

Identifying data deleted to
prevent disclosure and protect
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

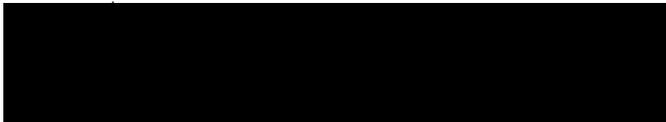


101

FEB 07 2005

FILE: WAC 02 116 50474 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 a nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(1)(15)(L). The petitioner is a corporation organization in the State of California that is operating as an importer and distributor of automobile parts. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Tae-Gu, Korea. The petitioner now seeks to extend the beneficiary's stay for two years.

The director denied the petition concluding that the petitioner had not demonstrated that: (1) the petitioning entity is a qualifying organization; and (2) the beneficiary had been and would be employed by the United States entity in a primarily managerial or executive capacity. The director specifically noted that the petitioner failed to demonstrate that it has been doing business in the United States during the past year, and failed to show that it has the financial ability and physical premises to support the United States operation.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion, and forwarded it to the AAO for review. On appeal, the petitioner references its previously submitted letter explaining the petitioner's delay in commencing operations in the United States, and submits additional documentation confirming that the petitioner "has resumed its active business activity." The petitioner also claims that the beneficiary has been and will continue to be employed in an executive capacity as the company's president. The petitioner submits a brief and additional documentary 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) 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 consider the issue of whether the petitioner satisfies the definition of qualifying organization at outlined in the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term “qualifying organization” and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien’s stay in the United States as an intracompany transferee; and,
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

(H) *Doing business* means the 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.

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *Subsidiary* means 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.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) 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.

The petitioner filed the nonimmigrant petition on February 14, 2002 noting that it would be operating in the United States as a wholesaler and distributor of automotive parts. In a letter submitted with the petition, dated February 1, 2002, the petitioner indicated that it would be a distribution center for products manufactured by the foreign entity, and anticipated expanding the foreign company's market into the United States. The petitioner noted that since its organization as a California corporation on August 17, 2000, it has obtained its federal employer identification number and received a seller's permit to operate its business in California. The petitioner stated that during its first year of operation, it generated gross revenue of approximately \$291,000.

As evidence of its operations in the United States, the petitioner submitted: (1) articles of incorporation; (2) bylaws; (3) minutes from its first meeting of directors; (4) the Statement by Domestic Stock Corporation in California; (5) a letter from its financial institution identifying a business checking account balance at the time of incorporation of approximately \$145,000; (6) Internal Revenue Service (IRS) Form SS-4, Application for Employer Identification Number; (7) a seller's permit; (8) a standard industrial/commercial single-tenant lease executed by the petitioning organization on October 1, 2000; (9) IRS Form 1120, U.S. Corporation Income Tax Return for the year 2001 reflecting income in the amount of \$78,585.00; and (10) bank statements reflecting account balances for March through December 2001.

In a request for evidence issued on November 6, 2002, the director asked that the petitioner submit the following information: (1) the petitioner's bank statement for the past year; (2) letters from the petitioner's financial institutions indicating when the petitioner's account was opened, the account's current status and balance, and all persons authorized to access the account; and (3) a copy of the petitioner's seller's permit.

Counsel responded in a letter dated January 14, 2003 and provided an accompanying letter from the president of the foreign entity dated January 22, 2003. The president stated in his January 2003 letter that the petitioning organization's operations in the United States did not begin as early as anticipated for the following reasons:

Our efforts to firmly establish our business operations in the U.S. have been slowed by several factors beyond our control. In order to comply with the federal automotive safety regulations, several of our main products are undergoing tests to determine their compatibility and safety on vehicle-use on U.S. highways. The export of our products into the U.S. for their sale and distribution has also been slowed by recent union dock workers strike at the various ports in Los Angeles-Long Beach harbor that have caused delays in the delivery of shipment of our products to the U.S. [s]subsidiary. We are still waiting for our cargo to be unloaded from ships that are still at bay. These delays have further effected [sic] purchase contracts which are being re-negotiated due to delays in shipment and change in prices due to market supply/demand. These events beyond our control have stymied our efforts to start full operation of the U.S. [s]subsidiary including their efforts to hire the necessary number of professional and staff employees.

The president further stated he anticipates that within the next six months the petitioner will be fully operating in the United States.

