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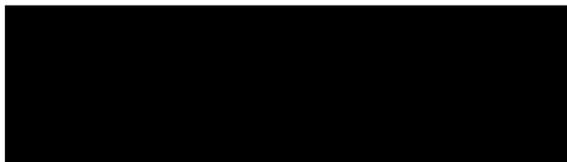
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
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U.S. Citizenship
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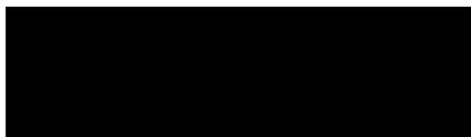
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File: LIN 04 096 53785 Office: NEBRASKA SERVICE CENTER Date: JUL 05 2007

IN RE: Petitioner:
Beneficiary:



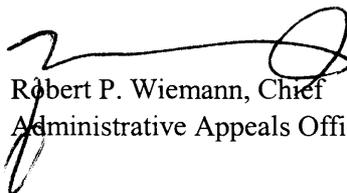
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, Nebraska 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 managing director 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, an Illinois corporation, states that it is engaged in the business of selling security and fire-proof doors. The petitioner claims that it is the subsidiary of Namyoung Co. Ltd, located in Korea. The beneficiary was initially granted a one-year period of stay in the United States to open a new office and the petitioner now seeks to extend the beneficiary's stay for two additional years.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) that the petitioner had been doing business for the prior year.

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, the petitioner asserts that the company has been the victim of a "corporate scam" that has delayed its plans, but notes that the problems have been solved and it intends to staff the U.S. company "as soon as an order contract is signed." The petitioner further asserts that while the petitioner does not have any direct employees, it participates in the Korean Small Business Corporation "U.S. Incubator program," for new Korean U.S. subsidiaries, which provides marketing support to the petitioner and other participating companies. Finally, the petitioner asserts that the beneficiary is employed in a managerial capacity, and states that it previously provided evidence that it is conducting business in the United States. The petitioner submits a brief and additional documentary evidence in support of the appeal.

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)(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 first issue addressed by the director is whether the petitioner established that 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 nonimmigrant petition was filed on February 19, 2004. The petitioner stated on Form I-129 that the beneficiary would serve as its managing director under the extended petition and indicated the number of current employees as "none." In a supporting letter dated February 13, 2004, the petitioner described the beneficiary's role as follows:

[The Beneficiary's] responsibilities include marketing and sales in North America, recruiting, hiring, training and supervising U.S. staff, managing all financial affairs of the company, exploring opportunities for joint ventures and product licensing, and building a distribution agent network.

In a separate statement, the petitioner provided the following description of the beneficiary's duties:

- Marketing and merchandising in the world as well in the U.S.
- Getting the information of new trend.
- Finding the good American company to share [petitioner's] patent.
- Applying the U.S. code & U.L. certification.
- Marketing to American architectural firms.
- Participate in builder's fair in North and South America
- Develop appropriate operating strategies.
- Hire and train a staff adequate to generate and service sales[.]

The petitioner stated that the U.S. company plans to hire a total of five staff "next year" to fill marketing, engineering and administrative positions.

On March 22, 2004 the director issued a request for the missing initial evidence required by 8 C.F.R. § 214.2(l)(14)(ii), including a statement describing the staffing of the U.S. company, evidence of wages paid to employees, and a detailed statement of the beneficiary's job duties.

In the response letter dated June 9, 2004, the petitioner included the following description of the beneficiary's proposed duties under the extended petition:

- Contact potential customer
- Coordinate import / export operation
- Provided information to [foreign organization] (Korea Office) on regulatory environment to overseas market
- Interview and hire necessary sales and support staff
- Train and evaluate staff
- Develop relationships with freight forwarding companies
- Report to act on behalf of shareholders
- Manage company finances and liquidity

- Product sales and product requirements
- Meet annual sales and profitability targets
- Participate in builder's fair in North America
- Marketing to American architectural firm
- Oversee general administration and maintenance of a customer database
- Finding a good American company to share [petitioner's] patent

The petitioner indicated that it did not hire any employees because it had not yet made any income in the United States. The petitioner submitted its IRS Form 1120, U.S. Corporation Income Tax Return for 2003, which shows no income and no wages paid to employees, officers or outside staff.

On August 30, 2004, the director denied the petition. The director determined that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director noted that many of the beneficiary's stated responsibilities are not managerial or executive in nature, and that the petitioner had not established that the beneficiary will manage a function or a subordinate staff of professional, managerial or supervisory personnel who would relieve him from performing the services of the company. The director further observed that there was no evidence that the beneficiary functions at a senior level within an organizational hierarchy other in position title.

On appeal, the petitioner states that the beneficiary does fulfill a managerial role in the U.S. business, noting that he "has done his best under difficult conditions," has participated in product exhibitions, and has been working in conjunction with local firms to create business opportunities. The petitioner also emphasizes that it participates in the Korean Small Business Corporation (SBC) operated by the Korean government, which supports select U.S. subsidiaries of Korean companies. The petitioner states that SBC has three Korean and four U.S. marketing experts who are available to the petitioner when requested and who "act as employees" of the U.S. company in assisting with marketing strategy, market analysis, marketing research, initial contact services and documentation services. The petitioner submits a letter from the SBC USA Office confirming that the petitioner is an existing member of its "Incubator Program," and eligible to receive marketing and secretarial services offered by SBC.

The petitioner asserts that in addition to the SBC personnel, it pays KOTRA (Korea Trade and Investment Promotion Agency) offices in Los Angeles, Chicago and Vancouver to analyze the U.S. and Canadian market. The petitioner states that these offices hire specialists who periodically submit market reports to the beneficiary. In support of the appeal, the petitioner provides letters from the KOTRA offices in Chicago and Los Angeles. Each office confirmed that the petitioner had requested a marketing and research report.

