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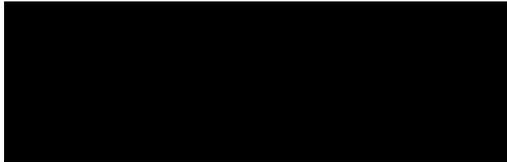
DA

File: WAC 04 046 53360 Office: CALIFORNIA SERVICE CENTER Date: **NOV 28 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 president 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 Texas that is engaged in the wholesale trade of filtration parts and automobile components. The petitioner claims that it is the subsidiary of Yong Il Transportation Co., Ltd., located in Incheon, Korea. The beneficiary was initially granted a one-year period of stay in order to open a new office in the United States and was subsequently received a two-year extension of stay. The petitioner now seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would 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 disputes the director's claim that the beneficiary is merely a first-line supervisor and asserts that the beneficiary is employed in a "managerial/executive" capacity.

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.

At 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 a November 25, 2003 letter submitted in support of the initial petition, the petitioner indicated that as president, the beneficiary will exercise wide latitude in discretionary decision making, formulate short-term

and long-term goals, establish and implement policies and hire, fire and promote employees. The petitioner indicated on Form I-129 that it employed three individuals at the time the petition was filed.

In support of the petition, the petitioner provided an organizational chart showing the beneficiary as "president & branch manager" supervising a corporate secretary, who in turn supervises a "purchasing and export administrator." In an attached statement, the petitioner provided brief job descriptions for the beneficiary and his subordinates:

President and Branch Manager – Responsibilities include managing entire U.S. branch office operation and develop new business opportunities. Also responsible for formulating both short term and long term goals and will continue to establish and implement policies of the company.

Corporation Secretary – Responsibilities include financial management and price negotiation with vendors. Has final authority to establish purchasing and selling prices. Report directly to the president.

Purchasing and Export Administrator – Responsibilities include search and obtaining potential source of supply, price negotiation and issuing purchase orders. Also responsible for handling of import and export transactions. Initiate new business projects under direct order and supervision from the president.

The petitioner provided the date of hire, salary and educational background for each employee, noting that the corporation secretary has a bachelor's degree in aerospace engineering and the purchasing and export administrator has a bachelor's degree in Chinese literature and a master's degree in speech communication.

On March 29, 2004, the director requested additional evidence. In part, the director instructed the petitioner to submit: (1) an organizational chart for the U.S. company clearly listing all employees under the beneficiary's supervision, and including a brief description of job duties, educational level, annual salaries wages and immigration status for all employees; (2) a list of all of the U.S. company's employees from the date of establishment to the present, including names, job titles, social security numbers, beginning and end date of employment, wages per week, and alien registration numbers and immigration status for any non-U.S. citizen employees; and (3) a detailed description of the beneficiary's duties in the U.S. and the percentage of time he spends on each of the listed duties.

In a reply dated June 16, 2004, the petitioner submitted a revised organizational chart showing that the beneficiary directly supervises the corporate secretary, purchasing and export administrator, and a "product support" employee as of April 2004. The petitioner attached a statement titled "List of Current Employees" which provides brief job descriptions for the beneficiary's subordinates identical to those submitted with the initial petition. The petitioner also included a job description for the product support employee hired in January 2004, indicating that he arranges shipping and advises customers of order status and schedule. The petitioner noted that the corporate secretary, who previously received a \$1,000 monthly salary and bonus, began working on commission only as of January 2004.

The petitioner provided a list of the five employees who have worked for the petitioner since it commenced operations in February 2001. Finally the petitioner submitted the following job description for the beneficiary:

- Manage and maintain daily business operation (40%)
- Identify and review new products for possible export to Korea market (20%)
- Contact manufacturers and distributors for a possible distribution right to and from Korea (10%)
- Manage and maintain customer's relationship at executive levels (20%)
- Review sales project, business plan and establish the business direction for the U.S. operation (10%)

On July 20, 2004, the director denied the petition concluding that the beneficiary would not be employed in a managerial or executive capacity under the extended petition. Specifically, the director found that the petitioner did not demonstrate that the beneficiary would manage a subordinate staff of professional, managerial or supervisory personnel who would relieve the beneficiary from performing non-qualifying duties. The director concluded that the beneficiary is performing as a first-line supervisor of non-professional employees, rather than as a manager or executive.

On appeal, counsel for the petitioner asserts that the beneficiary's subordinates serve in a "supervisory and administrative" capacity and relieve the beneficiary from mere first-line supervisory duties. Counsel claims that the beneficiary's subordinates utilize "industry resources" to carry out their job functions, thus freeing the beneficiary to oversee the company's goals and enter into major contracts. Counsel further asserts: "The size of the company is irrelevant in this situation as the business deals with directing its sales and distribution utilizing industry resources as opposed to an industry that utilizes its internal uses for all transaction." Finally, counsel provides a more detailed job description for the beneficiary which indicates that he devotes 49 percent of his time to management and review, 31 percent of his time to marketing; 10 percent of his time to conferences with "managerial/sales staff," and 10 percent of his time to goals and policies.

