citizenship and Immigration Services

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[redacted]

FEB 07 2005

FILE: LIN 02 079 54024 Office: NEBRASKA SERVICE CENTER Date:

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

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president as a nonimmigrant intracompany transferee pursuant to § 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 Illinois that is operating as a freight forwarding company. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Seoul, Korea. The petitioner now seeks to extend the employment of the beneficiary for three years.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary would be employed under the extended petition in a primarily managerial or executive capacity; and (2) that the petitioning organization is doing business in the United States.

On appeal, counsel contends that the beneficiary is employed by the United States entity is a primarily executive capacity as he is serving as the president and chief executive officer of both the petitioning organization and the foreign entity. Counsel states that the "detailed" job description previously provided by the petitioner demonstrates that the beneficiary "has wide discretionary decision making authority for the expansion and operating policies of both organizations." Counsel also claims that the record establishes that the petitioning organization is operating as a sales office of the foreign entity, and is "an integral part of providing quality service to the customers of [the foreign organization]." Counsel states that it is unrealistic to expect a new office to reach its full development within one year, and claims that the petitioner's "fairly in-depth business plan" reflects the business' development over the next three years. Counsel submits a brief and additional evidence in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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 AAO will first address the issue of whether the beneficiary would 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), 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner filed the nonimmigrant petition on January 7, 2002, noting that the beneficiary would be employed by the United States entity as its president. In a letter submitted with the petition, dated December 26, 2001, counsel provided the following description of the beneficiary's present and proposed job duties:

As President, [the beneficiary] has been responsible for establishing the company, establishing the business objectives and methods of implementation, overseeing the business operations, establishing business operation goals and expansion plans, overseeing the financial condition of the company, establishing operating policies, hiring/firing personnel.

[The petitioning organization] is submitting the instant petition for [the beneficiary] to continue to serve as President of the company. As President, [the beneficiary] will be responsible for establishing operating objectives and time frames, establishing US market presence for the business, establishing company policies, forming operating divisions of the company, overseeing the overall operations, reviewing financial condition[s] and reporting to the Korean parent corporation, and full discretion over hiring and firing of personnel.

Counsel submitted with the nonimmigrant petition Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return, for the quarters ending March, June and September 2001. Counsel also provided a statement from the petitioner, dated November 17, 2001, indicating that, other than the beneficiary, it presently employs a full-time ocean export operator who is responsible for the petitioner's "[e]xport operation for Far-east development."

The director issued a request for additional evidence on February 7, 2002, asking that the petitioner submit a statement from an authorized official of the petitioning organization describing in detail the job duties presently performed by the beneficiary and the tasks that the beneficiary would perform under the extended petition. The director also requested that the petitioner submit a description of its staff, including the number of employees and position held by each.

Counsel responded and submitted a letter from the petitioner, dated February 20, 2002. The petitioner explained in its letter that over the past year the beneficiary has served as the president of both the United States and foreign organizations, and in this position, is responsible for:

> [T]he overall supervision and management of the 2 organizations including developing company expansion plans (such as establishing a China branch and the US branch office), negotiating contracts with export agents, assigning employees for obtaining marketing data for establishment of additional branch locations, working with company executives for the marketing of expanded services and location of international export partners to provide their service, assignment of personnel for engaging in marketing functions to expand client base, establishing operating divisions, delegating responsibilities, overseeing the financial operating conditions and making appropriate changes, promoting personnel.

Counsel submitted an organizational chart of the petitioning company that identified the beneficiary as the president with a coordination director as his subordinate. The chart also reflected the petitioner's claimed relationship with a third United States company, United Transportation (UTS), which is responsible for the foreign entity's customs and shipping. The petitioner noted in its February 2002 letter that due to the nature of its business, which acts as a "service oriented" office support and coordination center for orders being shipped to and received from the foreign entity, it is not necessary to employ many workers. The petitioner explained that the actual storage and shipment of merchandise is handled by UTS.

In a decision dated March 22, 2002, the director determined that the petitioner did not demonstrate that the beneficiary would be employed by the United States entity in a qualifying capacity. The director stated that the beneficiary's job description does not provide an adequate outline of the specific tasks the beneficiary has been performing in the United States and would perform under the extended petition. The director noted that the job description also encapsulates the job duties of the beneficiary's position as president in the foreign organization. The director also noted a discrepancy in the record regarding the job title of the beneficiary's subordinate employee, who was referred to as both an ocean export operator and a coordination director, and indicated that the petitioner failed to provide her job description. The director concluded that the petitioner's organizational structure would not support the beneficiary in a primarily executive position. Accordingly, the director denied the petition.

In an appeal filed on April 19, 2002. counsel provides the following similar job description for the beneficiary as that previously outlined above:

> Serving as President and CEO of both [the foreign entity] and [the petitioning organization]. Responsibility for the overall supervision and management of the 2 organizations including developing company expansion plans (such as establishing a China branch and a US branch company), negotiating contracts with export agents, assigning employees for obtaining marketing data for establishment of additional branch locations, working with company executives for the marketing of expanded services and location of international export partners to provide service, assignment of personnel for engaging in marketing functions to expand client base, establishing operating divisions, delegating responsibilities, overseeing the financial operating conditions and making appropriate changes, sole discretionary decision making regarding day to day operations of both companies.