Counsel submitted the petitioner's bank statements for January through October 2002, and a letter from the petitioner's bank stating that the beneficiary is the sole signer on the petitioner's account, which has been maintained in "good manner." Counsel also provided the petitioner's seller's permit, a certificate of payment of business tax, various invoices from February through December 2002, and IRS Form 941, Employer's Quarterly Federal Tax Return for the quarters ending June, September, and December 2001 and March, June, and September 2002.

In a decision dated April 29, 2003, the director stated:

In response [to the director's request for evidence] the petitioner submitted a letter from the parent company stating that the slow progress in the start-up business is due to [a] strike by union dock workers causing delays in delivery of shipments and that several main products are undergoing testing to comply with federal automotive safety regulations. However, the petitioner provided no documentation in support of the allegations. As such, the petitioner has not adequately corroborated the nature of the events that led to the new office's difficulties.

The director concluded that the petitioner failed to demonstrate that it has been doing business in the United States. Accordingly, the director denied the petition.

In an appeal filed on May 29, 2003, the petitioner states that contrary to the director's finding, the foreign entity's January 22, 2003 letter documented "the nature of the delays in the start of full business operation by the Petitioning U.S. Company." The petitioner further states that it has resumed business activity in the United States and recently received a shipment of products, valuing approximately \$150,000, from the foreign entity to be distributed in the United States. The petitioner also indicates that during the next two years it plans to import over \$3 million worth of products from the foreign entity "in order to maintain our full business operation in the U.S." The petitioner submits a May 2003 shipping schedule, which lists inventory received by the petitioner and a business plan for the next three years.

On review, the petitioner has demonstrated that it has been doing business in the United States during its first year of establishment. The AAO acknowledges the director's references to the petitioner's "difficulties" in establishing its new office due to a strike by union workers and delays in shipments. However, it does not appear from the record that these "difficulties" rendered the petitioner incapable of engaging in the provision of goods and services in the United States. See 8 C.F.R. § 214.2(l)(1)(ii)(H). Rather, it seems that the strike and shipment delays affected the petitioner's overall projected profitability. The petitioner demonstrated through invoices, permits, a lease agreement, and its corporate income tax return that it has been engaged in the sale of automotive parts during the past year.

Although not addressed by the director, when establishing classification as a qualifying organization, the petitioner is also required to demonstrate the existence of a qualifying relationship between the beneficiary's foreign employer and the petitioning organization. The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens-Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); see also *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

Here, the petitioner claimed on the nonimmigrant petition that it is the subsidiary of the beneficiary's foreign employer. The petitioner provided as evidence of a parent-subsidary relationship its articles of incorporation, corporate by-laws and a stock certificate identifying the beneficiary's foreign employer as the sole stockholder of the petitioning organization. However, Schedule E of the petitioner's 2001 corporate income tax return indicates that the beneficiary owns 100% of the petitioner's stock. Schedule K of the tax return also indicates that the petitioner's stock is wholly owned by an individual or corporation. The petitioner failed to provide the required tax return attachment identifying which party, the beneficiary or the beneficiary's foreign employer, is the petitioner's sole shareholder. Based on the petitioner's conflicting representations, the petitioner's stock ownership is unclear. Consequently, the petitioner has failed to demonstrate a parent-subsidary relationship between the two organizations. As a result, although the petitioner is deemed to be doing business in the United States, the AAO cannot determine that the petitioner is a qualifying organization. Accordingly, the appeal will be dismissed.

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).

The AAO will next consider the issue of whether the beneficiary has been and 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 stated on the nonimmigrant petition that the beneficiary would be employed under the extended petition as president and would perform the following job duties:

Establish the overall financial goals and set policy guidelines for all sales and distribution activities for the expansion of our business. Develop pricing strategy with an eye towards maximizing [the petitioner's] share of the market. Exercise final authority in negotiating and entering into any binding contracts with suppliers and buyers. Review all financial records of the company to ensure the maximization of its profitability and maintenance of the company's financial strength. Direct and confer with managers regarding the daily business operation and exercise wide range of discretion in the overall management. Exercise ultimate authority to hire and fire all personnel of the company.

In the petitioner's accompanying letter, the petitioner provided a similar description of the beneficiary's proposed job responsibilities. The petitioner explained that the beneficiary is qualified for employment as

president as he possesses a degree in technology management from a junior college in Korea and has previously managed his own business.

