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FILE: EAC 05 093 53437 Office: VERMONT SERVICE CENTER Date: FEB 01 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)

ON BEHALF OF PETITIONER:
[Redacted]

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, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president and 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, a Pennsylvania corporation, claims to be a branch of Hanyang Feed Company Ltd., located in Seoul, South Korea. The petitioner claims to be engaged in the import and export of agricultural products. 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 L-1A classification for an additional three years.

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 filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that the director's decision was erroneous and that, contrary to the director's findings, the petitioner has grown to the point where it can support the beneficiary in a qualifying position, and thus is qualified for the benefit sought. In support of this contention, counsel submits a brief statement.

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) provides 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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) 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 this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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

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

acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

In a letter dated February 10, 2005, the petitioner provided an overview of the beneficiary's duties in the United States. Specifically, the petitioner stated:

The position of President is vital to the success of [the petitioner's] operation in the United States. The incumbent will set long term objectives for world wide business growth and profitability. These goals are then translated into short-range goals and strategies (plans of action) taking maximum advantage of our strengths. [The beneficiary] will maintain knowledge of the market; develop and foster contacts at all levels among the key supplier base. He will set up and maintain systems to take advantage of creative strengths throughout [the petitioner].

* * *

With his position as President and Chief Executive Officer, [the beneficiary] serves the petitioner in an executive and managerial capacity. In this position, [the beneficiary] continues to be responsible for the company's entire feed import and premix production program. [The beneficiary] has been a valuable asset to the company and his length of employment with [the petitioner] allows him to meet the length of employment requirements of [the regulations].

On March 16, 2005, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request specifically asked the petitioner to submit an organizational chart for the petitioner; a complete description of the beneficiary's duties; a list of all subordinates of the beneficiary, with a description of each person's position title, duties and educational backgrounds, and an explanation as to how the beneficiary is relieved from performing non-qualifying duties.

In a response dated April 4, 2005, counsel addressed the director's queries. With regard to the beneficiary's duties, counsel stated:

[The beneficiary] will continue his role as the President of [the petitioner] in Pennsylvania as he establishes the U.S. sales and marketing office. In his role as President, [the beneficiary] will direct and control all business activities of the worldwide [region of the petitioner]; provide leadership and development skills to enhance the capabilities of [the petitioner's] business heads; and ensure that [the petitioner's] group profit plan is implemented and met.

Attached to the response was a more detailed job description for the beneficiary, which indicated that his basic purpose was as described above. In addition, his principal responsibilities were outlined, and these responsibilities included reporting to the foreign entity, setting long-term objectives, decision-making, problem solving, and accountability.

The organizational chart demonstrated that the beneficiary would directly oversee an auditor and a managing director. The managing director, in turn, would oversee three divisions: HQ, Plant Division, and Sales Division. Under each division were numerous positions. At the time of filing, however, none of these positions were actively being performed by personnel.

On June 9, 2005, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a managerial or executive capacity. The director concluded that the documentary evidence submitted did not establish that the beneficiary would function at a senior level within the organization or that the beneficiary had sufficient subordinate staff to relieve him from performing non-qualifying duties. Therefore, the director concluded that the petitioner had not yet reached the point where it could support the beneficiary in a primarily managerial or executive capacity. On appeal, counsel for the petitioner asserts that the petitioner has in fact expanded greatly in the past year, and contends that the director's findings were erroneous.

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 initial description of duties provided by the petitioner in these proceedings did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a vague overview of the nature of his duties, namely that he would function as president and oversee virtually all aspects of the business, from the sales and marketing to human resources. Consequently, the director requested more specific information, including an organizational chart and overview of the petitioner's structure in order to better comprehend the work environment of the beneficiary. The petitioner responded to this request, and although a detailed job description was submitted, the description merely provided a generalized overview of the beneficiary's responsibilities. Furthermore, despite the submission of a detailed business plan, the organizational structure of the petitioner, as evidence by the organizational chart, suggested that none of the proposed positions had yet been staffed.

