

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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



U.S. Citizenship
and Immigration
Services

D7



File: WAC 04 031 52679 Office: CALIFORNIA SERVICE CENTER Date: MAR 17 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)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that is engaged in the import and export of steel. The petitioner claims that it is the subsidiary of [REDACTED] and [REDACTED] in Masan City, South Korea. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, which was subsequently extended for an additional year. The petitioner now seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition concluding that (1) the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; and (2) the petitioner had not established that it had been doing business as required by the regulations.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner and the petitioner itself contend that the denial was erroneous because the beneficiary in fact manages an important function of the business and also operates a very positive business despite the director's findings. In support of these contentions, the petitioner submits a brief.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior

education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (a) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (b) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (c) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (d) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The first issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

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

In the initial petition, the petitioner submitted a letter dated November 3, 2003 detailing the nature of the beneficiary's duties. Specifically, the petitioner provides the following description of the beneficiary's duties:

Direct the management of the organization: Make decisions regarding company budget, short and long term objectives, hiring employees as well as entering into contracts/agreements and making proposals relating to the company operations; implementing the marketing plan to ensure that the company will be correctly positioned in the North American market, a strategy which is in line with [the foreign entity's] philosophy; implement an effective marketing program taking into account the current market situation; analyze activities, costs, operations and forecast data to determine whether the company is achieving its goals and objectives and make changes where needed.

Establish the goals and policies of the organization: Set operational activities; develop a marketing plan to penetrate the North American market.

Exercise wide latitude in discretionary decision making: [The beneficiary] will have discretionary authority to market and develop an operational strategy for [the U.S. petitioner], including promotions, incentives, proposed agreements and contracts.

Receives only general supervision or direction from higher level executives, board of directors or stockholders: [The beneficiary] will continue to work closely with the parent company, communicating with executives, sharing ideas and obtaining approval for implementing marketing plans, formulating policy and directing the company's operations.

Cultivate sales by finding new business partners. Also set up meetings with managing directors to introduce the company to them and to try to secure business.

Communicate and work with existing clients to ensure that they are satisfied with the level of service and that their needs are met.

Act as a catalyst in driving implementation of service standards, initiative, improvements, and change management activity.

Based on the evidence submitted with the initial petition, the director concluded that the record contained deficiencies. Thus, on November 26, 2003 the director requested additional evidence. Specifically, the director requested evidence establishing the need for the extension of the beneficiary's stay, as well as additional details on the beneficiary's duties, including information on the duties of his co-workers and evidence of wages paid to all employees.

In a response dated December 4, 2003, the petitioner, through counsel, submitted the requested documentation, including an updated list of the beneficiary's duties as well as a list of the beneficiary's subordinate employees, their positions, and their duties. With regard to the beneficiary's duties, the petitioner submitted additional supplemental duties to the previously submitted list. Such new duties included:

- Formulating policy for the Los Angeles company and directing the company's operations
- Liaising with vendors to control just-in-time shipments; liaising with U.S. vendors to check market trends and report information to [the foreign entity]
- Collecting market information and developing import/export routes between South Korea and the U.S.A.

In addition, the petitioner indicated that it employed two additional employees: [REDACTED] a manager who "directs the organization," and [REDACTED] an assistant who deals with accounts and [aids] in trading with Guam and Saipan. Employee payroll records further indicated that [REDACTED] did not begin her employment with the petitioner until June 2003.

On December 18, 2003, the director denied the petition. The director, who reviewed the record to determine eligibility under both managerial and executive capacity, concluded that the beneficiary was not supervising a staff of professional, supervisory, or managerial employees, and did not employ a sufficient number of subordinate employees to relieve him from performing the routine tasks necessary to maintain business operations.

On appeal, counsel for the petitioner and the petitioner itself assert that the beneficiary's duties in fact conform to the regulatory definitions and aver for the first time that the beneficiary manages an essential function of the organization, namely, deciding the fate of the U.S. entity and the direction of the parent company abroad. Although claiming that the beneficiary is a function manager, the petitioner and counsel in effect simultaneously reassert that the beneficiary's duties are both managerial and executive in nature by

repeating the previously claimed duties. Finally, counsel and the petitioner cite legal precedents in support of these contentions.

Upon review, the petitioner's assertions on appeal are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

As previously discussed, the initial description of the beneficiary's duties was insufficient. Consequently, the director requested additional details in the request for evidence. The petitioner's response further clarified the beneficiary's proposed duties, and explained that the beneficiary would also engage in formulating policy, liaising with vendors, and collecting market information. On appeal, the petitioner newly asserts that in addition to the previously stated duties, the beneficiary manages an essential function of the organization. The AAO, however, disagrees with the petitioner's position in this matter.

There are several problems with the petitioner's assertions. First, the description of duties provided prior to adjudication summarizes the definition of "executive capacity." Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Despite the repetition of the definition, the AAO notes that the petitioner does supplement the definitions with a brief description of the beneficiary's duties. The description, however, remains insufficient since most of the duties described are non-executive functions. For example, developing a marketing plan, cultivating relationships with potential clients, liaising with vendors and collecting market information are not duties that fall under the regulatory definitions.

The beneficiary's stated duties, therefore, include numerous non-executive and/or non-managerial tasks that on their face do not qualify. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial and/or executive functions and what proportion would be non-managerial or non-executive. As indicated above, the petitioner lists the beneficiary's duties as including both managerial and operational tasks but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is 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).

