

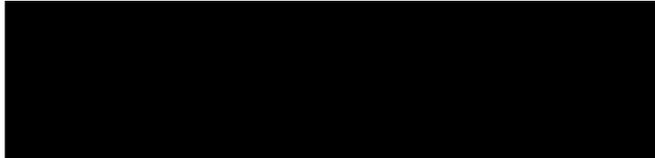
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U.S. Department of Homeland Security
20 Massachusetts Ave, N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

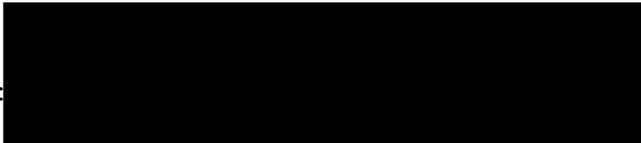
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File: SRC 04 170 50481 Office: TEXAS SERVICE CENTER Date: **JUN 20 2007**

IN RE: Petitioner:
Beneficiary:

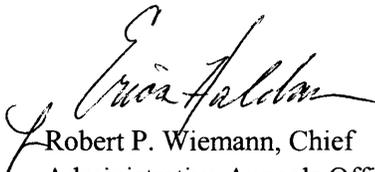


Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN 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, Texas 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 and general manager 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 Texas corporation, claims to be the subsidiary of MC Electronics Co., Ltd., location in Kyoungki-Do, South Korea. The petitioner claims to be engaged in the manufacturing, marketing and sale of closed circuit security cameras and related recording equipment for both digital and analog systems worldwide. 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 for an additional two years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary had been and will continue to 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, the petitioner contends that the denial was contrary to federal case law, and contends that the director placed undue emphasis on the size of the petitioner's enterprise. In support of these contentions, the petitioner submits a detailed brief.

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 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.

In support of the initial petition, former counsel submitted a letter dated May 28, 2004. Counsel explained that the beneficiary, as president and general manager, was not a manager overseeing personnel, but rather an executive directing the organization's North American presence.¹ Counsel explained that although the petitioner currently employed only the beneficiary, it anticipated hiring one to two staff members within the next year. In addition, the petitioner submitted a letter dated May 25, 2004, which provided an outline of the beneficiary's duties while employed in the United States. The petitioner described her duties as follows:

[The beneficiary] is responsible for and directs marketing, sales, and distribution of [the foreign organization's] products in North America (and beyond Asia). She has and will continue to analyze markets, develop and cultivate customer relationships, [and] negotiate and conclude contracts on behalf of the company.

* * *

Although she will continually liaise with our executive group in Korea, as the sole executive in our North American operation, **she will continue to exercise a wide degree of latitude and discretion.** In short, she will continue to be our decision-making authority in North America. As mentioned before, **[the beneficiary] will receive only limited oversight, and has the authority to act independently within our organizational framework,** which includes the authority to negotiate and execute binding corporate agreements, establish sales and marketing plans, and ensure their fulfillment. Additionally, she will have the authority to hire sales and marketing personnel for the U.S. office, decide on the best method of increasing market share, and decide what factors can or will impact the company's sales

¹ Despite the claim that the beneficiary is acting as an executive, Citizenship and Immigration Services (CIS) normally considers the beneficiary's duties for eligibility under the definitions of both managerial and executive capacity.

goals. **In short, she establishes corporate objectives, ensures their fulfillment, and takes remedial actions when necessary.** She is the key executive to the success of our U.S. operations.

Emphasis in original.

On June 15, 2004, the director requested additional evidence pertaining to the nature of the U.S. business, including an organizational chart demonstrating all employees and their positions within the petitioner's organizational hierarchy as well as evidence of the employment and wages paid to such employees. In a response dated June 17, 2004, former counsel for the petitioner provided an overview of the petitioner's current structure. Counsel repeated the contention that the petitioner employed only the beneficiary at the current time, but anticipated hiring a sales staff in 2005 to "better round out its current sales and marketing functions." Counsel further stated the following:

The petitioner submits that despite not having employees at the current time, it can nonetheless meet at least two of the three guidelines for start-up extensions: generation of significant cash flow and attending a significant customer. We expect the third element, creation of employment will occur in the second year of business.

