



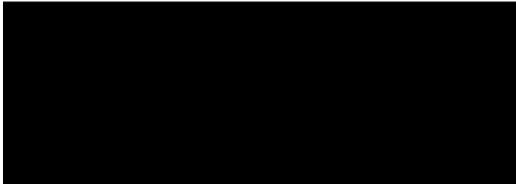
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U.S. Department of Justice

Immigration and Naturalization Service

Decision made timely to
prevent clearly unwarranted
division of personal services

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC 99 248 50903 Office: California Service Center Date: 1 - MAR 2002

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:



Administrative Appeals Office

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Myra L. Rosaney
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, a company manufacturing and distributing semi-conductors, seeks to employ the beneficiary temporarily in the United States as its general manager. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, the petitioner argues that the beneficiary is employed in a primarily managerial or executive capacity.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(1)(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 (1)(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 performed.

8 C.F.R. 214.2(1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

A) Sufficient physical premises to house the new office have been secured;

B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that

the proposed employment involved executive or managerial authority over the new operation; and

C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The United States petitioner was established on March 31, 1999, and is a branch office of AUK Co., Ltd., a Korean Corporation, which was established on July 31, 1984, and claims 651 employees and sales totaling 104 billion won. The United States petitioner states that it is trying to improve its international competitiveness by providing top notch quality products ranging from basic elements to applied merchandise. The petitioner further stated that it plans to expand to California and that the beneficiary is well qualified to help in its initial development. The petitioner seeks to employ the beneficiary for a period of three (3) years at a annual salary of \$35,000.00 per year.

At issue in this proceeding is whether the beneficiary has been employed abroad and will be employed in the United States in a primarily managerial or executive capacity.

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

"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:

"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.

In a letter dated September 1, 1999, the foreign entity states that the beneficiary's duties will consist of the following:

[The beneficiary] will fill the position of Manager of San Jose Office. This position is a key managerial one within each branch office, because it is the manager who surveys and determines the future course of action for the company in its geographical area. It is this manager who will bring together the whole creative team to work

on each account, supervise their work, set standard for work, and coordinate the various projects and market research to guide the company's future plans. Also involved in her task is explaining technical aspects of products produced by our company. [The beneficiary], with her background, and her doctorate degree in the field, qualifies as the best candidate for the position...her major work will involve survey and planning of company strategy.

In her decision, the director noted:

The petitioner has not provided a comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary will be managing or directing the management of a function, department, subdivision or component of the petitioning company. The petitioner has not persuasively demonstrated that the beneficiary will be functioning at a senior level within an organization hierarchy. Instead, it appears as though the beneficiary, in actuality, will be merely functioning as a first-line supervisor who will be managing two (2) nonprofessional employees.

On appeal, counsel asserts that the beneficiary's duties will be managerial in nature and that she will be the "highest officer within the U.S. organization." Counsel states, in pertinent part, that:

Contrary to what was stated in the Decision, the petitioner's type of business is not the import of semi-conductors. The petitioner's business consist[s] mostly manufacturing of semi-conductors and other high tech products...as states in the petitioner's supporting letter, [the beneficiary] would be functioning as "General Manager." Although the title given is itself not sufficient, it is the petitioner's intention to authorize the beneficiary to implement plans for hiring of local employees for the future operation of the company. It is stated in the job duties of the beneficiary that the beneficiary will "survey(s) and determine the future course of action for the company in its geographic area." As a start-up company in the U.S., it is only natural and reasonable that at this stage of the petitioner's branch office in San Jose, California, the petitioner cannot be employing a number of employees.

The Service points out that the submitted organizational chart of projected staffing includes only three positions. Again the confusion here is that the

organization chart included only the employees whom the beneficiary thought would be needed for a short period while she established the U.S. organizations' future growth plans...the petitioner is planning to move its U.S. business part to the San Jose office. The projected volume of the trade between the U.S. and Korea is in excess of \$50,000,000.00.

It is noted for the record that at the time of filing, the United States petitioner submitted a lease agreement, which indicated that the U. S. petitioner leased *120 sq. ft of office space* from Airport Park Office Building at a monthly rate of \$300.00, on September 8, 1999, for the stated purpose of "Representative agency for semiconductor manufacturing."

Counsel indicates that the overall purpose and stage of development of the United States organization should be taken into consideration when determining whether the beneficiary's position is managerial or executive, rather than relying solely on staffing levels. According to counsel, it is reasonable for a company to employ a staff of an appropriate size to meet the needs of the enterprise.

Further, counsel states that the title given is itself not sufficient, it is the petitioner's intention to authorize the beneficiary to implement plans for hiring of local employees for the future operation of the company. Counsel further indicates that it is stated in the job duties of the beneficiary that the beneficiary will survey and determine the future course of action and that as a start-up company in the U.S., it is only natural and reasonable that at this stage of the petitioner's branch office in San Jose, California, the petitioner cannot be employing a number of employees.

Although counsel appears to argue that the beneficiary controls an essential function, the record does not demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the function. The record must further demonstrate that there are qualified employees to perform the function so that the beneficiary is relieved from performing non-qualifying duties. Absent details concerning the position descriptions and wages of subordinate employees, as well as the company's managerial structure, the record fails to establish that the beneficiary will be managing rather than performing the function.

Moreover, the beneficiary at present is the sole employee of the petitioning entity. Therefore, the record does not establish that the beneficiary will be primarily managing an organization, or a department, subdivision, function, or component of the organization.

Despite counsel's contentions, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in the U.S. in a primarily managerial or executive capacity. The record does not contain a comprehensive description of the beneficiary's duties which would establish that the beneficiary has managerial control and authority over a function, department, subdivision, or component of the company. Simply stating that the beneficiary is the general manager, who will analyze market conditions, bring together a working team and determine future growth plans, is not sufficient to establish that the duties actually performed will be of a primarily managerial capacity. The petitioner's proposal shows three employees, the beneficiary as general manager and two additional non-supervisory personnel. The minimal description of the beneficiary's duties has not persuasively distinguished the beneficiary as an executive or that she is relieved from performing non-qualifying duties. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or primarily managing an essential function within the organization. Based on the evidence submitted, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason the petition may not be approved.

Beyond the decision of the director, the record does not demonstrate that the petitioner has demonstrated that the beneficiary has been employed abroad for one continuous year in the three year period preceding the filing of the petition, in an executive or managerial capacity, by a qualifying organization. As the appeal will be dismissed on the grounds discussed above, this issue need not be examined further.

In visa petition proceedings, the burden of proof 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.