

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

DUSTIC COPY

D 7



File: WAC 02 082 50540 Office: CALIFORNIA SERVICE CENTER Date: MAY 13 2005

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

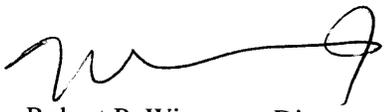
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 account operator¹ 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 claims to be a corporation organized under the law of the State of California engaging in the “import, export, wholesale” business. The petitioner claims that it is a wholly owned subsidiary of Aleum Co, Ltd., located in Seoul, South Korea. The beneficiary was granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary’s stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary does serve the U.S. entity in a managerial capacity.

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

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

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

¹ The beneficiary’s title is listed as “Account Operator” on the Form I-129 and in the petitioner’s December 27, 2001 letter, and as “General Manager and Key Accountant” on the petitioner’s April 19, 2002 response to the director’s request for further evidence.

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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

At issue in this proceeding is 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), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

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

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

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

In a letter dated December 27, 2001, submitted with the initial petition, the petitioner stated that the beneficiary "coordinates and manages daily financial transactions of the U.S. company, evaluating cost and income prospects to make efficient allocation of funds; reporting to the executive on detailed financial reports and proposals; analyzing cost and productivity of import/export transaction and makes recommendations to the executive. [She] has and will be responsible for company import/export/wholesale accounts California [sic]. She has and will direct and train additional new U.S. employees expected in our employment. She has wide discretion in the operation of the office being answerable [sic] to the executive/president of the Korean parent company."

On January 30, 2002, the director requested additional evidence. Specifically, the director requested (1) the U.S. entity's organization chart; (2) a detailed description of the beneficiary's jobs duties, including the percentage of time to be spent on each duty; (3) indication of whether the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees; and (4) the name, job title, entry date of employment, educational level, and the salaries/wages of other employees currently under the beneficiary's supervision, and evidence that they are actually the employees of the U.S. entity.

In a letter dated April 19, 2002, responding to the director's request, the president of the U.S. entity provided the following description of the beneficiary's job duties:²

- **Import/Export Coordination (30%):** administer and coordinate import/export procedures to custom clearing house and give directives on delivery details.
- **Key Account Duties (60%):** Maintain customer relations and accounts receivable in U.S. Administer Accounts receivable of U.S. Accounts of [REDACTED] In Korea.
- **Administration/Communication (10%):** Issue schedule directives and contract requirement to Seoul staff. Keep log of accounts and keep scheduled information and documentation network with [REDACTED] In Korea.

² The AAO notes here that the percentages the petitioner assigned to the different categories of the beneficiary's job duties add up more than 100%. The petitioner has not offered any correction of this error.

- **Commissioned Staff Coordination (10%):** Contract with commission agents in U.S. for sales/purchase/quality control of manufactured products for import/export. Adjust and issue commission structure according to shipment type and transaction type.

The petitioner further asserts that the beneficiary's main responsibility "is not [to] direct workers in [the] U.S. but to maintain the status of current account and business relations while coordinating and directing head office staff in Seoul for [the U.S. entity] to enter into negotiation and contract on behalf of the whole organization."

With respect to other employees of the U.S. entity, the petitioner indicated that the beneficiary is the only employee stationed in the U.S. The petitioner explained that the beneficiary is supported by a subordinate staff based in the Seoul office, and the petitioner provided the name, salary, and education level of each of those employees. The petitioner also stated that the U.S. entity required no other work force because it uses commission-based independent contractors. However, the petitioner submitted no documentation with respect to the employment of, or payment of wages to, any independent contractor.³ Finally, the petitioner submitted an organizational chart of the U.S. entity, which shows that in addition to the beneficiary and the managing director, there are two other individuals listed under "sales & purchasing" and "quality control inspector." The petitioner provided no other information relating to these persons or their positions within the U.S. entity.

On May 22, 2002, the director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Specifically, the director found that the evidence failed to establish that the beneficiary would be managing a subordinate staff of professional, managerial or supervisory personnel who would relieve her from performing non-qualifying duties. The director further found that there is insufficient evidence to establish that the beneficiary would be managing or directing the management of a department, a subdivision or a function of the U.S. entity, other than in position title.