Counsel challenges the director's finding that the beneficiary's job description did not adequately outline the beneficiary's tasks and states:

> Contrary to [Citizenship and Immigration Services' (CIS)] contention, the job description provided is quite detailed and cannot be construed as being general in nature. The duties are well defined and are easily broken down into specific job duties necessary to expand and operate the organizations. It is clear that [the] Beneficiary's duties are executive in nature. [The] Beneficiary's duties also include presiding over the Korean parent corporation as its President. [The] Beneficiary has a proven record of success in developing a freight forwarding business as shown through the success of the foreign parent corporation. [The] Beneficiary's duties cannot be stated as clerical or auxiliary in nature nor is he engaged in the performance of the day to day tasks necessary to run the operation. [The] Beneficiary also has the specialized expertise in the freight forwarding business and must make the essential decisions necessary for the expansion of the business. He has exclusive discretionary decision making authority over both entities and receives little direction from the board[s] of directors. Additionally, as the President, he is operating at the most senior level in both organizations.

Counsel also cites four unpublished AAO decisions as evidence that CIS should not rely solely on the size of the petitioner's staffing levels when determining managerial or executive capacity. Counsel states that the beneficiary may qualify as an executive even if he is the petitioner's sole employee. Counsel further notes that the petitioner's use of independent contractors would satisfy the requirement that the beneficiary works through other employees rather than performing the business' functions himself.

On review, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. In order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's job duties and the staffing of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity. 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.

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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.* Additionally, as the definitions of executive and managerial capacity have two parts the petitioner must first show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Based on the current record, the AAO is unable to determine whether the claimed executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-executive administrative or operational duties. The petitioner's job description of the tasks to be performed by the beneficiary indicates that a portion of the beneficiary's time would be spent performing non-executive functions of the organizations. Specifically, the petitioner noted that the beneficiary would be responsible for negotiating contracts, marketing the petitioner's services, and locating companies to provide export services. As the petitioner did not provide an allocation of the amount of time the beneficiary would spend on the non-qualifying functions of the business, the AAO cannot determine whether the majority of his time would be dedicated exclusively to executive tasks as claimed by counsel. 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).

Additionally, while the petitioner's job description provides an outline of the job duties to be performed by the beneficiary, it does not seem plausible that the United States corporation can sufficiently operate with the beneficiary and a subordinate employee. 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* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, 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.*

At the time of filing, the petitioner employed the beneficiary as president and a second employee as an ocean export operator. The AAO notes that in the petitioner's response to the director's request for evidence the petitioner identified the subordinate employee as a coordination director. Although requested by the director, the petitioner did not submit a description of the job duties to be performed by the ocean export operator/coordination director. Counsel submits on appeal the petitioner's business plan, which includes a job description for the coordination director. As the petitioner was previously put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated the AAO will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director. At the time of the director's review, the record did not contain sufficient evidence to determine who is responsible for the "service oriented" functions of the business, which the petitioner stated include coordinating and confirming reservations and shipments. It does not appear therefore that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and one subordinate employee.

The AAO acknowledges the petitioner's claim that additional personnel are not necessary due to the nature of the petitioner's business. The petitioner bases this claim on its supposed relationship with UTS, a United States storage and shipping company, which the petitioner stated is responsible for clearing shipments through customs and receiving and inspecting shipments. The petitioner, however, offers no documentary evidence establishing its relationship with UTS or confirming the terms of the relationship. 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).

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 is to be 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.

The AAO also acknowledges counsel's claim on appeal that the petitioner has hired an additional two employees since the filing of the nonimmigrant petition. This information however will not be considered. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Furthermore, the petitioner's claim that the beneficiary is continuing his role as president of the foreign entity while employed in the United States has no relevance on the beneficiary's employment in the United States as a manager or an executive. Section 101(a)(15)(L) of the Act and the regulation at § 214.2(l)(1) require that the beneficiary render services in a managerial or executive capacity to a parent, branch, affiliate or subsidiary of the beneficiary's foreign employer. In other words, the beneficiary's employment in a managerial or executive capacity is determined by the functions performed by the beneficiary during his employment with the United States entity.

