

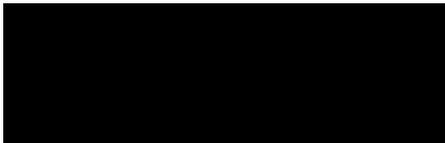
**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy.**

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



[Handwritten initials]

FILE: WAC 03 072 53863 Office: CALIFORNIA SERVICE CENTER Date: FEB 18 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

[Signature]
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 marketing and sales manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that is engaged in the import and distribution of videos, compact discs and related products. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Seoul, Korea. The petitioner now seeks to extend the beneficiary's employment for three years.

The director denied the petition concluding that the petitioner had failed to demonstrate: (1) that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity; and (2) that a qualifying relationship exists between the beneficiary's foreign employer and the petitioning organization. The director specifically noted that the petitioner did not contain the "organizational complexity" to support the beneficiary as a manager or executive.

On appeal, counsel contends that the director erred in his decision that the beneficiary would not be employed in a qualifying capacity, stating that the beneficiary "exercises managerial functions not to ordinary employees of the company but to the managers of the different departments of the petitioner, i.e. Customer Service, Administrative Services and Accounting." Counsel also notes that the applicable statute does not require that the petitioner "possess organizational complexity in order that the Beneficiary may qualify as an intra-company transferee." Counsel further rejects the director's finding that a parent-subsidiary relationship failed to exist between the foreign and United States organizations. Counsel submits a brief and 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 AAO will first consider the issue of whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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

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

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the instant nonimmigrant petition on August 21, 2003. In an appended letter, dated December 16, 2002, the petitioner provided the following description of the beneficiary's position in the United States organization:

As marketing & sales director, [the beneficiary] has been and will continue to oversee and manage the overall U.S. sales & marketing operations of the products; he will continue to analyze the market and set strategic planning goals; he will continue to be responsible for the hiring, firing and direction of cyber sales management personnel; he will continue to develop advertising and promote products in U.S.; he will continue to develop both short-term and long-term goals for the company in regard to profit, administration and operations. Moreover, he will continue to exercise wide-latitude in discretionary decision making in the operation of the marketing & sales department of the U.S. company; and he will continue to report to the president s [sic] of the U.S. company with regard to the business operations of the marketing & sales department of the U.S. company.

The petitioner explained that the beneficiary has been instrumental in the development of the United States organization, and is needed to further expand the company.

In the attached documentation, the petitioner submitted a list of its five employees, which included the company's president, the beneficiary, who is employed as the general manager, a customer service department manager, an administrative manager, and a manager of the accounting department. The petitioner provided a list of job duties performed by each worker, and outlined the following job duties for the beneficiary:

- Oversee & manage the overall sales & marketing operations of the products (35%);
- Analyze the market and set strategic planning goals (20%);
- Exercise wide latitude in discretionary decision making (15%);
- Responsible for hiring, firing & direction of cyber sales management personnel (10%);
- Develop advertising and promote products in U.S. (10%); and
- Plan marketing strategy for sales of products (10%).

The petitioner also submitted documentary evidence, including its Forms DE-6, Quarterly Wage and Withholding Report, from the State of California as evidence of employment of the five workers.

The director issued a request for evidence on February 25, 2003 asking that the petitioner provide the following: (1) its organizational chart describing the managerial hierarchy and staffing levels and clearly identifying the beneficiary's position in relation to all other employees, particularly the workers subordinate to the beneficiary; (2) a description of the job duties performed by each worker; and (3) copies of the petitioner's payroll summary, and Forms W-2 and W-3 evidencing wages paid to its employees. The director also outlined the statutory definition of managerial capacity and requested that the petitioner provide evidence that the beneficiary is employed as a manager.

Counsel responded in a letter dated May 1, 2003, stating that the beneficiary is performing in a managerial position "by virtue of supervising and controlling the work of other managerial employees." Counsel stated:

As general manager of the U.S. company [REDACTED] the beneficiary is responsible for overseeing and managing overall business operations and activities of the U.S. subsidiary; he

is responsible for the establishment, direction and coordination of all business activities of our company; he establishes policies designed to increase business productivity and sales; and he develops both short-term and long-term goals for the company in regard to profit, administration and operations; and he exercises wide-latitude in discretionary decision making in the operation of the U.S. subsidiary; he has the authority to hire, fire and promote the personnel; and [the beneficiary] acts as acting president in lieu of the company president during his absence for business trips to overseas.

Counsel stated that an organizational chart was provided, yet none was included in the record.

