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Office: NEBRASKA SERVICE CENTER

Date: FEB 28 2008

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON 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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an office of the Korea Trade Investment Promotion Agency, an agency of the Government of Korea. It seeks to employ the beneficiary as its director. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director denied the petition based on the following independent grounds of ineligibility: 1) as an agency of the Government of Korea, the petitioner is ineligible for the benefit sought as a "United States employer;" 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and 3) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's findings and submits a brief and additional evidence in support of his arguments.

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A "United States employer" may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The first issue in the present matter is whether the petitioner, as an office of an agency of the Government of Korea, is eligible for the benefit sought as a "United States employer."

In support of the Form I-140, counsel submitted a letter dated October 5, 2006 in which he explains that the petitioner is a "miscellaneous foreign government office" of the Government of Korea located in Michigan and describes the mission of the petitioning organization as follows:

Since its foundation in 1962, [the Korea Trade Investment Promotion Agency or KOTRA] has been committed to promoting mutual prosperity between Korea and its trading partners through international commerce and investment. The experts in the worldwide network of Korea Trade Centers help Korean exporters meet local requirements and provide personal service to those overseas who seek to do business with Korea. For almost four decades, KOTRA has contributed to the development of the Korean economy through various trade promotion activities, providing trade information, market research services and business matchmaking.

* * *

The [petitioner] is one of KOTRA's 105 overseas offices, currently operating in 74 countries, the main goal of which is to pursue the above-mentioned KOTRA's mandates more efficiently.

The petitioner also submitted translations of Korean statutory materials indicating that the petitioning organization was established under the Korea Trade-Investment Promotion Agency Act. Article 3 of the statute indicates that:

The principal office of [KOTRA] shall be located in the city of Seoul, and if required for the performance of its services, it may establish Regional Offices, Korea Trade Centers, Korea Trade Offices, Trade Exhibition Centers, and branches, and assign representatives in necessary places at home or overseas through approval of its board of directors.

The record indicates that the petitioner is not a separately organized or incorporated entity. It is a branch office of KOTRA, an agency of the Government of Korea.

According to the October 5, 2006 letter and the beneficiary's resume, the beneficiary has been employed by KOTRA abroad and in the United States for a total of 22 years. Furthermore, according to the beneficiary's Form I-485 filed concurrently with the instant Form I-140, the beneficiary claims to be working in the United States for the petitioner in A-2 visa status. A-2 visas are reserved for aliens and immediate family members accredited by foreign governments engaging solely in "official activities" on behalf of foreign governments while in the United States. See 22 C.F.R. § 41.22(a).

On November 8, 2006, the director issued a Notice of Intent to Deny (NOID). The director noted, *inter alia*, the following:

The record indicates that the petitioning entity is a branch of a Korean government agency and is recognized by the Department of State as a miscellaneous foreign government office. As the petitioner is a foreign government office, it does not appear that the petitioner is actually a United States employer. As such, it does not appear that you are eligible to file a petition for this classification.

In response to the NOID, counsel submitted a letter dated December 5, 2006 in which he asserts that the petitioner is a "United States employer" because it currently employs persons in the United States. Counsel also claims that the petitioner is an "affiliate" of the foreign employer.

On February 26, 2007, the director denied the petition. The director concluded, *inter alia*, that, as an office of an agency of the Government of Korea, the petitioner cannot "be considered to be a United States employer."

On appeal, counsel asserts that the petitioner may be considered to be a "United States employer" even though it is an agency of the Government of Korea. In support of this argument, counsel cites *Matter of Barsai*, 18 I&N Dec. 13 (Reg. Comm'r 1981) which held that a United States petitioner, a Delaware corporation wholly owned by a Hungarian parent firm, could file a petition on behalf of an intracompany transferee even though the Hungarian parent firm was owned and operated by the Hungarian communist government. The regional commissioner reasoned as follows:

The District Director's analysis fails to recognize the form of commercial activity conducted within a communist, economic, and political system. Generally, ownership of the means of production in a communist system is held by the country's central government. Nevertheless, the record shows that the direction and management of such enterprises are primarily conducted independently from the government; they constitute separate legal persons which are free to operate in a basically profit-maximizing manner. Even if it could be said that the petitioner's Hungarian parent is nothing more than a branch of the Hungarian Government, this would not belie the fact that it remains the legal and whole owner of the petitioning corporation, thereby creating the requisite business affiliation between the two. In any event, the fact that business organizations in communist-bloc countries exist in a somewhat different formal and theoretical structure is no reason for refusing to bring these bona fide commercial firms within the provisions of section 101(a)(15)(L) of the Act. Indeed, the situation here presents the very type of personnel interchange, cross-fertilization of ideas, and fostering of international trade which, in part, the statute was intended to promote.