Upon review, counsel's assertions are not persuasive. As a preliminary matter, the AAO acknowledges the expanded job description submitted by counsel on appeal. The petitioner was previously instructed to provide a detailed description of the beneficiary's job duties and the percentage of time he devotes to each duty. The petitioner responded to the director's request for additional evidence. On appeal, rather than elaborating on the job description previously provided, counsel submits a considerably different account of the beneficiary's duties. A petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Therefore, the analysis of this issue will be limited to the evidence submitted with the initial petition and in response to the request for evidence.

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 does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. At a minimum, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

The petitioner's initial description of the position generally paraphrased the statutory definitions of managerial and executive capacity. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B). For instance, the petitioner indicated that the beneficiary would "exercise wide latitude in discretionary decision making," "formulate short-term and long-term goals" "establish and implement policies," and "hire and fire employees." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co. Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The job duties described in the petitioner's response to the director's request for a detailed job description are too broad and nonspecific to convey an understanding of the beneficiary's daily responsibilities. For instance, the petitioner indicates that he will devote 40 percent of his time to "manage and maintain daily business operation;" however, the petitioner has not provided any indication as to what specific tasks the beneficiary performs within this broad responsibility. The beneficiary will also "identify and review new products for possible export to the Korean market," "contact manufacturers and distributors," and "manage and maintain customer's relationship at the executive levels." Without further explanation, these duties, which require 50 percent of the beneficiary's time, cannot be distinguished from non-qualifying market and product research, sales, and customer service tasks. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co. Ltd. v. Sava*, 724 F. Supp. at 1108. The AAO will not speculate as to what managerial and executive duties the beneficiary may perform in the absence of the required detailed job description. The petitioner's job descriptions are insufficient to establish that the beneficiary's duties will be primarily managerial or executive in nature.

Moreover, contrary to counsel's assertions, the petitioner has not demonstrated that the beneficiary will primarily supervise a subordinate staff of professional, managerial, or supervisory personnel who can relieve him from performing non-qualifying duties. See section 101(a)(44)(A)(ii) of the Act. At the time of filing, the petitioner claimed to employ a corporate secretary and a purchasing and export administrator whose duties have only been vaguely defined. Counsel claims that the beneficiary's subordinates are supervisors because they work with "industry sources" such as logistics companies in order to carry out their job functions. However, a distinction must be made between supervising the work of subordinate employees and contracting

the services of outside service providers to accomplish a specific task. The petitioner has not demonstrated that the beneficiary's subordinates actually supervise or control the work of other employees, such that they could be considered supervisors for purposes of section 101(a)(44)(A)(ii) of the Act. Nor has the petitioner claimed or established that the beneficiary's subordinates are employed in managerial or professional positions.

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 § 101(a)(44)(C) of the Act, 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.* 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) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The petitioner has failed to provide probative evidence to confirm the employment of the beneficiary's claimed subordinates. The beneficiary was last granted an extension of his L-1A status in 2001. The record shows that the petitioner paid no salaries or commissions in 2001, although the petitioner claims that the corporate secretary had been receiving a \$1,000 monthly salary and bonuses since March 2001. In 2002, the petitioner paid only \$7,500 in salaries, although it claimed to employ the corporate secretary all year and a purchasing employee beginning in October 2002. The petitioner submitted Forms 941, Employer's Quarterly Federal Tax Return, for the first three quarters of 2003, but these documents do not provide the names of the employees receiving wages. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). It is not possible to conclude from the totality of the evidence presented that the petitioner employs personnel to perform the operational and administrative tasks necessary to operate the company.

Based on the foregoing, 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).

Beyond the decision of the director, the record does not establish that the petitioner and the foreign entity currently have a qualifying relationship pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner indicated on Form I-129 that the U.S. company is a subsidiary of the foreign entity and that it is wholly owned and controlled by the beneficiary. In an accompanying cover letter dated December 4, 2003, former counsel indicated that the petitioner is the sole owner of the petitioning company. With respect to the foreign entity, counsel stated: "[The beneficiary] is the president/sole owner of the company and he holds 63% of the shares of the company." The petitioner also submitted the minutes of its first meeting of the board of directors dated

August 15, 2000, which indicates that all of the petitioner's 100,000 authorized shares with par value of \$1.00 per share, were issued to the foreign entity. The petitioner's IRS Forms 1120, U.S. Corporation Income Tax Return, for 2001 and 2002 indicate at Schedule E that the beneficiary owns 100 percent of the U.S. entity, and at Schedule K indicate the value of the company's stock as "\$0." The petitioner has not submitted evidence to establish the ownership of the foreign entity. 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). Based on the conflicting documentation and statements, the AAO cannot conclude that the U.S. entity maintains a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(3)(i). For this additional reason, the petition will be denied.

An application or petitioner that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the decision of the director will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.