In a decision dated June 18, 2003, the director determined that the petitioner had failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director noted that each of the three departments under the beneficiary's supervision consists on one employee, each labeled as a manager, and noted that a review of the managers' salaries indicates that each is working part-time as the wages are "abnormally low." The director concluded that because the managers are employed part-time and because there are no other employees in the organization the majority of the beneficiary's job duties would not include primarily directing the management of the organization.

The director also stated that the petitioning organization does not contain "the organizational complexity to support [an] additional executive or managerial position." The director stated that the petitioner had failed to establish that the beneficiary's daily activities will be primarily managerial or executive, or that the beneficiary supervises a staff of professional, managerial or supervisory employees who would relieve him from performing the non-qualifying functions of the business. The director concluded that the beneficiary "is at best employed as a supervisor." Accordingly, the director denied the petition.

In an appeal filed on July 21, 2003, counsel explains that the beneficiary is presently holding two positions within the company, general manager and manager of the marketing and sales department, which "are instrumental in the operation of the company." Counsel states that as the general manager, the beneficiary allocates his time in the following manner:

- 30% - Responsible for overseeing and managing overall business operations and activities of the US subsidiary (Customer Department, Administrative Services and Accounting Department)
- 20% - Responsible for the establishment, direction and coordination of all business activities between the parent company and subsidiary;
- 15% - Establish policies designed to increase business productivity and sales; Targeting new major accounts and implementing strategic goals and accountability systems;
- 20% - Develop both short-term and long-term goals for the company in regard to profit, administration and operations;
- 10% - Exercise wide-latitude in discretionary decision making in the operation of the US subsidiary;
- 5% - Implement a system that will be available to other Marketing and Sales Managers at the termination of the temporary employment; including the development and review of new mechanisms and procedures for a more efficient system.

Counsel contends that "[a] cursory reading of the above stated duties of the Beneficiary would reveal that he is performing tasks that demand the exercise of [a] high level of discretion."

Counsel rejects the director's finding that the beneficiary does not qualify as a manager or executive because he does not supervise any subordinate personnel who would relieve him from performing non-qualifying duties. Counsel notes "there is no minimum number of employees required in order to qualify an employee's functions as managerial." Counsel states the beneficiary exercises managerial functions over departmental managers, "not to ordinary employees of the company." Counsel also rejects the director's conclusion that the department managers are working part-time, and therefore the beneficiary would not be primarily directing the management of the company. Counsel states that "there is no requirement that the employees over which a manager or executive exercises control must receive a certain wage," and states that the managers are compensated through stock options, commissions and bonuses.

Lastly, counsel contends "there is no requirement that the petitioner must possess organizational complexity in order that the Beneficiary may qualify as an intra-company transferee." Counsel notes that the director failed to define organizational complexity, and states that if referring to the corporation's number of employees, there is no statute limiting managers or executives to only those who supervise a large number of persons or a large organization. Counsel states that a beneficiary may be a functional manager even if he is the sole employee of a company where he utilizes independent contractors or where the business is complex.

Counsel submits on appeal an organizational chart of the United States company and an additional description of the job duties performed by each of the five employees of the organization.

On review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. 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.*

The record is inconsistent in defining the beneficiary's position and the job duties performed by the beneficiary while employed in the United States entity. On the nonimmigrant petition, the petitioner identifies the beneficiary as the marketing and sales manager, but subsequently claims on appeal that the beneficiary is employed in two capacities: as the general manager and the marketing and sales manager. Counsel does not explain on appeal how these two positions differ. More importantly, counsel provides a job description for the position of general manager only, and does not outline the specific job duties of the beneficiary as the marketing and sales manager that would qualify him as a manager or executive. Counsel's claim that a cursory reading of the beneficiary's tasks demonstrates "the exercise of high level discretion" is insufficient to establish employment in a primarily managerial or executive capacity. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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).

Additionally, a critical review of the description provided on appeal of the beneficiary's job duties reveals that the beneficiary's tasks are identical to the claimed job duties of the company's president. Each position is noted to involve the same five job duties, the only difference being a slight variation in the percentage of time spent by each individual on a particular job duty. This brings into question the validity of the petitioner's claim that the beneficiary is performing the named managerial and executive job duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. Again, the petitioner is required to resolve any inconsistencies in the record by independent and objective evidence. The petitioner has failed to satisfy this crucial requirement.

Counsel correctly notes on appeal that a complex organizational structure is not required in order for the beneficiary to be considered a manager or executive of the petitioning entity. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the instant matter, counsel does not explain how the reasonable needs of the organization are met through the employment of a president and three department managers, yet no lower-level employees. While counsel claims that the petitioner utilizes outside contractors and laborers to perform the functions associated with each department, the record is devoid of documentary evidence establishing the use of independent contractors. 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).

