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FILE: EAC 03 152 54234 Office: VERMONT SERVICE CENTER

Date: NOV 28 2005

IN RE: Petitioner:
Beneficiary:



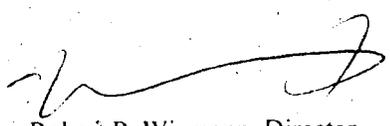
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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 nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, Inktec America Corporation, endeavors to classify the beneficiary as a manager or executive 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 subsidiary of [REDACTED] located in Korea. The petitioner is engaged in the business of manufacturing and selling printer related products. It seeks to extend the petition's validity and the beneficiary's stay for two years¹ as the U.S. entity's general manager and vice president. The petitioner was incorporated in April 2002.

On September 2, 2003, the director denied the petition and determined that the petitioner failed to establish that the beneficiary has been and will be primarily performing managerial or executive duties for the United States entity.

On appeal, the petitioner's counsel asserts that the beneficiary duties include "manag[ing] all aspects of the company's day-to-day U.S. activities."

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. 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. Furthermore, 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(14)(3) state 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.

A visa petition under section 101(a)(15)(L) 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;

¹ Although the Form I-129 indicated that the petitioner would like to extend the beneficiary's stay from June 1, 2002 until May 31, 2009, the April 1, 2003 letter indicated that the petitioner intended to extend the beneficiary's stay until May 31, 2005.

(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 issue in this proceeding is whether the beneficiary has been and will be primarily performing executive or managerial duties for the United States entity. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

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

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

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

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

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;

- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

On April 21, 2003, the petitioner filed the Form I-129. The petitioner described the beneficiary's proposed U.S. duties as the following:

[M]anag[ing] and direct[ing] marketing efforts in the U.S., Canada, Central America and South America markets.[The beneficiary] directs a managerial staff of 6 managers/executives/staffs both in the U.S. and Korea and direct business development activities.

The petitioner also stated that the beneficiary has over ten years of managerial and executive experience in "international marketing, project management, business development and sales."

In addition, the petitioner submitted an April 1, 2003 supporting letter claiming that the purpose of the petition was to extend the beneficiary's stay in the United States "while [the beneficiary] continue the same managerial/executive duty in the U.S."

On May 23, 2003, the director requested additional information concerning a comprehensive description of the beneficiary's duties in the U.S. and a complete list of the United States employees, their job positions and descriptions. The director also requested a breakdown of the number of hours devoted to each of the employee job duties and the beneficiary's job duties and an organizational chart. Finally, the director requested a copy of all 2002 Form W-2's, Form 1099's, W-3's, Form 1096's, and Form 941's for the fourth quarter of 2002 and the first quarter of 2003.

In response, the petitioner described the beneficiary's duties and stated that his primary duties included the following:

- Direct all sales and Marketing Personnel.
- Monitor market changes and marketplace needs, competitor's products, technology changes and manufacturing processes in order to recognize market opportunities for new and existing products and identify market weaknesses.
- Oversees all sales and [m]arketing activities and development for the Domestic and international Markets and key accounts are properly managed.
- Determines departmental staffing requirements, defines specific job requirements and submits recommendations for reviews and authorizations. Interviews department candidates, determines suitability of candidates and arranges for hiring. Trains personnel, reviews and explains work, explains and enforces company rules and regulations, conducts disciplinary interviews, counsel and coaches employees, appraise performance and recommends changes to pay or status.

- Participates in the development and implementation of sales and marketing policies, business agreements, sales agreement and strategic business alliances.
- Oversees the development of market research programs and provides the support necessary to ensure all research is carried out consistent with the product line objectives.
- Oversees and directs budgets of all promotional marketing and sales plans.
- Oversees all sales performance and sales forecasts. Evaluates the impact of sales performance and sales market support and company goals are achieved.
- Directs the support for the product line marketing plans, ensures timely completion of all marketing projects and coordinates product launches and sales staff training.
- Travel is required to meet company goals and objectives for Sales and Marketing.

In addition, the petitioner submitted a position description for its account manager and a breakdown of his hours. The petitioner also submitted an organizational chart indicating that as of June 2, 2003, the following three employees were working for the U.S. company: a president (staying in the Korean headquarters), vice-president (the beneficiary), and an account manager. The petitioner submitted 2002 W-2's for two employees, 2002 W-3, Form 941 for the quarter ending March 31, 2003.

On September 2, 2003, the director denied the petition and determined that the petitioner failed to establish that the beneficiary has been and will be primarily performing managerial or executive duties for the United States entity. The director noted discrepancies regarding the number of employees and wages paid. The director found that the beneficiary was primarily providing the sales and services of the business rather than directing the organization.

On appeal, the counsel asserts that the beneficiary duties include "manag[ing] all aspects of the company's day-to-day U.S. activities." Counsel further claims that the beneficiary "must establish the goals and policies of the company's U.S. component and exercise wide latitude in decision making receiving only general direction from the company's Korean headquarters." Counsel submits supporting documentation along with his brief.