On appeal, counsel for the petitioner asserts that the beneficiary does serve the organization in a managerial capacity. Counsel refers to the beneficiary as a "Key Account Executive" and the "Chief Accounting Officer" of both the foreign and U.S. entities, and offers a job description for the beneficiary's position as "Key Account Executive," which comprises four components: Management & Review (49%), Marketing (31%), Conference (10%), and Goal and Policy (10%). Counsel further asserts that the beneficiary has recruited, and is assisted by, three persons who work for the U.S. entity on an independent contractual basis – a sales manager, general manager, and sales agent. Counsel indicates that the company intends to hire additional employees as it develops additional ventures in the United States.

On review, the record is not persuasive in demonstrating that the beneficiary would be employed by the U.S. 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.

³ The AAO notes that the only evidence of wages paid to employees by the U.S. entity was the company's 2001 U.S. Corporation Tax Return, which showed \$28,978 in salary and wages paid in total in the year 2001, but which did not provide a break down of wages paid to individual employees.

§ 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 in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. 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).

In this matter, the petitioner's description of the beneficiary's job duties do not substantiate that the beneficiary will perform tasks associated primarily with managerial or executive duties rather than with carrying out the necessary day-to-day operations of the U.S. entity. For example, the petitioner indicated that the beneficiary would spend 60% of her time maintaining customer relations and administering accounts receivables. In addition, part of her remaining working hours would be spent coordinating import/export procedures to a customs clearing house, keeping logs of accounts, maintaining a scheduled information and documentation network, and contracting with commission agents in the United States for sales/purchase/quality control of the products. These tasks are part of the day-to-day operations of the petitioner's business and are necessary to provide the company's services. 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).

The petitioner had indicated in its April 19, 2002 letter that the beneficiary's main responsibility is not to direct workers in the U.S. entity, but to maintain the status of current account and business relations in coordination with the staff in Seoul the Seoul office. 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). To the extent the petitioner is claiming that the beneficiary is managing an essential function of the company, 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. As discussed above, the petitioner's description of the beneficiary's job duties suggests that the beneficiary does not manage an essential function of the organization, but instead, appears to be performing the duties relating to that function herself. Again, 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.

Moreover, as the director correctly concluded, the record does not establish that the beneficiary would be supervising a subordinate staff of supervisory, professional, or managerial employees within the U.S. entity. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The record further fails to establish that there is sufficient staff in the U.S. entity to relieve the beneficiary of the non-qualifying duties. The petitioner indicated in its April 19, 2002 letter that the beneficiary is the only employee stationed in the United States. To the extent the beneficiary has a support staff, those persons are employees of the foreign

entity, not the U.S. entity. Furthermore, while the petitioner claimed that it employs independent contractors, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the day-to-day operations of the U.S. entity. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Since there is insufficient evidence to establish that the beneficiary is supervising a staff of professional, supervisory, and managerial employees, or indeed, that there is a subordinate staff within the U.S. entity that could relieve the beneficiary from performing non-qualifying duties, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

Counsel's assertions on appeal are not persuasive. Counsel asserts that the beneficiary "does serve the function of 'managerial capacity,' whereas she manages the major accounts of the organization in U.S. as well as in Korea [sic]." As previously discussed, the beneficiary cannot be considered a "function manager" since the beneficiary's job description suggests that the beneficiary does not manage an essential function of the organization, but instead, is performing the duties relating to that function herself.

Counsel also makes certain factual representations in his brief that are inconsistent with the evidence of record. Counsel appears to have assigned the beneficiary new titles, "Chief Accounting Officer" and "Key Account Executive," and provides a new job description for the position of "Key Account Executive" that bears little resemblance to the job description for the beneficiary previously submitted by the petitioner. Counsel also states that the beneficiary is supported by a sales manager, general manager, and sales agent, who are employed by the U.S. entity on an independent contractual basis. The AAO notes that these positions do not appear in the organizational chart for the U.S. entity that the petitioner submitted, nor was this information provided elsewhere in the record. Counsel includes no documentation to support these assertions in his brief. Without documentary evidence to support the claim, 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).

With respect to the inconsistencies between the petitioner's previously submitted evidence and information set forth in counsel's brief, the AAO notes that 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). 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. *Id.*

Finally, even assuming the facts as set forth in counsel's brief accurately represent the current situation with respect to the U.S. entity and the beneficiary's job, a petitioner cannot materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities on appeal. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

In light of the foregoing, the AAO agrees with the director's conclusion that the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity by the United States entity, as required by 8 C.F.R. § 214.2(1)(3).

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.