While counsel correctly notes on appeal that a beneficiary who is the sole employee may be considered to be employed in a qualifying capacity as a functional manager, counsel has not demonstrated that the beneficiary in the instant matter qualifies for the claimed position. 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, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function.

In the instant matter, counsel merely asserts the concept of "functional manager," and fails to identify the specific organizational function to be managed by the beneficiary. Additionally, as noted previously, although counsel contends that the functions of the business are being performed by contractors or laborers not directly employed by the petitioning organization, counsel has not documented the use of outside labor by the petitioner. The petitioner's 2002 corporate income tax return indicates that no amounts were paid by the petitioner during 2002 for outside labor, such as contractors. In addition, the record does not establish that the petitioner has other full-time employees who would relieve the beneficiary from performing non-qualifying operational and administrative tasks associated with the essential functions of the business. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec.

593, 604 (Comm. 1988). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

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 reason, the appeal will be dismissed.

The AAO will next consider whether a qualifying relationship exists between the beneficiary's foreign employer and the petitioning organization.

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.

* * *

(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 indicated on the nonimmigrant petition that it is a subsidiary of the beneficiary's foreign employer as the foreign company owns 60% of the petitioning organization, while an individual [REDACTED] owns the remaining forty percent. The petitioner submitted copies of two stock certificates reflecting each party's respective stock ownership in the organization. The petitioner also provided a copy of a canceled stock certificate and its stock certificate ledger reflecting a transfer of 400 shares of stock from [REDACTED] to its present owner [REDACTED] on May 4, 2001.

In his February 2003 request for evidence, the director questioned the existence of a qualifying relationship between the two organizations. The director stated that collectively, the three stock certificates indicate that the beneficiary's foreign employer does not own 60% of the petitioner's issued stock.

In counsel's May 1, 2003 response, counsel explained:

[REDACTED] the foreign parent company, owns 60% of the stocks of [the petitioning organization], and [REDACTED] who is currently serving as president of JC 21, Inc., the U.S. subsidiary, owns 40% of the shares of the U.S. company. Prior to May 4, 2001, [REDACTED] owned 40% of the shares of [REDACTED] the U.S. subsidiary; however, he no longer owns any of the shares of the U.S. company. Please see the Stock Transfer Ledger indicating the date of transfer of 400 shares (40%) [REDACTED] from [REDACTED] the previous shareholder, which was on May 4, 2001.

The petitioner submitted three stock certificates with Stock Transfer Ledger to show that [REDACTED] had transferred his 40% shares of the U.S. company to [REDACTED] president of the U.S. company, on May 4, 2001. Therefore, [REDACTED] the parent company, owns 60% of the shares and [REDACTED] owns 40% of the shares of the U.S. subsidiary, [REDACTED]

In his decision, the director determined that the petitioner did not establish the existence of a parent-subsidary relationship between the two organizations. The director stated that prior to the May 2001 stock transfer the stock ownership of the petitioning organization was as follows: [REDACTED] 600 shares or 43%; [REDACTED] 400 shares or 28%; and [REDACTED] 400 shares or 28%. The director concluded that as a result of the transfer of stock from [REDACTED] to [REDACTED] on May 4, 2001, [REDACTED] now owns 800 shares of the petitioner's 1,400 shares of issued stock, or 56% of the petitioning organization. The director stated that the record does not demonstrate that the two companies are owned and controlled by the same parent, individual or group of individuals. The director also concluded that the petitioner did not establish an affiliate relationship between the two companies. Accordingly, the director denied the petition.

On appeal, counsel explains that [REDACTED] acquired stock in the petitioning organization as a result of a stock transfer from [REDACTED], and notes that [REDACTED] did not subscribe to the originally issued stock. Counsel states "[t]herefore, it was not possible for [REDACTED] to possess 400 shares at the time of incorporation and acquired another 400 shares from the transfer of shares on May 4, 2002 as suggested by [Citizenship and Immigration Services (CIS)]." Counsel states that the beneficiary's foreign employer

remains that majority shareholder of the United States company by virtue of its ownership of 60% of the company's outstanding stock.

On review, the petitioner has established the existence of a parent-subsiary relationship between the beneficiary's foreign employer and the United States entity. It appears the director misinterpreted the evidence submitted by counsel in support of the qualifying relationship. The petitioner provided documentary evidence, including stock certificates and stock certificate transfer ledger, explaining the relationship between the two organizations. The parent-subsiary relationship is further supported by ownership information included in the petitioner's corporate tax return. Therefore, the director's decision pertaining to this issue will be withdrawn.

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.