In applying the holding of *Barsai* to the instant petition, counsel argues:

It is submitted that by focusing on the fact that the petitioner is a legally incorporated commercial entity doing business in the U.S. and employing individuals in the U.S. establishes it as a U.S. Employer despite the fact that it has also been accredited by a foreign government recognized *de jure* by the United States, and accepted by the Secretary of States [sic].

Upon review, counsel's assertions are not persuasive in establishing that the petitioning organization is a "United States employer" as it has not established that it is a "firm or corporation, or other legal entity, or [an] affiliate or subsidiary of such a firm or corporation or other legal entity" and, thus, the petitioning organization is not eligible for the benefit sought.

Title 8 C.F.R. § 204.5(j)(3) explains that a petition filed for a multinational executive or manager under section 203(b)(1)(C) must be accompanied by a statement from an authorized official of the "petitioning United States employer" which demonstrates that:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

While the phrase "United States employer" is not specifically defined, it is clear from the Act that a petitioner must be the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas and that the foreign employer must be "a firm or corporation or other legal entity or an affiliate or subsidiary thereof." See section 203(b)(1)(C) of Act, 8 U.S.C. § 1153(b)(1)(C).¹

A "subsidiary" is defined at 8 C.F.R. § 204.5(j)(2) 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; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

¹While "United States employer" is defined for purposes of 8 C.F.R. § 214.2(h), this definition is not applicable to petitions filed under section 203(b)(1)(C). Furthermore, given the fundamental differences between the two classifications, this definition does not appear to be useful by analogy.

Likewise, an "affiliate" is defined in pertinent part at 8 C.F.R. § 204.5(j)(2) as:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual; [or]
- (B) One 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[.]

While neither "corporation" nor "firm" are defined for purposes of 8 C.F.R. 204.5(j), a corporation is generally considered to be an entity having a continuous existence and which was created by law or under authority of law. *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). Similarly, a "firm" refers to partnerships or associations or two or more persons, including unincorporated associations, which pursue some type of business enterprise. *See generally Black's Law Dictionary* 438 (abridged 6th ed., West 1991); *The American Heritage Dictionary of the English Language*, 4th ed., Houghton Mifflin Co. 2006, <http://dictionary.reference.com/browse/firm> (accessed December 13, 2007). Finally, a "legal entity," by its own terms, refers to an entity having some separate existence under the law of a jurisdiction, such as a corporation, limited liability company, limited partnership, or other entity. *See Black's Law Dictionary* at 620.

In this matter, the petitioner has failed to establish that either it or the foreign employer is a "a firm or corporation, or other legal entity, or [an] affiliate or subsidiary of such a firm or corporation or other legal entity." Therefore, it has failed to establish that it is a United States employer eligible for the benefit sought. The foreign employer is an agency of the Government of Korea and the record does not establish that it has any legal existence separate and apart from the government. The record does not establish that the foreign employer, an agency of the Government of Korea, could be considered under the laws of Korea to be a firm, corporation, or legal entity, or an affiliate or subsidiary of a firm, corporation, or legal entity. In immigration proceedings, the law of a foreign country is a question of fact which must be proven if the petitioner relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). To the contrary, the Government of Korea, and its agencies and instrumentalities, are all part of the government of a sovereign nation, which is not listed as a petitioning organization eligible for the benefit sought in this matter.²

²It must be noted that the United States has established a visa category which accommodates the Government of Korea's desire to promote "mutual prosperity between Korea and its trading partners through international commerce and investment," which is evidenced by the Government of Korea's "accreditation" of the beneficiary and his subsequent acquisition of an A-2 visa permitting him to perform his official functions in the United States. *See* 22 C.F.R. § 41.22(a). Indeed, if it appears to a district director that an alien residing in his district, who was lawfully admitted for permanent residence, has an occupational status described in section 247 of the Act, the director shall give notice and adjust the status of that alien to that of a nonimmigrant under section 101(a)(15)(A), (E) or (G) of the Act. *See generally*, 8 C.F.R. part 247.

