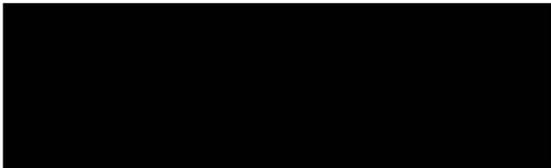


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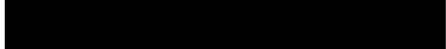


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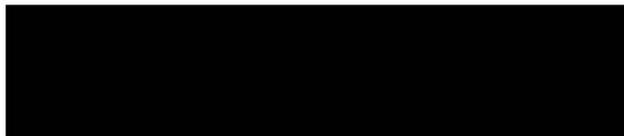


File: WAC 04 038 52569 Office: CALIFORNIA SERVICE CENTER Date: **SEP 08 2006**

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)

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, Chief  
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 Hawaii that is engaged in the marketing, sales and trading of air filter products. The petitioner claims that it is the subsidiary of Koair CO., Ltd. located in Kimpo, Korea. The beneficiary was initially 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 in the United States 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 addresses the director's grounds for denial and asserts that a favorable decision is warranted.

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.

At issue in the present matter 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 November 14, 2003 accompanying the Form I-129, the petitioner described the beneficiary's the job duties as follows:

[The beneficiary] is essentially unsupervised and her duties entail directing the overall management and control enterprise [sic], including participating in the establishing of policy and goals. She is exercising wide latitude in discretionary decision-making and subject only to supervision by the parent company's board of directors.

The key elements of her duties are as follow:

**I. Managerial capacity**

- (1) Human resource management is the significant company strategy that she concerns [sic]. Currently, the petitioner has 4 employees including [the beneficiary], but, as president, [she] supervises and manages 3 all other employees [sic]. In addition, they have planned to hire more employees within next year according to business plan and recruit independent contracted sales agents. [The beneficiary] also supervises them indirectly.
- (2) She directs and manages communication with customers and vendors direct [sic] to sales manager and employees.
- (3) She plans marketing strategy for new customers and new products.
- (4) She research[es] and review[s] market trend and situation in [the U.S.] and South America and makes report to BOD of the foreign parent company and evaluates business activities and make necessary changes according to the new market situation and adapts them to new business policies and goals.
- (5) She makes strategies to improve corporate image and satisfy the local customers' needs in the US.

**II. Professional knowledge of the parent company's business**

- (6) Increase company recognition in the U.S. market; approval of marketing strategies for the petitioner's business and parent company's products.

- (7) Search potential customers and business partners: meet potential clients and business partners and discuss & negotiate with them for future contacts [sic].
- (8) Cooperate with the parent company: Coordination with parent company regarding technical trends to improve quality of products.

In addition, as president, [the beneficiary] is responsible for managing and controlling the company including hiring, firing, promoting and demoting personnel. The beneficiary is also responsible for managing and controlling the work of other enterprise officers, managers and supervisors, including hiring, firing, promoting and demoting personnel [sic]. She plans and formulate[s] aspects of research and development projects, and developing long range goals and objectives. Finally, she exercises complete discretion over the enterprise's day-to-day operations.

The petitioner submitted a proposed organizational chart for the U.S. entity showing that the beneficiary's subordinate staff consists of (1) a sales department with one manager and one sales staff, and with additional customer service staff yet to be hired, (2) an administration department with one person responsible for accounting and an assistant to be hired when there is greater business volume, and (3) an import/export department which was not yet staffed.

On December 6, 2003, the director requested additional evidence to establish that the beneficiary has been performing the duties of a manager or executive with the U.S. company, including (1) the total number of employees at the U.S. office where the beneficiary would work, (2) copies of the U.S. entity's Federal Form 941, Quarterly Wages Reports, for all employees for the preceding two quarters, (3) copies of the U.S. company's payroll summary and Forms W-2 and W-3, and (4) copies of the U.S. entity's California Employment Development Department Form DE-6, Quarterly Wages Reports, for all employees for the preceding two quarters, noting that if the U.S. company is not located in California then the wage reports for the appropriate state.

In a letter dated January 29, 2004, responding to the request for evidence, counsel for the petitioner indicated that the petitioner has four employees, including the beneficiary, a sales manager, a sales specialist, and an administrative staff. Counsel included brief descriptions of these employees' job duties and stated that the petitioner plans to hire three more employees by June 2004. The petitioner submitted its Hawaii wage reports for the last two quarters in 2003, the company's payroll summary for the year 2003, and Forms W-2 for all four employees for the year 2003.

On February 13, 2004, the director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Specifically, the director noted that, although the beneficiary is claimed to be an executive, the job description does not indicate that she "establish[es] goals and policies for the U.S. company" as the regulations require. In addition, the director found the evidence indicates that a preponderance of the beneficiary's time would be spent on non-managerial duties. Finally, the director found that there is no evidence on record of a subordinate staff of managerial, supervisory or professional employees to relieve the beneficiary from performing non-qualifying duties.

On appeal, counsel for the petitioner addresses the director's grounds for denial and assert that a favorable decision is warranted because (1) the beneficiary does function in an executive capacity, (2) the preponderance of the beneficiary's time is spent on duties of a managerial nature, and (3) one of the beneficiary's subordinate qualifies as a manager.

