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U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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Washington, D.C. 20536

[redacted]

FEB 28 2003

File: WAC 01 179 54391 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER: [redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision 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.

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 that 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

for Myra L Rosenberg
Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is described as an import/export business. The record indicates that the beneficiary originally was granted L-1 classification as a manager or executive with validity of the visa petition granted until May 12, 2001. Currently, the petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States in the capacity of a manager or executive, namely as its president. The director determined that the petitioner had not established that the beneficiary would be employed in a qualifying managerial or executive capacity.

On appeal, counsel presents a brief.

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 his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and seeks to enter the United States temporarily to continue to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

To obtain an extension of a visa petition's validity, 8 C.F.R. § 214.2(l)(4)(i) states, in pertinent part:

> *Individual petition.* The petitioner shall file a petition extension on From I-129 to extend an individual petition under section 101(a)(15)(L) of the Act. Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director. A petition extension may be filed only if the validity of the original petition has not expired.

The issue in this proceeding is whether 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:

> "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 Form I-129, Petition for a Nonimmigrant Worker, for an extension, was filed on May 23, 2001, with an earlier date of April 25, 2001 deleted. The petitioner states that it is a branch of Samas Electronics, Inc. and was formed for the purpose

of "importing stationary and fancy sundries from Korea and marketing in the U.S.A."

The petition indicates that the duties of the position will be:

> Oversee day to day operations; hire, train & terminate employees; marketing/development; manage all asepcts [sic] of the operation [sic] Develop and plan marketing strategy; conduct market research, etc.

Included in the record is an undated listing of the petitioner's three employees, indicating the beneficiary as "branch president" performing the duties of:

> Management, marketing, final decision for purchasing & selling (time is equally divided among these duties, which are th [sic] duties performed for the parent company).

This document indicates that the beneficiary will be paid a salary of $50,000.00 per year, and will perform the duties of president at the United States entity for three weeks per month with one week of each month to be spent in Korea, performing the duties of the foreign entity's president. No evidence of the petitioner's assertions of the beneficiary's monthly commute between the United States and Korea is included in the record. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The "branch manager" position, occupied by [redacted] also an L-1A, is indicated as "general management, marketing planning, purchasing planning and sales," with a salary of $40,000.00. The only other individual employed by the petitioner is listed as an "employee," [redacted] to perform the duties of "warehouse management, sales support & customer service" at a salary of $24,000.00 per year. These listed salaries total $114,000.00, an amount not supported by any evidence submitted by the petitioner as either paid in the past year, or capable of being paid at any foreseeable time in the future.

Included in the record is a "Balance Certificate" dated March 6, 2000, from a financial institution indicating that the petitioner holds a business checking account, with an available balance of $87,294.92 on March 3, 2000. No information to indicate how such an infusion of cash into a business that holds a negative income on its tax and accounting statements is included in the record.

In another document dated March 21, 2000, the petitioner indicates that it will employ two people in the United States, the beneficiary as the president of the company, to "control general

business matters," and an "officer," [redacted] who is indicated as "in charge of business matters," and that "representatives from Korea Company shall be sent to promote business in the U.S. office more rapidly and efficiently." Here, the petitioner states that it plans to hire three United States citizens, and that it "[m]ay add more as business grows." In this document the petitioner states that it will pay the two representatives from Korea $40,000.00 each with the "U.S. resident employee" to be paid $30,000.00, for a total of $110,000.00.

In yet another document, an organizational chart, the beneficiary indicated that the petitioner consists of a "manager of branch office," occupied by [redacted] an "export in charge" occupied by [redacted] and a "[b]usiness," occupied by [redacted]

On appeal, counsel states that the foreign entity was established in 1993 as an auto parts manufacturer for Hyundai Motors. Counsel states that the foreign entity employs approximately 400 persons, that in 1999 it generated over $2 million in revenue, and that it was created to import and export goods between Korea and the United States. Counsel states that the foreign entity has been the exclusive Korean agent of Lansmont Corporation since 1993. Counsel also states that between 1993 and 1998, the total import volume equaled $4,530,954.00, with an import volume in 1999 exceeding $5 million and expected to double in 2000.

A letter dated July 15, 1999, however, does not entirely support counsel's assertion. Here, the General Manager, Equipment Division, Lansmont Corporation, indicates that a sales agreement between the Samas Korea Company and Lansmont Corporation in California was initiated on August 31, 1993, and that Samas Korea Co., was the company's exclusive agent in Korea. Total sales per year from 1993 through 1998, indicate sales between $12,700.00 in 1998 to a high of $1,456,482.00 in 1996. However, no explanation of the plummeting level of sales in 1998 or an indication of future increased sales to the level indicated by counsel is included in the record. Also included in the record is a copy of the agreement between Samas Korea and the Lansmont Corporation dated August 30, 1993.

Counsel asserts that the beneficiary clearly qualifies in both a manager and executive capacity, and that in his capacity as president of the petitioner, his duties are similar to those he performs as president of Samas Electronics, "namely being the chief decision-maker for both companies."

The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1990).