Based on the evidence of record, the AAO is not convinced that the duties and the percentage of time the beneficiary allegedly devotes to each is an accurate portrayal of a typical workday. In sum, the description in the record claims that the beneficiary has the general responsibility of running and overseeing the entire operation of the petitioner. In addition, 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. 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. Although the petitioner briefly supplemented the beneficiary's position description in the response to the request for evidence, the updated description is not adequate to clearly establish the day-to-day nature of the beneficiary's position, or the capacity in which the petitioner intends for the beneficiary to be employed.

It appears, therefore, upon review of the limited position description in the record and the fact that the beneficiary appears to be the petitioner's sole employee, the beneficiary is directly responsible for all aspects of running the business, including personnel, premises, and inventory, in addition to handling all financial aspects of the business.¹ Finally, in addition to these tasks, it appears that the beneficiary must directly handle all sales, marketing, and acquisitions for the businesses, including the payment of domestic and foreign taxes and the performance of administrative duties. These generalized duties do not appear to fall directly under traditional managerial or executive duties as defined in the statute. While some of these areas would generally be recognized as the responsibilities of a manager or executive, the vague descriptions provided and the lack of sufficient subordinate staff at the time of filing suggest that the beneficiary directly handles most aspects of the business himself, instead of managing these operations. For example, the description of duties emphasizes the beneficiary's responsibilities to "set long-term objectives" and to "direct and control the petitioner's worldwide operations." These tasks include a tremendous amount of responsibility, and the fact that the petitioner has failed to submit evidence that the beneficiary has a subordinate staff to relieve him from performing the non-qualifying but inevitable duties indicates that the beneficiary's primary responsibilities cannot be exclusively devoted to managerial or executive tasks. An employee who primarily performs the

¹ The AAO notes that on appeal, counsel for the petitioner provides documentation of an L-1A visa approved for an alleged subordinate of the beneficiary in the United States. This documentation, however, is not evidence of this person's employment with the U.S. petitioner, since the approval notice merely demonstrates his authorization to work in the United States, and not that he is currently doing so for the petitioner. Nevertheless, in the event that this L-1A petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

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).

More importantly, however, the petitioner claims that it will soon be hiring personnel to fill all the proposed positions, but that at the time of filing, the beneficiary was the petitioner's sole employee. There is no evidence in the record that at the time of filing the petitioner employed anyone other than the beneficiary. Although the beneficiary's W-2 form for 2004 was submitted, no additional payroll documentation is contained in the record, despite the director's specific request for such information in the request for evidence issued on March 16, 2005. In fact, the petitioner also failed to adequately address the director's request for more information regarding the position requirements and associated duties of the beneficiary and any subordinate employees. 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). Therefore, absent any evidence to the contrary, the only logical conclusion is that the beneficiary is the petitioner's sole employee.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 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 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 petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

Beyond the decision of the director, there is contradictory evidence in the record with regard to the foreign entity which raises the issue of whether there is a qualifying relationship between and U.S. entity and the beneficiary's foreign employer pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). In this matter, the petitioner claims to be a branch of the foreign entity. In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(l)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). CIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. *See Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982)(stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common

ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick*, 13 I&N Dec. at 649-50.

Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer.

In this matter, the petitioner claims that it is a branch office of the foreign entity. It indicates on the Form I-129 that the beneficiary owns 89.99% of the petitioner; however, no further evidence regarding the U.S. company has been submitted. As a result, the AAO is unable to determine whether the petitioner is in fact a branch of the foreign entity, or whether it is incorporated in the United States and thus a subsidiary or affiliate of the foreign entity. 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). Without additional evidence pertaining to the petitioner's status in the United States, CIS is unable to accurately determine the nature of the qualifying relationship between the foreign entity and the petitioner. For this additional reason, the petition may not be approved.

In addition, the petitioner indicates that the beneficiary is the majority owner of the petitioner. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States.

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).

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.

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

ORDER: The appeal is dismissed.