Lastly, counsel references on appeal several unpublished AAO decisions as evidence of the beneficiary's employment in a primarily executive capacity. Counsel, however, failed to specifically establish that the facts of the instant petition are analogous to those in the referenced decisions. Counsel's summary of the decisions and subsequent statement that "[t]he instant case falls squarely within the parameters of the [AAO] decisions" is not sufficient. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Based on the foregoing discussion, the petitioner failed to demonstrate that the beneficiary would be employed under the extended petition in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

The AAO will next address the issue of whether the petitioning organization is doing business in the United States.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines "doing business" as:

> [T]he regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

Counsel stated in her December 25, 2001 letter submitted with the nonimmigrant petition that the petitioning organization has been operating in the United States since April 2001 as an import, export and freight forwarding company, which sells the services provided by the beneficiary's foreign employer. As evidence of the petitioner's business in the United States, counsel provided: (1) the petitioner's articles of incorporation

and corporate certificate; (2) a lease agreement entered into on January 15, 2001; (3) three photographs of the petitioner's office door and inside office space; (4) June through October 2001 statements for inventory; (5) a letter from the petitioner's financial institution confirming the existence of a checking account balance of $60,827.28 on November 20, 2001; (6) bank statements for August through October 2001; and (7) a financial statement for the period ending October 31, 2001 reflecting a gross profit of $68,500.

In his February 7, 2002 request for evidence, the director asked that the petitioner submit documentary evidence demonstrating that it has conducted the regular, systematic and continuous provision of goods or services in the United States for the previous year.

In its February 20, 2002 letter in response to the director's request for evidence, the petitioner stated it was established to provide sales and office coordination support services in the United States to the foreign entity. The petitioner explained that the its primary function is to receive sales for the foreign entity from the United States, while UTS handles the foreign entity's customs procedures and shipping. The petitioner further explained:

> The US subsidiary is responsible for receiving orders from US customers shipping to the Pacific Rim and for tracking incoming shipments from Giant Express Co., Ltd., the Korean parent corporation. The US subsidiary is responsible for working closely with UTS for the purpose of clearing shipments through customs and performing inspecting functions and receiving the shipment which are stored at their storage facility.
>
> The US subsidiary receives a coordination and origination fee from the Korean parent corporation for sales orders initiated from its office and also for providing coordination service and support to incoming shipments originated by the Korean parent corporation.

Counsel submitted numerous statements titled tax payment invoices, inventory statements from June through November 2001, and partially translated applications for remittance. Counsel also provided several untranslated documents.

The director determined in his March 22, 2002 decision that the petitioner had not established that it has been doing business in the United States. The director noted that all invoices submitted in support of the petitioner's business were issued by the foreign entity, and stated that although the petitioner provided prepared invoices, the remittance was paid by UTS in care of the petitioner. The director stated that "the United States entity appears to have little function, with most major functions being performed by a third party agent of the foreign entity." The director concluded that the petitioner's functions of providing office coordination and support, receiving orders from United States customers and tracking incoming shipments were similar to those of an agent of the foreign company. The director determined that the petitioning organization was not doing business in the United States, and consequently, denied the petition.

On appeal, counsel states that the petitioning organization has been doing business continuously in the United States. Counsel references the petitioner's business plan submitted with the appeal as evidence of the petitioner's expansion over the next three years, and states that the petitioner will reach its full business potential if given the opportunity. Counsel claims that it is unrealistic for CIS to expect that the business will have reached its full development within one year, and states "[i]t takes time and investment to operate a business, acquire new clients, [and] develop a well-staffed company."

Counsel also submits letter from the petitioner, in which the petitioner explains its business operations. In its April 17, 2002 letter, the petitioner states that it is not an agent of the foreign entity, but rather provides freight-forwarding services to customers in the United States on behalf of the foreign entity. The petitioner provides:

> Our function is to facilitate the transport and clearance of the freight from one location to another. We get orders, we make the reservation on the transportation medium, we assist with filling out customs and other shipping documentation, we ensure receipt on the receiving side, we confirm reservations with the shippers, we utilize the services of a customs brokerage to help the client get the merchandise out of the customs and to make sure that the freight is ultimately delivered to the recipient. The greatest thing that we sell is our excellent service. If we do not provide good service and we do not follow through with the orders, etc. and freight does not get delivered in [a] timely manner, we would be out of business tomorrow.

The petitioner explains that due to licensing restrictions in the United States, which require that a company operate for three years in the United States prior to receiving federal licensing for freight shipping and customs, the foreign entity contracts with UTS as its customs brokerage house.

On review, the petitioner has not demonstrated that it is doing business in the United States. As correctly noted by the director, the record supports a finding that the petitioning organization is acting as an agent or office of the foreign entity as the services provided by the petitioner are dependent on the operations of the foreign corporation. In other words, the services offered by the petitioner are merely an extension of the foreign entity's business. This is further supported by both the petitioner's statement in its February 2002 letter that it receives orders from customers in the United States for products offered by the foreign company and counsel's statement on appeal that the petitioner makes reservations for the shipment of the foreign entity's products, assists with the completion of customs and shipping documentation, and confirms delivery. Based on the petitioner's representations, it is reasonable to conclude that the petitioning organization is functioning as a sales or customer service division of the foreign entity. Moreover, the fact that the petitioning organization is not paid directly by its United States customers but is instead compensated by the foreign entity further supports a conclusion that the petitioner is merely an agent or office of the foreign corporation. While the petitioner may maintain an office in the United States, this alone is not sufficient to establish that the petitioning organization is performing the regular, systematic, and continuous provision of goods and services. 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 petition will be denied.

ORDER: The appeal is dismissed.