The AAO further notes that the petitioner's claim that the beneficiary is managing an essential function is first made on appeal. The petitioner and counsel further acknowledge that the record prior to adjudication lacked sufficient descriptions and evidence upon which a favorable finding could be based. On appeal, they

introduce new evidence and newly structured assertions in support of the beneficiary's qualifications. These assertions, however, are not persuasive. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Citizenship and Immigration Services (CIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The AAO will next examine the director's conclusion that the beneficiary was primarily engaged in day-to-day tasks as opposed to managerial or executive duties based on the small staff employed by the U.S. petitioner. Counsel correctly asserts that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C); *see, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See id.*

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 present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties, such as developing and implementing marketing policies and liaising with vendors, particularly since the U.S. petitioner has been in operation for more than two years. The petitioner fails to explain the justification for these non-managerial and non-executive duties, yet continually asserts that the beneficiary performs only managerial or executive tasks. 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).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. As previously stated, a large percentage of the beneficiary's duties appear to be allotted to marketing and customer relations, which are duties that do not fall under the regulatory definitions of managerial and/or executive capacity. These duties, which appear to constitute the majority of the beneficiary's time, are akin to a marketing agent or salesperson as opposed to a true manager or executive. 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). Based on the evidence contained in the record, the AAO finds that the beneficiary must in fact be engaging primarily in non-qualifying duties in order to maintain the petitioner's business operations.

The AAO notes that counsel relies heavily on *Mars Jewelers, Inc. v. Immigration and Naturalizations Services*, 702 F. Supp. 1570 (N.D. Ga. 1988) and *Johnson-Laird, Inc. v. INS*, 537 F. Supp. 52 (D.C. Ore. 1981) in support of the premise that the director erred in examining the size of the petitioning entity in reaching the decision. However, counsel fails to recognize or discuss the subsequent holding in *Systronics*, which, as discussed above, permits CIS to examine an entity's size in relation to the reasonable needs of the entity. Consequently, counsel's reliance on *Mars Jewelers* and *Johnson-Laird* is misplaced and will not be considered for purposes of this analysis.

The petitioner has failed to establish that the beneficiary has been and will continue to be employed in a managerial or executive capacity, as required by 8 C.F.R. §214.2(l)(3)(iv). 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. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner, now in its third year of business, has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

The second issue in this matter is whether the petitioner has been doing business as required by the regulations for the previous year. The regulation at 8 C.F.R. §214.2(l)(1)(ii)(H) defines the term "doing business" as "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."

In this matter, the petitioner claims that it is engaged in the import and export of steel. The director denied the petition, finding that the petitioner had failed to submit sufficient evidence to establish that it had been doing business for the previous year. Specifically, the director noted that the petitioner's Form 1120, U.S. Corporate Tax Return for the year 2002, showed a taxable income of zero, and further noted that the petitioner's commercial lease agreement indicated that the premises leased was for "general office use" only, and did not indicate that stocking and shipping of iron and steel products was an intended use for the facility.

On appeal, counsel for the petitioner and the petitioner itself discuss the nature of the petitioner's business. They note that although established in 2001, the U.S. petitioner is still a relatively new business in its development stage. Despite this relatively new status, counsel and the petitioner state that the petitioner exported \$10 million in scrap steel in 2002 and assert that such an amount is impressive based on industry standards. Counsel and the petitioner, however, provide no supporting documentation to supplement these claims.

On review of the evidence submitted, the AAO concludes that the petitioner failed to demonstrate that it had been doing business during the past year for several reasons. First, in the course of examining whether a petitioning company has been doing business as an import and export firm, it is reasonable to submit copies of documents that are required in the daily operation of the enterprise due to routine regulatory oversight. Upon the importation of goods into the United States, the Customs Form 7501, Entry Summary, serves to classify the goods under the Harmonized Tariff Schedules of the United States and to ascertain customs duties and taxes. The Customs Form 301, Customs Bond, serves to secure the payment of import duties and taxes upon entry of the goods into the United States. According to 19 C.F.R. § 144.12, the Customs Form 7501 shall show the value, classification, and rate of duty for the imported goods as approved by the port director at the time the entry summary is filed. The regulation at 19 C.F.R. § 144.13 states that the Customs Form 301 will be filed in the amount required by the port director to support the entry documentation. Although customs brokers or agents are frequently utilized in the import process, the ultimate consignee should have access to these forms since they are liable for all import duties and taxes. Any company that is doing business through the regular, systematic, and continuous provision of goods through importation may reasonably be expected to submit copies of these forms to show that they are doing business as an import firm.

No such documentation exists in the record. In fact, there is no documentary evidence to establish that the petitioner has been engaging in the import and export of steel as it claims in the petition and again on appeal. 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). In addition, without documentary evidence to support his claims, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Consequently, there is no documentation contained in the record that explains or supports the petitioner's operations for the first year of the beneficiary's stay. 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 establish the new office. Furthermore, at the time the petitioner seeks an extension of a new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) require the petitioner to demonstrate that it has been doing business for the previous year. In the present matter, the evidence submitted is insufficient to establish that the petitioner has been doing business as defined by the regulations.

The definition of doing business clearly requires the continuous provision of goods and services, yet the petitioner has failed to submit evidence establishing its business activities for the remainder of the first year. The beneficiary was granted a one-year stay, beginning in November 2001, in which to open a new office. There is no evidence of any business activity during this period. The petitioner, therefore, has not established that it was regularly, systematically, and continuously providing goods and/or services during the entire first year of the beneficiary's stay. For this reason, the visa petition may not be approved.

The prior approval of the visa extension for this beneficiary in 2002 does not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). In this matter, the petitioner has failed to

establish that the beneficiary is employed in a primarily managerial capacity, and likewise has failed to show that it has regularly and systematically been doing business.

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.