Upon review of the record, the AAO concurs with the director's conclusion that the record is insufficient to demonstrate that the beneficiary would be employed in the United States 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 beneficiary's 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. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In this matter, while the petitioner did not make an explicit claim in the initial petition that the beneficiary is employed both in a managerial capacity and in an executive capacity, the job description the petitioner provided attempts to characterize the beneficiary's job under both categories. However, the AAO finds that the petitioner's description of the beneficiary's "executive" duties is vague and generally paraphrases the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner states that the beneficiary's "duties entail directing the overall management and control enterprise [sic], including participating in the establishing of policy and goals. She is exercising wide latitude in discretionary decision-making and subject only to supervision by the parent company's board of directors." As counsel claimed on appeal, the petitioner did include the "establish goals and policies" language in this description. Nonetheless, the description is merely a reiteration of the four criteria in the statutory definition of "executive capacity" and no more. Without specific details regarding what the beneficiary actually does on a daily basis, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. 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); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

The definitions of executive and managerial capacity have two main 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). Here, the director concluded that the evidence indicates that a preponderance of the beneficiary's time would be spent on non-managerial duties. Counsel asserts on appeal that the petitioner is still in the developing stage and will hire additional employees. Thus, counsel

states, at this stage of business operations, the beneficiary is not entirely relieved from non-managerial duties, but a preponderance of the beneficiary's time is still spent on duties that are managerial in nature.

The AAO does not find counsel's assertion to be persuasive. The job description provided by the petitioner indicates that the beneficiary is engaged in significant marketing activities for the company (i.e., "plans marketing strategy for new customers and new products," "research[es] and review[s] market trend and situation in [the U.S.] and South America," "makes strategies to improve corporate image and satisfy the local customers' needs in the US," "increase company recognition in the U.S. market; approval of marketing strategies for the petitioner's business and parent company's products"). Even though the petitioner claims that the beneficiary plans, makes and approves of marketing strategies for the company, the record does not indicate that any other employee of the petitioner is involved in the implementation of these marketing strategies. Thus, it would appear that the beneficiary herself directly engages in the day-to-day implementation of the company's marketing strategies as well as the planning. As such, some of the beneficiary's work in marketing would be considered tasks that are necessary to provide the company's services or product, and would not be considered managerial or executive in nature. In listing the beneficiary's duties, the petitioner has not quantified the time the beneficiary spends on them. Because the beneficiary's job involves tasks that are not executive or managerial in nature, as described above, the Citizenship and Immigration Services (CIS) cannot determine what proportion of the beneficiary's duties would be managerial or executive in nature and what proportion would not qualify as such. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Based on the foregoing, the AAO concurs with the director's conclusion that the evidence is insufficient to establish that the beneficiary's job duties are "primarily" managerial in nature.

Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, as is the case here, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. On appeal, counsel does not contest the director's finding that the beneficiary does not supervise professional employees. Counsel claims, however, that the beneficiary does supervise a managerial employee. The AAO finds that the record does not support this claim. In response to the director's request for further evidence, counsel has described the sales manager's duties as "mainly engaged in managing local clients, developing new business partners and customers and searching and developing effective distribution channels;" and the sales specialist's duties are described as "meets with customers and makes reports of customer requirements, claims and needs [and] manages the import/export schedules." Thus, it would appear that these two employees share the different responsibilities in the sales department, but it is not clear that the sales manager actually "manages" the sales specialist, or the entire sales function, such that he can be considered a "manager" other than in title. As such, the petitioner has not shown that the beneficiary supervises subordinate employees who are supervisory, managerial, nor has the petitioner shown that any of the beneficiary's subordinates are professionals, as required by section 101(a)(44)(A)(ii) of the Act.

In light of the foregoing, the AAO finds that the evidence is insufficient to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(1)(3).

Beyond the director's decision, the petitioner has not provided sufficient evidence to establish that a qualifying relationship continues to exist between the U.S. and foreign entities. The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. at 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

On the L Supplement to Form I-129, the petitioner indicated that the U.S. entity is wholly owned by the foreign entity. In support of this claim, the petitioner submits a copy of share certificate number 1 of the U.S. entity, which indicates that the foreign entity owns 10,000 shares of the U.S. entity. The petitioner submitted no other evidence of ownership interest in the U.S. entity. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control, and therefore cannot conclude that a qualifying relationship between the U.S. and foreign entities continues to exist as claimed. For this additional reason, the petition will be denied.

In addition, the record contains insufficient evidence to establish that the overseas company employed the beneficiary in a primarily managerial or executive capacity. On the L Supplement to Form I-129, the petitioner indicated that the beneficiary was the director of the foreign company's research and development department from January 2000 through December 2002. The petitioner also submitted copies of certificates of income showing wages paid to the beneficiary by the foreign entity in the years 2001 and 2002. However, the petitioner has failed to include any description of the beneficiary's job duties with the foreign entity. Without such information, CIS is unable to determine whether the beneficiary's "prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge" as required under 8 C.F.R. § 214.2(1)(3)(iv). For this additional reason, the petition will be denied.

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 for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.