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U.S. Department of Justice  
Immigration and Naturalization Service

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

File: LIN 99-049-50851 Office: Nebraska Service Center Date:

MAY 09 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:



PUBLIC COPY

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. Rosenc*  
for Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner, a company engaged in the retailing of men's and women's clothing, seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary had been or would be employed in the United States in a primarily managerial or executive capacity, or that it is doing business and denied the petition.

On appeal, counsel asserts that the beneficiary performed various functions for the petitioner, who had economic difficulties, which would "force any employee to perform various duties for the survival of the company regardless of their title."

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 to be performed.

8 C.F.R. 214.2(1)(14)(ii) states that a visa petition under section 101(a)(15)(L) 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 (1)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(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 U.S. petitioner stated that it was established in 1996, and that it is a wholly owned subsidiary of Illwon Korea Company, Ltd. located in Seoul, Korea. The petitioner declared one employee and a gross annual income of \$500,000.00. It seeks to extend the petition's validity and the beneficiary's stay for two years at an annual salary of \$52,000.00.

The first issue in this proceeding is whether the beneficiary has been or 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:

"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.

The petitioner described the beneficiary's duties as follows:

[THE BENEFICIARY'S] ACCOMPLISHMENTS IN USA

[The beneficiary], as president of our USA entity IL-WON CORPORATION, has demonstrated superb managerial and marketing skills since he transferred to the USA, which include the sales, management, and marketing of stores in Cleveland, Ohio. from November 1997 through June 1998 and in Fairview Park, Ohio from February 1998 through July 1998; then [the beneficiary] opened a store in Gibraltar Trade Center in Taylor, Michigan in August 1998, and he is in charge of its operation since August 1998. In addition, [the beneficiary's] effort resulted in securing a store to be opened in February 1999 at Westgate Mall in Cleveland, Ohio.

...We now wish to propose that [the beneficiary] be granted an extension of stay in the USA to further assume his responsibility as President of our U.S. operation...His duty and responsibility will be the same as our previous assignment as President of IL-Won Corporation in the United States. This position is executive and managerial in nature and is at the highest level of authority. [The beneficiary] will report only to the President of Illwon Korea and will work with minimal supervision.

[The beneficiary] will be invested with sole executive power and authority to oversee and direct the operations of the USA entity. This shall include the adoption of corporate policies, formation of corporate structure, extension of all legal documents, and all financial matters of the Company.

Initially, [the beneficiary] had have [sic] two (2) other individuals under his supervision, the General Manager who will guide the Operations Department, and the Sales Manager who will guide the Sales Department, both of whom are degreed professionals. [The beneficiary] has had full discretionary authority to hire, terminate, promote and demote those under him.

In response to the Service's request for additional information, the petitioner submitted a document entitled "Statement for New Store Operation and Employees, which stated in pertinent part, that:

Il-Won Korea, Co.,Ltd., parent company of Il-Won Corporation of USA, had conducted a market investigation for a new store in Westgate Mall in Cleveland, Ohio, with special consideration of the number of potential customers and their average income. This investigation was vital to the success of the company's business operation in the United States. A business operation of our U.S. corporation in the same area during 1997 did not produce a desirable outcome.

The result of our investigation showed the decrease in potential customer population from 1997. Currently, our company is taking a careful analysis of customer data to prepare for a new store at the Great Northern Mall located in the western suburb of the city of Cleveland. We are planning to open this new store in July of this year, 1999.

...There will be a total of seven employees-five for this new store and two for other store. The composition

of the employees are one store sales manager, two sales clerks for women's clothing and accessories, two sales clerks for country style men and women's clothing and two sales clerks for the company's other store in Gibraltar Trade Center.

The petitioner submitted an organizational chart reflecting the proposed staffing. However, it is significant that, the beneficiary was identified as being the only employee of the U.S. entity. None of the evidence submitted names any other employee(s). Additional documentation submitted consisted of fund transfer statements and several documents entitled "Week-to-Week Rental Agreement".

On appeal, counsel asserts that:

[The beneficiary] is president and he performs various functions. However, his performance duties do not negate him to be called executive under Title 8, Part 214.2 because business needs necessitate a business executive to exert his or her time to the betterment of the progress of the company. [The beneficiary's] role as a "first-line supervisor" in this instant case comes into this category. Il-Won Corporation's survival in the U.S.A. was a pivotal task given the [the beneficiary] as the company's sales experienced a record low and a financial support from South Korea was decreased due to an economic downturn of South Korea.

The company with an economic hardship had to force any employee to perform various duties for the survival of the company regardless of the title...

The 1997 income tax return showed a loss of over \$24,000. We acknowledge this fact. Difficulties in business and a learning process in the U.S.A. for cultivating [a] market require more than a few years to demonstrate whether the business is successful or not. The struggle to survive in a difficult time for certain industries does not signal that there is no ongoing business.

The information provided by the petitioner does not describe in sufficient detail any of the actual duties of the beneficiary, but rather goes to some length to concentrate on the failings of the venture. Duties described as having sole executive power and authority to oversee and direct the operations of the USA entity, adoption of corporate policies, formation of corporate structure, extension of all legal documents, and all financial matters of the Company, are of little probative value in light of the fact that the record contains no evidence that the U. S. petitioner had more than one employee, the beneficiary, at any time during the period

of time initially approved on petition. The use of the position title of "president" is not persuasive.

The record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a managerial or executive capacity. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business and engaging in other non-qualifying activities. The Petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy. Further, the petitioner's evidence is not persuasive in establishing that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. Based on the evidence furnished, it cannot be found that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

The next issue in this proceeding is whether the petitioner is doing business.

8 C.F.R. 214.2(l)(1)(ii)(H) states:

*Doing business* means 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.

The petitioner has submitted documentary evidence indicating that the corporation operated in the red during 1997. The petitioner asserts that surveys were done, plans have been made and a new store will be opened, with an additional seven (7) employees hired. However, the record contains no evidence to corroborate these claims other than the tax documents reflecting that the petitioner did not break even or make a profit during 1997. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, the petitioner has not accounted for how sufficient funds will be generated to pay the beneficiary \$52,000.00, when according to counsel the parent organization has significantly decreased its support of the U.S. entity, and the U.S. entity is losing money. Rather, based on the minimal documentation of the petitioner's

business operations, the issue of whether the petitioner is a qualifying organization doing business in the United States pursuant to 8 C.F.R. 214.2(l)(1)(ii)(G)(2) is questionable. The petitioner has claimed, but not demonstrated that it is engaged in the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not represent the mere presence of an agent or office in the United States. For this additional reason, the petition may not be granted.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (Comm. 1988).

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.