In a supporting letter, dated September 8, 2003, written by the beneficiary, he explains,

The reason that the company does not need any day-to-day follow-up sales persons or customer servicemen is we import the products from Korea H.Q., keep them in the warehouse and sell to a few wholesale distributors only. Which is a way of business strategy to benefit each other, and if we sell the products directly to end users or small resellers later, then we must need more sales persons and customer service staffs.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of job duties. *See* 8 C.F.R. § 214.2(1)(3)(ii). On review, the petitioner has not established that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The petitioner's descriptions of the beneficiary's proposed U.S. duties are vague and do not elaborate how the beneficiary will primarily serve in a managerial or executive capacity. For example, the petitioner described the beneficiary's

duties as the following: “[p]articipat[ing] in the development and implementation of sales and marketing policies, business agreements, sales agreement and strategic business alliances” and “[d]irect[ing] the support for the product line marketing plans.” However, the petitioner failed to specify the duties that the beneficiary will perform or how these duties relate to him serving in a primarily managerial or executive capacity. Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge, otherwise meeting the definitions would simply be a matter of reiterating the regulations. See *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the petitioner stated that the beneficiary has “over ten years of managerial and executive experience in “international marketing, project management, business development and sales.” However, it is unclear how his prior experience in the areas of international marketing, business development, and sales relate to serving in a primarily managerial or executive position. The petitioner did not explain how these skills apply to his current position or demonstrate how specifically he will use these skills. 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).

Moreover, the petitioner described the beneficiary as “manag[ing] and direct[ing] marketing efforts” and “[o]versees all sales and [m]arketing activities.” Since the record indicated that there were only two other employees, a president and account manager, neither of which appear to perform the marketing or sales of the company, it appears that the beneficiary is selling the products of the company rather than overseeing these sales efforts. Although the beneficiary indicated in his September 8, 2003 that he “[o]versees all sales and [m]arketing activities” and that “there was no need for any day-to-day follow-up sales persons or customer servicemen,” it is unclear how the beneficiary oversees the very services that he provides. 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).

Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary's 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. On the Form I-129, the petitioner described the beneficiary's proposed U.S. duties as including “direct[ing] a managerial staff of 6 managers/executives/staffs both in the U.S. and Korea.”

Though requested by the director, the petitioner did not provide a comprehensive description of the account manager's duties. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Thus, the petitioner has not established that this claimed subordinate employee possesses or requires an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that this employee supervises subordinate staff members or manages a clearly defined department or function of the petitioner, such that he could be classified as a manager or supervisor. Thus, the petitioner has not shown that the beneficiary's subordinate employee is supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The AAO notes that the record indicates that the petitioner appears to employ two employees as indicated on the 2002 W-2's rather than the three indicated on the U.S. organizational chart and the six indicated on the Form I-129. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Further, 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). The petitioner described the beneficiary as being involved in "manag[ing] all aspects of the company's day-to-day U.S. activities" and "[M]anag[ing] and direct[ing] marketing efforts." 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. Here, the petitioner has failed to provide a detailed description specifying the duties that the beneficiary will primarily perform for the U.S. entity. As previously stated, 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 593, 604. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

After careful consideration of the evidence, the AAO concludes that the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. The petitioner submitted insufficient evidence to indicate that it has been selling its goods on a regular basis. The initial petition was approved on May 15, 2002, and the petitioner was allowed one year to open the new office. However, it appears as if the business was not operating until September 2002 or possibly October 2002, several months after the petition was approved. The petitioner submitted a lease indicating that although it was signed on June 6, 2002, it would not be effective until October 1, 2002. On appeal, counsel claims that although the U.S. business signed a lease in June 2002, the company did not occupy the rented space until October 1, 2002 and only began operating "on a day to day basis in September 2002." This assertion also raises a question as to the actual date of operation of the petitioner's business since counsel claims on appeal that the U.S. company began operating in September 2002, one month prior to occupying its rental space on October 1, 2002. Counsel claims that the beneficiary "had to undergo the many necessary activities involved with the establishment of a business office" because the beneficiary was involved in purchasing equipment and office furniture, hiring personnel, arranging telephone service, and printing business cards. The petitioner's telephone bills, listed as Exhibit F, submitted in response to the director's request for additional evidence indicated that the earliest telephone call was recorded on November 11, 2002. Therefore, since these activities were necessary for running the business, the AAO is not persuaded that the office was operating one month prior to the beneficiary completing these activities.

Pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business for the previous year, since the date of the approval of the initial petition. In the instant matter, there is insufficient evidence to establish that the petitioner was doing business from May through April of 2003. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). For this additional reason the petition may not be approved.

Another issue not addressed by the director involves the qualifying relationship between the petitioner and foreign entity. The petitioner claimed on the Form I-129 that the U.S. company is a wholly owned subsidiary of the Korean company. However, it is unclear who owns and controls the company. The petitioner's 2002 Internal Revenue Service (IRS) Form 1120 corporate tax return reveals that it is not a subsidiary and is not affiliated with any other entity. Consequently, it cannot be concluded that the petitioner is a qualifying organization doing business in the United States and at least one foreign country, or that it has a qualifying relationship with a foreign entity. See 8 C.F.R. § 214.2(l)(1)(ii)(G). Absent documentary evidence, the petitioner has not established that the U.S. entity is a wholly owned subsidiary of the foreign company. 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). Thus, based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations. For this additional reason, the petition may not be approved.

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 petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 appeal will be dismissed.

ORDER: The appeal is dismissed