Likewise, the record does not establish that the United States office of the petitioning organization is a "a firm or corporation, or other legal entity, or [an] affiliate or subsidiary of such a firm or corporation or other legal entity." To the contrary, the record indicates that the United States petitioner in Detroit is simply a branch or office of the foreign employer, an agency of the Government of Korea. Despite counsel's assertions to the contrary on appeal, the United States petitioner has no legal existence separate and apart from the foreign employer. It has not been incorporated under the laws of any state or territory of the United States and, as indicated above, the record is devoid of evidence that it has any legal existence under the laws of Korea making it separate and distinct from the government of that nation. Therefore, in this matter, the foreign employer and the petitioner are the same – an agency of the Government of Korea. As noted above, as a foreign government is not listed as being eligible for the benefit sought in this matter, the petition must be denied for this reason.

On appeal, counsel cites *Matter of Barsai*, 18 I&N Dec. 13, in support of his argument that ultimate ownership of a petitioner by a foreign government will not disqualify a petitioner from eligibility for the benefit sought. However, the decision in *Barsai* is inapposite to the current matter, and counsel's reliance on this decision is misplaced. In *Barsai*, unlike in the current matter, the petitioner was a Delaware corporation wholly owned by a foreign firm which, apparently, was ultimately owned and controlled by the communist government of Hungary. Therefore, in *Barsai*, both the petitioner and the foreign employer had a legal existence separate and apart from the Hungarian government. As noted by the Regional Commission in *Barsai*, the Hungarian firm, a "separate legal person" which was free to operate in a "basically profit-maximizing manner," was "the legal and whole owner of the petitioning corporation, thereby creating the requisite business affiliation between the two."

The facts surrounding the current petition differ dramatically from those at issue in *Barsai*. In the current matter, the petitioning organization, both the foreign employer and the United States office, is *the Government of Korea*. As an A-2 visa holder, the beneficiary is an accredited government official purportedly engaged "solely in official activities" for the Government of Korea. See 22 C.F.R. § 41.22(a). There is no "requisite business affiliation" between "separate legal persons" operating in a "basically profit-maximizing manner." As the Government of Korea is not a "firm or corporation, or other legal entity, or [an] affiliate or subsidiary of such a firm or corporation or other legal entity" it is not eligible for the benefit sought. As noted above, the record does not establish that the Government of Korea could be considered under the laws of Korea to be a firm, corporation, or legal entity, or an affiliate or subsidiary of a firm, corporation, or legal entity. In immigration proceedings, the law of a foreign country is a question of fact which must be proven if the petitioner relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502.

Accordingly, as the petitioning organization is not a "United States employer" in that it has not established that it is a "firm or corporation, or other legal entity, or [an] affiliate or subsidiary of such a firm or corporation or other legal entity," the petitioning organization is not eligible for the benefit sought and the appeal will be dismissed for that reason.

Beyond the decision of the director and for the same reasons explained above, the petition will also be denied because the petitioner has failed to establish that the beneficiary has been or will be employed "by a firm or

corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity." 8 C.F.R. § 204.5(j)(3).

The second and third issues in this proceeding concern the beneficiary's employment capacity in the United States and abroad. The second issue is whether the petitioner provided sufficient evidence to establish that it will employ the beneficiary in a primarily managerial or executive capacity. The third issue is whether the petitioner established that the beneficiary was employed abroad 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) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and

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

The petitioner indicates in the Form I-140 that it employs nine people at its office in Detroit, Michigan. Furthermore, counsel described the beneficiary's proposed duties in the United States in a letter dated October 5, 2006 as follows:

- Direct the development and management of the agency's organizational policies, objectives and marketing strategies;
- Direct research and evaluation of potentially marketable products made in South Korea and selection of manufacturers to be introduced to a particular industry in the North American market;
- Direct planning and coordination of production of informative materials;
- Direct organization of seminars and workshops on variables and relationships between Korean products and investment/trade opportunities in the U.S. market;
- Review and evaluate business match-making (between Korean companies and U.S. companies) strategies, and provide prompt responses to inquiries on Korean products and suppliers;
- Direct and oversee overall information collection/delivery process to ensure the accuracy and promptness of information provided by the agency; and,
- Oversee and supervise subordinates' performance in market research, product/buyer research, investment promotion, trade promotion, business-match making [sic], and exhibition preparation.