On July 1, 2004, the director denied the petition. The director, who reviewed the record to determine eligibility under both managerial and executive capacity, found that the beneficiary's stated duties had satisfied neither. The director noted that the nature and structure of the business as currently functioning did not appear to support the position of a bonafide executive. In addition, the director noted that the petitioner had not established that the beneficiary would exercise authority over subordinate employees or manage an essential function or component of the organization. The director concluded by finding that the beneficiary was primarily performing the tasks necessary for the continued operations of the business, and therefore was ineligible for the classification sought.

On appeal, the petitioner, acting on a *pro se* basis, asserts that the director's decision was contrary to federal case law, and contends that the director unfairly relied on the size of the petitioner's enterprise in reaching the decision.

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

The AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not demonstrated that the beneficiary will be employed in a primarily managerial or executive capacity. Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B)

of the Act. Here, the petitioner claims that the beneficiary's duties are exclusively executive, yet the identified duties of the beneficiary in the record include non-executive tasks. For example, the petitioner states that the beneficiary "negotiates business contracts" and will eventually "hire and fire personnel." Such duties are not included in the definition of executive capacity, which former counsel alleged was the proper capacity of the beneficiary. The record contains no additional evidence or explanation with regard to the duties of the beneficiary. Merely claiming that the beneficiary is an executive is insufficient to establish eligibility in this matter. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The description of duties for the petitioner indicates that she directs the sales, marketing, and distribution departments, yet the evidence contained in the record confirms that she is currently the petitioner's sole employee. Former counsel for the petitioner specifically claims, in both his May 28, 2004 letter and June 17, 2004 response to the request for evidence, that the beneficiary is the petitioner's sole employee. As a result, the beneficiary is the only person who can perform the essential tasks of the petitioner. 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). Absent evidence to the contrary, it appears that the beneficiary, as the petitioner's sole employee, is engaged in client-related services.

The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitutes significant components of the duties performed on a day-to-day basis. In fact, the record in its current state indicates that all or the majority of the beneficiary's duties constitute marketing, sales, or other customer services which are not traditionally considered managerial or executive duties.

On appeal, the petitioner argues that the director's emphasis on the current size of the petitioning entity was erroneous. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* Further, in this matter, 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).

In this matter, there are no other employees currently on the petitioner’s payroll who can relieve the beneficiary from performing non-qualifying tasks. Furthermore, despite the clear lack of subordinate staff, the petitioner repeated asserts that the beneficiary directs various departments such as sales and marketing, thereby suggesting that the functions of these departments are delegated to others. This claim, however, contradicts the undisputed fact that the beneficiary is the sole employee of the petitioner, and therefore has no one upon which to delegate such tasks. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Moreover, the petitioner relies on *Mars Jewelers Inc. v. I.N.S.*, 702 F. Supp. 1570 (N.D. Ga. 1988) and *Johnson-Laird, Inc. v. INS*, 537 F. Supp. 52 (D.C. Ore. 1981) in support of the premise that the director erred in examining the size of the petitioning entity in reaching the decision. However, counsel fails to recognize or discuss the subsequent holding in *Systronics*, which, as discussed above, permits CIS to examine an entity's size in relation to the reasonable needs of the entity. Consequently, counsel's reliance on *Mars Jewelers* and *Johnson-Laird* is misplaced and will not be considered for purposes of this analysis.

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 CIS regulations that allows for an extension of this one-year period. Although former counsel and the petitioner both contend that the petitioner will hire additional employees within the next year, this claim is insufficient to establish eligibility in this matter. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has failed to establish that it has been doing business for the previous year. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines the term “doing business” 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.”

In this matter, the petitioner claims that it is engaged in the manufacturing, marketing and sale of electronic goods. More specifically, the petitioner indicates that it specializes in security cameras and related recording equipment. The record in this matter indicates, by the petitioner’s own admission, that its revenue is “not on the books” as a result of the fact that its primary customer wanted its business to be attributed to the foreign entity, not the petitioner. The petitioner’s Form 1120, U.S. Corporation Income Tax Return for 2003 no gross receipts or

sales. Although various invoices, purchase orders and bills of lading are submitted for the record, the U.S. company appears to be acting merely as an agent for the foreign entity.

The definition of doing business clearly requires the continuous provision of goods and services, yet the petitioner has failed to submit evidence establishing its business activities for the first year of operations. The beneficiary was granted a one-year stay in which to open a new office. There is no evidence of any business activity during this period. The petitioner, therefore, has not established that it was regularly, systematically, and continuously providing goods and/or services during the entire year preceding the filing of the extension request. For this additional reason, the visa petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.