The petitioner submitted with the petition its most recent quarterly tax return, dated December 31, 2001, indicating the employment of three workers, including the beneficiary.

In his request for evidence, the director asked that the petitioner submit the following: (1) an organizational chart identifying the petitioner's managerial hierarchy and staffing levels, including the beneficiary's position within the organization and all workers subordinate to the beneficiary; (2) a brief description of the job duties performed by all employees; (3) copies of the petitioner's Form DE-6, California quarterly wage reports for the last four quarters; and (4) the petitioner's payroll summary, Form W-2, Wage and Tax Statement, and W-3, Transmittal of Wage and Tax Statements.

Included in counsel's January 14, 2003 response was an organizational chart of the petitioning organization, which indicated that the beneficiary, as president, had control over the company's import and export/distribution division and its sales and marketing division. The chart identified two employees as managers of each department. The petitioner again outlined the same job description of the beneficiary as that provided in the nonimmigrant petition, and briefly described the job responsibilities of each of the department managers. Counsel also provided the petitioner's Forms W-2 and W-3 and its quarterly tax returns from June 2001 through September 2002, which confirmed the employment of the beneficiary plus the two managers as of December 2001.

In the director's April 29, 2003 decision, the director determined that the petitioner had not demonstrated that the beneficiary had been or would be employed by the United States entity in a primarily managerial or executive capacity. The director stated that other than the petitioner's two managers there are no subordinate employees to perform the non-qualifying duties of the petitioning organization. The director also stated that the record does not indicate "that the beneficiary has exercised and will continue to exercise significant authority over generalized policy or that the beneficiary's duties have been and will be primarily managerial or executive in nature." The director further noted that the beneficiary would not be managing a subordinate staff of professional, managerial, or supervisory personnel. The director concluded that the beneficiary would be involved in performing the daily operations of the business rather than directing the business' activities through managers, executives or other professionals. Consequently, the director denied the petition.

On appeal, the petitioner states that the beneficiary has been and would continue to be employed in the United States in an executive capacity as president of the business operation. The petitioner explains that the beneficiary would oversee all workers employed by the petitioning organization and would establish the company's sales and distribution policies and goals. The petitioner also explains that the recent advances in its business in the United States "could not have been accomplished without the guidance and supervision of the instant Beneficiary who has been acting on behalf of our company throughout the difficult business situation to coordinate the business efforts with our Korean Parent Company." The petitioner submits order confirmations for automotive parts, which reference the beneficiary as executive manager, as evidence of the beneficiary's participation in furthering the petitioner's business in the United States.

On review, the AAO first notes that because the beneficiary was responsible for establishing a new office upon his transfer to the United States, the petitioner was not required to demonstrate that the beneficiary was employed during the first year of approval of the petition in a primarily managerial or executive capacity. *See*

8 C.F.R. § 214.2(l)(3)(v)(C). Therefore, despite the director's finding that the beneficiary was not employed as a manager or executive, this issue need not be considered.

The petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. As previously noted, 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 Citizenship and Immigration Services (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.

The definitions of executive and managerial capacity have two parts. First, the petitioner must 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). 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.*

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. Here, the petitioner fails to document what proportion of the beneficiary's duties would be executive functions and what proportion would be non-executive. Although the petitioner demonstrates that the subordinate managers would be responsible for performing some of the non-qualifying functions of the business, the petitioner indicates that the beneficiary is responsible for reviewing the corporation's financial records and developing the company's pricing strategies. Based on the petitioner's representations, it appears that the beneficiary would be responsible for the financial functions of the business, including the above-named non-qualifying duties as well as such other responsibilities as bookkeeping and payroll. Because the petitioner has not provided an allocation of the amount of time the beneficiary would dedicate to the non-managerial and non-executive tasks of the business, the AAO cannot determine whether the beneficiary is primarily performing in an executive capacity. 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. at 604.

Additionally, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. While the petitioner identifies the beneficiary's two subordinate employees as managers, there is no evidence in the record that either employee

supervises subordinate staff members or manages a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Moreover, the record does not contain documentation that these employees possess or require an advanced degree, such that they could be classified as a professional. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act, or that the beneficiary is directing "management" of the organization as required by section 101(a)(44)(B) of the Act.

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. 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.