The petitioner also submitted an organizational chart for the United States office. The chart shows the beneficiary at the top of the organization supervising a deputy director, and three "divisions" each consisting of two or three employees. The petitioner did not specifically describe the duties of the eight subordinate employees in the United States.

Regarding the beneficiary's employment abroad, the petitioner submitted a "certificate of experience" dated May 2, 2006 which describes the beneficiary's employment abroad, in pertinent part, as follows:

- **Director-general (Trade Promotion Strategy Bureau) with Korea Trade Center, Seoul Headquarters in Seoul, Republic of Korea (01/2005-07/2005):**
Directed planning and management of the agency's organizational and trade policies, objectives and marketing strategies; directed establishment and evaluation of mid-long-term organizational goals for the agency's branch offices worldwide in accordance with the trends of the domestic and global economy; directed and oversaw assessment and analysis of each branch office's operational goals and performance in promoting mutually beneficial trade between Korea and foreign countries; and, oversaw and supervised subordinates' performance in market

research, product/buyer research, investment promotion, trade promotion, business-match making, and exhibition preparation.

- **Director-general (Overseas Market Research Bureau) with Korea Trade Center, Seoul Headquarters in Seoul, Republic of Korea (10/2002-12/2004):**

Directed planning and management of organizational policies, objectives and marketing strategies of the bureau, as well as branch offices in overseas countries; directed planning and organization of overseas companies' trade mission to Korea and vice versa, to promote and accomplish business match-making between Korean companies and overseas companies; directed and oversaw research and analysis on the global economy and market trends on specific products; consulted with Korean companies regarding trade/investment opportunities in the global market; consulted with global companies regarding trade/investment opportunities in Korea; and, directed and coordinated organization of workshops and seminars on Korean products and suppliers for global companies, and on global market for Korean companies.

The petitioner also submitted an organizational chart for the Trade Promotion Strategy Bureau which indicates that the beneficiary supervised 12 employees. However, the petitioner did not specifically describe the titles or duties of the members of this subordinate staff.

On November 8, 2006, the director issued a Notice of Intent to Deny. The director indicated, *inter alia*, that the petitioner must provide more detailed descriptions of the beneficiary's duties abroad and in the United States sufficient to establish that he was and will be employed in a primarily managerial or executive capacity. The director also noted that the petitioner must clearly define the duties, delineate the proportion of time devoted to each duty, and describe the duties and position requirements of his subordinate employees.

In response, counsel submitted a letter dated December 5, 2006 in which he further describes the beneficiary's duties abroad and proposed duties in the United States. Counsel explains that, both abroad and in the United States, the beneficiary devoted, or will devote, 45% of his time to "operations management," 40% of his time to directing the facilitation of international trade through market research and business matching, 10% of his time to directing the organization of exhibitions, seminars, and workshops, records management, and data processing, and 5% of his time to operational problem solving and diagnostics. Counsel also specifically described each of these categories of duties. As these descriptions are clearly set forth in the letter dated December 5, 2006, they will not be repeated here verbatim. Generally, the beneficiary's "operations management" duties (45% of his time) consist of directing the development of policies, objectives, and marketing strategies; directing the office's operation; reviewing reports; conferring with headquarters in Korea; cost analysis; and training employees. The beneficiary's market research and business matching duties (40% of his time) generally consist of directing the research of markets, products, buying habits, business opportunities, as well as advising importers and exporters.

The petitioner also submitted a list of employees in the Detroit office along with their corresponding titles and educational backgrounds. However, other than vague statements contained in resumes addressing each

employee's work history with the petitioner, the record is devoid of evidence addressing the employees' specific duties. Likewise, the record is devoid of evidence addressing the duties or organization of the beneficiary's purported subordinate employees abroad.

On February 26, 2007, the director denied the petition. The director concluded, *inter alia*, that the petitioner failed to establish that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that the director erred and that the beneficiary has been and will be performing qualifying duties. Counsel also submits additional evidence addressing the accomplishments of the beneficiary's subordinate employees in the United States. This evidence consists primarily of examples of the employees' work product and associated correspondence. The additional evidence, however, fails to address the specific duties of the employees, including supervisory or managerial responsibilities. The evidence also fails to address the duties and responsibilities of the beneficiary's purported subordinates abroad.

