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File: LIN 05 077 51484 Office: NEBRASKA SERVICE CENTER Date: **APR 08 2007**

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraksa 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 visa 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 under the laws of the State of Colorado and alleges to be a provider of oriental medical services and products. The petitioner claims a qualifying relationship as an affiliate with Jungwon Oriental Medicine Clinic in South 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 will 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 to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive or manager. In support of this assertion, counsel submits a brief. Specifically, counsel argues that the beneficiary's job duties, as well as his supervision of an office director and a physical therapist, qualify him as a manager or executive. Counsel relies in part on guidance provided in the Foreign Affairs Manual.

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 primary issue in the present 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.

The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act, and implies that the beneficiary is acting as both. 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 is indeed representing 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. Given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary is acting either as a managerial *or* as an executive and will consider both classifications.

The petitioner described the beneficiary's duties in a letter dated January 6, 2005 and provided an organizational chart for the United States operation. On February 16, 2005, the director requested additional evidence regarding the beneficiary's job duties and the petitioner's staffing. Specifically, the director requested a more detailed statement of the duties performed by the beneficiary, a breakdown of how much time he spends on each duty, a list of employees, a description of the employees' job duties, and educational credentials for the employees. In response, the petitioner provided a letter dated May 6, 2005 in which it describes the beneficiary's duties as follows:

- i) Oversee business operations;
- ii) Develop and modify on-going goals;
- iii) Set long-term goals;
- iv) Plan, forecast and establish budgets[;]
- v) Evaluate financial projections including capital expenditure projections, patient fees modules, P&L projections, cash flow projections to determine feasibility of each phase of the operation;
- vi) Has full, ultimate authority over personnel hiring and firing and[;]
- vii) Provide guidance and have authority over all business policies and procedures.

The petitioner also provided a breakdown of the beneficiary's duties as follows:

STRATEGIC DEVELOPMENT OF U.S. ENTITY	Formulate strategies and establish goals for current and future operations of our company.	40%
FINANCIAL ANALYSIS OF U.S. ENTITY	Plan, chart, forecast and establish budgets.	10%
ASSESS U.S. OPERATIONS	Evaluate financial projections including capital expenditure projections, patient fees modules, P&L projections, cash flow projections and balance sheet projections to determine feasibility of each phase of the operation; risk evaluation.	10%
MANAGE AND SUPERVISE U.S. ENTITY PERSONNEL	Supervise and direct personnel, hire, fire and make all necessary personnel decisions[.]	20%
DEVELOP U.S. PERIPHERAL BUSINESS	Oversee work of independent contractors, including negotiations with outside service providers such as advertising agencies, web domain developers, accountants and lawyers.	20%

The petitioner also asserts in the letter dated May 6, 2005 that it has 8 employees. While this is consistent with the organizational chart provided in response to the Request for Evidence, it conflicts with other documentary evidence. For example, the organizational chart provided with the initial petition and the employee roster applicable to the time period in which the petition was filed both identify 10 employees. Therefore, the initial organizational chart will be used to adjudicate the appeal. 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). That being said, to the extent the second organizational chart provides duty descriptions for employees identified in the initial petition, the AAO will consider this evidence.

Additionally, the petitioner asserts that the beneficiary is relieved from performing the day-to-day functions of the business by the office director, an independent contractor, and the other employees. While wage reports were provided for the employees, the record does not reveal how much the office director is paid nor does it reveal how much time he devotes to the petitioner's business. Also, the wage reports reveal that the petitioner did not have any employees until the fourth quarter of 2004, approximately 3 months prior to the filing of the current "new office" extension petition.

Finally, as indicated above, the petitioner provided an organizational chart for the United States operation. The chart shows the beneficiary at the top of the organization supervising the office director, an independent contractor. The office director, in turn, directly or indirectly supervises the subordinate employees including a licensed physical therapist, a licensed acupuncturist, two massage therapists, an assistant to the physical therapist, two receptionists, and a maintenance employee. The office director is described as overseeing the business operation, implementing the beneficiary's policies, and supervising employees, while the remaining employees are described as performing the tasks necessary to provide services.

On June 7, 2005, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, the petitioner asserts that the beneficiary's duties are primarily those of an executive or a manager.

Specifically, counsel argues that the beneficiary's job duties, as well as his supervision of an office director and a physical therapist, qualify him as a manager or executive.

Upon review, the petitioner's assertions are not persuasive.

Title 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the United States operation has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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 explained above, 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.

The petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary spends 60% of his time formulating strategies and establishing goals, budgeting, and evaluating financial projections. The petitioner did not, however, specifically define what strategies and goals will be formulated or provide details regarding what actions, exactly, the beneficiary intends to take to set budgets or to evaluate financial projections. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees. First, the supervision of the office director, an independent contractor, is not a qualifying managerial duty under the Act. The current version of the Act clearly requires the supervision or control of *employees*. See 8 U.S.C. § 1101(a)(44)(A)(ii). Independent contractors are not employees. See 26 C.F.R. § 31.3121(d)-1(c)(2). Second, the supervision of the physical therapist, while perhaps a professional employee, has not been established to be the "primary" function of the beneficiary. The petitioner claims that only 20% of the beneficiary's time is spent supervising staff, which presumably includes both the physical therapist and the other employees who have not been established to be professional employees. In view of the fact that the beneficiary's remaining duties are so vaguely described

that it cannot be ascertained what he does or will do on a day-to-day basis, the beneficiary would appear to be primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. 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). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Also, as indicated above, since the record fails to reveal the educational or skill levels necessary for entry into the positions held by the subordinate employees, other than the physical therapist, it cannot be determined if they rise to the level of professional employees.¹ Therefore, the record does not establish that the beneficiary will act in a managerial capacity.²

¹In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree, or even a master's degree, by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

²While the petitioner has not specifically argued that the beneficiary manages an essential function of the organization, the record nevertheless would not support this position. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, *i.e.*, 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. See 8 C.F.R. § 214.2(1)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce 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).

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* As indicated above, while the petitioner may have provided a vague job description which reiterates the regulations, the petitioner has failed to establish that the beneficiary, who is primarily acting as a first-line supervisor, will be acting primarily in an executive capacity.

On appeal, counsel relies heavily on the presence of the office director and the other employees in asserting that the petitioner employs a staff which relieves the beneficiary of the need to perform the day-to-day tasks necessary to the business. While the presence of such a staff, either employees or independent contractors, may be essential to establishing even the possibility that a beneficiary could be engaged primarily in performing executive or managerial duties, the petitioner must still establish through a clear description of the beneficiary's job duties that the beneficiary will be primarily engaged in performing these executive or managerial duties. As indicated above, the petitioner has provided a vague, non-specific description of the beneficiary's duties which do not establish that he will be primarily employed as a manager or an executive. The presence of subordinate employees alone does not automatically establish that the beneficiary is engaged primarily in performing managerial or executive duties.

Moreover, the office director and his alleged employment as an independent contractor must be addressed. As correctly indicated by the director, the record does not reveal the salary of this individual, does not include a copy of a consulting contract, and does not explain how much time the office director devotes to the petitioner's business. Not only can the beneficiary's supervision of this independent contractor not be used as a qualifying managerial duty, the petitioner has not sufficiently established that the office director provides any services which would relieve the beneficiary of the need to perform non-qualifying duties, including first-line supervisory duties. The director specifically requested wage and employment evidence for the petitioner's staff, and the petitioner chose not to provide this evidence for the office director and has thus failed to establish that he provides services to the petitioner. 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). 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.

Finally, on appeal, counsel repeatedly cites as authority guidance contained in the Foreign Affairs Manual (FAM). It must be noted that the FAM is not binding upon CIS. *See Avena v. INS*, 989 F. Supp. 1 (D.D.C. 1997); *Matter of Bosuego*, 17 I&N 125 (BIA 1979). The FAM provides guidance to employees of the

Department of State in carrying out their official duties, such as the adjudication of visa applications abroad. The FAM is not relevant to this proceeding.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, a related issue in this proceeding is whether the petitioner has provided evidence sufficient to establish that the petitioner and the foreign entity are qualifying organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G).

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e., one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). An affiliate means "[o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual." See 8 C.F.R. § 214.2(l)(1)(ii)(L). In this case, the petitioner asserts that it and the foreign entity are both 100% owned by Yun Suk Cho.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 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.

In this matter, the petitioner has provided conflicting documentary evidence regarding the ownership and control of the United States operation. While the petitioner has provided copies of organizational documents evidencing the issuance of 100% of the petitioner's stock to Yun Suk Cho, the petitioner's 2004 IRS Form 1120 indicates in Schedule E that the beneficiary owns 100% of the petitioner's stock. The petitioner offers no explanation for this serious inconsistency in the record. 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). Therefore, in view of this inconsistency, the petitioner has not established the ownership and control of the petitioner and has not established that it has a qualifying relationship with the foreign entity. For this additional reason, the petition may not be approved.

Beyond the decision of the director, a related issue in this proceeding is whether the petitioner has established that it has been doing business as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H) for the previous year. 8 C.F.R. § 214.2(l)(14)(ii)(B). In this matter, the record reveals that the petitioner did not have any employees until, at the earliest, October 2004 even though the initial "new office" petition was approved on May 5, 2004. The record also reveals that the petitioner had gross receipts of only \$15,085.00 in 2004. Therefore, the petitioner has not established that it engaged in the regular, systematic, and continuous provision of goods and/or services during its first year in operation. For this additional reason, the petition may not be approved.

