

Identifying data and redacted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

87

DATE: **DEC 13 2011** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner, a [REDACTED] claims that it is engaged in “trading guard and other protective services, wholesale of navigating and telecommunication equipment.” The petitioner states that it is a subsidiary of [REDACTED] located in Korea. Accordingly, the United States entity petitioned United States Citizenship and Immigration Services (USCIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) 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 was initially granted a one-year period of stay to open a new office. The petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of president/chief executive officer for a period of over five years.

The director denied the petition on December 7, 2009, concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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 to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means 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), provides:

The term "executive capacity" means 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 October 30, 2009. The Form I-129 indicates that the beneficiary will continue to be employed in the position of president/chief executive officer. On the Form I-129, the petitioner claimed to have two employees. In a support letter, the petitioner explained that it was established to "assist [the foreign company] and its subsidiaries" on the following:

- (1) To buy and import security NT workstation computer systems and parts thereof from the U.S.;
- (2) To provide communications/internet solutions and system back-up solutions for the same systems in Korea;
- (3) To invest in real estate and other businesses such as golf courses and restaurants.

The petitioner also stated that it already invested in real estate and businesses by purchasing [REDACTED]. The petitioner provided a description of the beneficiary's duties in the United States as follows:

Since his entry into the U.S. as an intracompany transferee, in 2009, [the beneficiary] has successfully performed in his current position of President of [the petitioner] and will continuously manage [the petitioner] in the United States. He functions as Founder and Owner of [the petitioner]. He enters and makes all agreements such as OEM agreements, product supply agreements, and purchase agreements with vendors. He entered into a real estate and business investment transaction on behalf of [the petitioner] for the purchase of [REDACTED].

In the area of human resources management, [the beneficiary] exercises authority in regard to investing, hiring, firing, training, delegation of assignments according to capabilities, preferences and technical goals, discipline, promotions, and remuneration. He conducts performance reviews and ensures that his staff follows corporate procedures.

Functioning autonomously, [the beneficiary] is responsible for managing and directing all development and sales (exports and imports) activities of [the petitioner] as they pertain to our international operations. The [redacted] of [the petitioner] promotes standardization across our international affiliates using head office policies and practices as a model. This includes communicating the technological and development direction of [the petitioner] to our international offices on a regular basis. [The beneficiary] routinely meets with various technical specialists from the international units and with managing directors of [the foreign company] to ensure that our corporate philosophy is understood and is being delivered accurately. He represents the unique concerns and requirements of the intentional operations to headquarters and provides significant contributions in the formulation of strategic product plans to ensure that the business and strategic policies are effectively incorporated into our international business activities.

[The beneficiary] also establishes and promotes the standardization of technical support and services based upon our corporate model. He meets regularly with various developmental units of [the foreign company] to review current policies and procedures and develop appropriate plans necessary to ensure consistency of development of practices in accordance with corporate standards. [The beneficiary] enhances the level of direct development expertise available in Korea and in the United States. He formulates strategies and plans to improve the communication between [the petitioner] and [the foreign company] and establishes and promotes standardization in the delivery of technical information and services to [the petitioner's] clients.

The petitioner submitted an organizational chart of both the foreign and U.S. offices. The petitioner in the United States is made up of the beneficiary as president who supervises one individual in each department: "Trade," "Security" and "Golf Course;" who in turn supervise seven administrative staff.

On November 12, 2009, the director determined that the petitioner did not submit sufficient evidence to process the petition and requested additional evidence to establish that the beneficiary will be performing the duties of a manager or executive with the U.S. company.

In response to the director's request for evidence, the petitioner submitted a list of all current employees. The list has 11 employees who fill the following positions: President; Trade Team Manager; Security Team Manager; two Security Team Administration/Clerks; Golf Course Manager/Trade Team Clerk; Golf Course Clerk/Trade Team Clerk; and four Golf course

Administration/Clerks. The petitioner explained that in the first year of operations, it purchased a Golf course and thus it employs the individuals that run the golf course.