Upon review, the petitioner's assertions are not persuasive in establishing that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The actual duties themselves reveal the true nature of the employment. *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).

In this matter, the petitioner's description of the beneficiary's job duties, both abroad and in the United States, as well as the description of duties of the beneficiary's subordinate employees, fail to establish that the beneficiary acted, or will act, in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary did or will do on a day-to-day basis in "directing" certain operations. For example, the petitioner states that the beneficiary directed, or will direct, the development of policies, plans, and strategies; the operation of the office; market research; and the production of informative materials. The petitioner also asserts that the beneficiary supervised, and will supervise, subordinate employees. However, as the petitioner fails to specifically describe the duties of the subordinate employees both abroad and in the United States, it cannot be concluded that beneficiary has been or will be relieved of the need to perform the non-qualifying tasks inherent to the duties he allegedly "directs." Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive duties. 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 petitioner has also failed to establish that the beneficiary supervised and controlled, or will supervise and control, the work of other supervisory, managerial, or professional employees, or managed, or will manage, an essential function of the organization. As explained above, the petitioner has failed to specifically describe the duties of the other employees, or the organizational structure, of both the beneficiary's bureau abroad and the Detroit office. Absent specific job descriptions, it cannot be concluded that any of these employees is truly a supervisory, managerial, or professional employee. Furthermore, in view of the evidence submitted, including the work product submitted for the United States workers on appeal, it appears that these employees are more likely than not primarily performing the tasks necessary to the provision of a service. Therefore, it appears that the beneficiary was and will primarily be a first-line supervisor of non-professional workers, the provider of actual services, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, as the petitioner failed to establish the skills required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary managed, or will manage, professional employees.³ Therefore, the petitioner has not established that the beneficiary was or will be employed primarily in a managerial capacity.⁴

³In evaluating whether the beneficiary managed or will manage professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a bachelor's, or even a master's, degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a degree is actually necessary, for example, to perform the duties of any of the subordinate positions.

⁴While the petitioner has not argued that the beneficiary managed or will manage an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the

Similarly, the petitioner has failed to establish that the beneficiary acted, or will act, in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary acted, or will act, primarily in an executive capacity. The job descriptions provided for the beneficiary and his purported subordinate employees are such that the AAO cannot deduce what the beneficiary did, or will do, on a day-to-day basis in "directing" certain operations. Moreover, as explained above, it appears that the beneficiary was, and will be, primarily employed as a first-line supervisor and performed, and will perform, the tasks necessary to produce a product or to provide a service. Finally, given that the beneficiary has one or more tiers of supervisors above him within his agency, an agency of the Government of Korea, it appears that any realistic authority to direct the "organization" would be vested in these governmental leaders and not in the beneficiary. Therefore, the petitioner has not established that the beneficiary was, or will be, employed primarily in an executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, 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,

beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary managed, or will manage, an essential function. The petitioner's vague job description fails to document that the beneficiary's duties were, or will be, primarily managerial. Also, as explained above, the record establishes that the beneficiary was, and will be, primarily a first-line supervisor of non-professional employees and was, and will, primarily perform non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties was, or will be, managerial, nor can it deduce whether the beneficiary was, or will be, primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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).

Accordingly, the petitioner has failed to establish that the beneficiary primarily performed, or will primarily perform, managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, the petition will also be denied because the petitioner has failed to establish that it has been "doing business" for at least one year. 8 C.F.R. § 204.5(j)(3)(D). "Doing business" is defined as "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." 8 C.F.R. § 204.5(j)(2). In this matter, the petitioner is described as an agency of the Government of Korea which promotes "mutual prosperity between Korea and its trading partners through international commerce and investment." The center serves as a representational agency or office of the Government of Korea and cannot be said to provide any services or products. Rather, the office is a mere agent or office in the United States of the Government of Korea. Accordingly, the petitioner has failed to establish that the United States employer has been or will be "doing business," and the petition may not be approved for this additional reason.

An application or petition 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). Therefore, based on the additional ground of ineligibility as discussed above, this petition cannot be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.