Upon review, the petitioner's assertions are not persuasive and the decision of the director will be upheld. 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(1)(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 has provided vague and nonspecific descriptions of the beneficiary's duties that fail to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "getting information of the new trend," "meet annual sales and profitability targets," and "develop appropriate marketing strategies." The petitioner did not, however, define the beneficiary's goals, policies, or clarify who will actually perform the duties necessary to provide the product or service of the petitioner. 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).

In addition, the petitioner describes the beneficiary's proposed duties under the extended petition as coordinating import/export operations, contacting potential customers, product sales, determining product requirements, making sales calls, marketing the petitioner's products, general administration of the company, managing company finances, and maintaining a customer database. Since the beneficiary will market and sell the product, and coordinate import and export operations, he will be performing tasks necessary to provide a service or product and these duties will not be considered managerial or executive in nature. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). Similarly, the beneficiary's proposed responsibilities for coordinating import and export operations, liaising with freight forwarders, database maintenance, providing reports on the U.S. regulatory environment, and "general administration" do not fall within the statutory definitions of managerial or executive capacity and can not be considered qualifying duties.

The definitions of executive and managerial capacity have two specific requirements. 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, while the beneficiary evidently exercises discretion over the U.S. company as its sole employee, the evidence does not establish that his actual duties are primarily managerial or executive in nature. The actual duties themselves reveal the true nature of the employment. *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).

The AAO acknowledges the petitioner's claim that the beneficiary will interview, hire and supervise staff in the future. However, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in U.S. Citizenship and Immigration Services (USCIS) regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, and does not have a subordinate staff to relieve the beneficiary from performing the day-to-day non-qualifying duties associated with operating its business, 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, as it did not employ any subordinate staff as of the date the petition was filed. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

On appeal, the petitioner asserts that the beneficiary does in fact supervise marketing staff employed by SBC and KOTRA. The letters submitted are not sufficiently detailed to constitute evidence of the beneficiary's managerial capacity. At most, it appears that the beneficiary requested two market research reports from external organizations within the previous year. The petitioner's claim that these organizations work under the beneficiary's supervision is not adequately supported. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner's evidence falls short of establishing that the petitioner utilizes direct employees or contractors to relieve the beneficiary from performing the routine functions of the petitioner's business on a day-to-day business, particularly in light of the beneficiary's proposed job description, which includes primarily non-managerial duties.

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, 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). Again, 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 USCIS regulations that allows for an extension of this one-year period. As noted above, 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.

Although the petitioner appears to dispute the director's reliance on the petitioner's staffing levels, there is no indication in this matter that the director did not consider the reasonable needs of the organization. On the contrary, it appears the reasonable needs were considered, and the director concluded that the petitioner was incapable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act. Contrary to the petitioner's assertions, the record does not establish that the beneficiary was relieved from primarily performing non-managerial duties associated with the company's sales, marketing, advertising, customer service, financial, and administrative functions.

Collectively, the lack of a subordinate staff brings into question how much of the beneficiary's time can actually be devoted to the claimed managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See*

sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also consistently required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties. As discussed above, the petitioner has not established this essential element of eligibility.

While the AAO recognizes that the beneficiary exercises discretion over the day-to-day affairs of the business, the fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The actual duties themselves reveal the true nature of the employment. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

The second issue in the matter is whether the petitioner established that it has been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii)(H).

At the time of filing, the petitioner indicated that during its first year of operations, it participated in two trade shows, placed advertisements in magazines, prepared a UL certification for its fire door, prepared a patent application for a printing process for metallic surfaces, and tried to contact distributors and representatives. In response to the director's request for evidence that the company has been doing business, the petitioner submitted its 2003 IRS Form 1120, U.S. Corporation Income Tax Return. A single tax return, however, is not sufficient to demonstrate that the petitioner is engaged in the regular, systematic, and continuous provision of goods or services. In this case, the tax return submitted shows that the petitioner had no gross receipts of sales for the prior year and assets of \$655. Therefore, the tax return supports a conclusion that the petition had not been doing business as defined in the regulations as of the end of 2003.

Further, as of June 9, 2004, when the petitioner responded to the request for evidence, the petitioner stated that it did not yet have any income from its business operations. On appeal, the petitioner implies that it still has not received its first order for goods as of September 2004, but mentions for the first time that the company "was the victim of a corporate scam" and that "the accident" delayed its plans. The petitioner references "rave reviews from leading firms in the U.S.," and states that several contracts were being negotiated before the "incident" had a serious impact on the firm, causing it to change its plans. The petitioner states that the "problem" has been solved and the petitioner will hire employees when an order contract is signed. The petitioner again stresses that the beneficiary attended product exhibitions, "worked hard to survey the market," and "has been working in conjunction with many local firms to create business opportunities."

The petitioner's assertions are not persuasive. The petitioner neither explained nor provided documentary evidence of the "scam," "accident," or "incident," which apparently prevented the company from commencing operations in the United States, nor has it clarified why such alleged problems were not mentioned at the time the petition was filed or when responding to the director's request for evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

The petitioner has not submitted evidence that it has been doing business as defined in the regulations at any point since the beneficiary was granted L-1A status on May 1, 2003. The petitioner's participation in two product exhibitions or trade fairs and ambiguously described collaborations with local firms "to create business opportunities" do not rise to the level of doing business for the purpose of this visa classification. After one year, USCIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B). The petitioner has not submitted evidence on appeal to overcome the director's determination on this issue. Accordingly, the appeal will be dismissed.

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.