The petitioner also submitted the beneficiary's duties in an executive capacity in the United States as follows:

1. Direct managers of the company.
2. Establish the goals and policies of company.
3. Exercise total and complete discretion in decision-making as the owner and sole investor.
4. [The beneficiary] has no one above him in [the petitioner].
5. The decision to expand international transactions.
6. The decision to more investment in the United States.
7. Choosing and hiring all employees.
8. Developing new business relationships with American vendors for the Trade with [the foreign company] in Seoul, Korea.
9. Entering into transaction agreements with vendors.
10. Managing the Golf Course and its clubhouse including a restaurant.

The petitioner also stated the percentage of time spend on each duty as follows:

1. 40% in working with the international trading manager, [REDACTED] to develop the trading business items.
2. 20% in marketing searching of the Security System products for international trade business.
3. 5% in oversight of the Golf Course (a turnkey operation with established management and staff).
4. 30% Research and planning for development of [the petitioner] (including development of new relationships and contracts with vendors).
5. 5% Miscellaneous business – related activities.

On appeal, counsel for the petitioner provides the following information about the duties to be performed by the beneficiary:

As President and Owner of [the petitioner], [the beneficiary] makes all decisions in regards to the management of the company. [The petitioner] employs eleven individuals and as President [the beneficiary] oversees the duties of all employees and implements all company policies. The management team at [the petitioner] then ensures that all other employees follow the company policies and work to meet company goals. Included with this motion to appeal is a list of all employees and an organizational chart implemented by [the beneficiary]. [The beneficiary] oversees and supervises [REDACTED] the international trading manager, [REDACTED] the security manager, and [REDACTED] the golf course manager. [The beneficiary] supervises and oversees all aspects of the marketing of security systems products for the international trade business of [the petitioner], specifically directing [REDACTED]

██████████ is the manager in charge of the day to day operations of the security systems department but [the beneficiary] oversees ██████████ work. [The beneficiary] also oversees and manages all operations at the golf course and the associated clubhouse. The golf course manager, ██████████ supervises the day to day operations of the golf course and the golf course staff but [the beneficiary] oversees the entire operation and directs ██████████ as he carries out his duties.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the 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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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. at 604.

The beneficiary's proposed job description is vague, stating that the beneficiary "makes all decisions in regards to the management of the company executive decision making;" "oversees the duties of all employees and implements all company policies;" "develop the trading business items;" and, "establishes and promotes the standardization of technical support and services based upon our corporate model." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will 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 petitioner stated that the beneficiary will spend 40 percent of his time "working with the international trading manager, ██████████, to develop the trading business items." The petitioner did not, however, provide any information regarding what the trading business entails. The petitioner stated that the beneficiary is responsible for "managing and directing all development and sales (exports and imports) activities of [the petitioner] as they pertain to our international

operations” but never explained what products the petitioner imports or exports and how that part of the company functions. Without further information about the trading department, it is impossible to determine that the 40 percent of the beneficiary’s time in this department is in a managerial or executive capacity.

In addition, the petitioner stated that 30 percent of the beneficiary’s time will be “research and planning for development of [the petitioner] (including development of new relationships and contracts with vendors).” Since the petitioner does not have a marketing or sales department, it appears that the beneficiary will be responsible for all of the business development and marketing. Again, based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary’s duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner’s description of the beneficiary’s job duties does not establish what proportion of the beneficiary’s duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

If the beneficiary is in fact researching the distributors and vendors, and negotiating the contracts, or simply ordering inventory from suppliers, these duties have not been shown to be managerial or executive in nature. 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 job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform or how his time will be divided among managerial and non-managerial duties.

On appeal, counsel asserts that the position offered to the beneficiary is 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, 8 U.S.C. § 1101(a)(44)(B). 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 managerial 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-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.* 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. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As the petitioner provided a very vague description of the duties to be performed by all of the employees supervised by the beneficiary, it is impossible to determine if

the U.S. company has established a complex organizational structure which would elevate the beneficiary beyond a first-line supervisor. The petitioner has not established that the beneficiary is serving in an executive capacity with the U.S. entity.

As discussed above, the beneficiary's job description was not sufficient to establish that he would be employed in a primarily managerial or executive capacity, and the petitioner has not provided sufficient information regarding the duties to be performed by the employees within the petitioner's organization subordinate to the beneficiary. Thus, it is impossible to determine whether the employees would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of an executive or manager as contemplated by the governing statute and regulations.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.