Counsel indicates the duties to be:

> He develops and plans marketing strategy (as evidenced by the participation in various trade shows/conventions and other sales activities); oversees marketing research; sets company budgets; searches and evaluates proper legal, tax, business advisors; acts as liaison between Samas Electronics and S & Mas, Inc.; oversees management hiring and transfers; determines company policy; oversees sales management and makes initial contacts; establishes relations with other companies and potential clients.... Further, the Branch Manager and Warehouse Manager report to him, and he oversees their duties.

Counsel states that the beneficiary is the president of both the foreign entity and the petitioner, and that he is to spend three weeks of each month in the United States with one week to be spent in Korea. Counsel adds:

> He sets policies and directs the company in both day-to-day functions, as well an [sic] in expansion and seeking of new business/clientele. [redacted] will continue to direct and supervise the activities of the two managers below him and will continue to develop business by directing participation in trade shows and other marketing activities, including making initial contacts with other businesses. [redacted] only supervision over himself comes from the parent company of Samas Electronics, where he is answerable to the board of directors.

Counsel states that the beneficiary, as president of both the petitioner and the foreign entity, is ultimately responsible for the activities of the supervised employees. Counsel also states that the company is still in its early developmental stages and requires the expertise of the president. Counsel concludes by stating that the beneficiary is merely continuing in the same executive capacity and duties for which he already has been deemed as qualified.

Also included in the record on appeal is a statement dated January 22, 2001, to Edward Hyum at the petitioner's address indicating the purchase of a booth at the ASD/AMD Trade Shows in Las Vegas, Nevada for a show from March 4 through 8, 2001. No explanation of this trade show is identifiable. Also included in the record are a few invoices for some months from September 2000 through July 2001, indicating imports to the petitioner from the foreign entity.

The petitioner has provided insufficient evidence to demonstrate that the beneficiary's duties have been or are primarily

managerial or executive in nature. A manager or executive may manage or direct the management of a function of an organization. However, it must be clearly demonstrated that the function is not directly performed by the manager or executive. The petitioner has not demonstrated that the beneficiary manages or directs the management of a department, subdivision, function, or component of the organization. The petitioner has not established that the beneficiary will manage a subordinate staff of professional, managerial or supervisory personnel who will relieve him from performing the services of the corporation. The evidence in the record does not demonstrate that the beneficiary has been or will be involved in something other than performing the day-to-day functions and operational activities of the company. Upon review, it cannot be found that the beneficiary has been or will be employed in the United States in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the record is replete with discrepancies concerning many aspects of the requirements under 8 C.F.R. § 214.2(l).

The petitioner has indicated that the beneficiary will be paid $50,000.00 per year. The petitioner also has indicated that it employs a total of three individuals. The petitioner also provided the State of California EDD DE-6 forms for the quarters ending December 31, 2000 and March 31, 2001. This form indicates only two employees--the beneficiary [redacted] The Form EDD DE-6 for September 30, 2000, indicates only one employee.

In response to a request for additional evidence, the petitioner submitted an unsigned, undated copy of a 1999 Form 1120, U.S. Corporation Income Tax Return, for the period ending June 30, 2000, indicating total income, after deductions, as a negative balance of $14,012.00, with no salaries and wages or compensation paid to officers for the year. Gross profit after deductions for cost of goods sold was $39,595.00, therefore prohibiting the salary of $50,000.00, as indicated to be paid to the beneficiary. It is noted that the petitioner also filed Form 3805Q, Net Operating Loss (NOL) Computation and NOL and Disaster Loss Limitations - Corporations, in 1999.

The beneficiary's Form 1040, U.S. Individual Tax Return, indicates his total income for the year as $6,000, also listing his spouse and child as dependents. Also included in the record is the beneficiary's Form W-2, Wage and Tax Statement, indicating that he earned $6,000.00 in income during 2000.

Other references to the petitioner's personnel issues are discussed previously in this decision. The discrepancies in the number of personnel, their titles, the names of the individuals in the positions, the salaries paid or to be paid, and the ability to

pay these salaries, are not explained satisfactorily within the record.

The accountant(s) who submitted the financial documentation on behalf of the petitioner states:

> Management has elected to omit substantially all of the disclosures and the statement of cash flows required by generally accepted accounting principles. If the omitted disclosure and the statement of cash flows were included in the financial statements, they might influence the user's conclusions about the Company's financial position, results of operations, and cash flows. Accordingly, these financial statements are not designed for those who are not informed about such matters.

Limited reliance can be placed on the validity of the facts presented in the financial statements in light of the preparer(s) statement, nor can the documentation submitted fairly present the financial position of the employer. No further supporting documentation is included in the record to reflect the assertions made by the accountant in the financial documentation, or contained within the unaudited financial statements.

Also included in the record is an undated, translated "notarial statement" of an organizational chart indicating the beneficiary's holdings. This document lists the beneficiary as the "representative" and places him at the top of the chart over six entities, including: one corporation in China, Sama Electronics Wuihae Co., Ltd; factories in Chungyang, Chunan, Pyungtaek; an affiliated company in Korea, Samas Kor [the copy deletes the rest of the document]; and, the petitioner. No evidence of the legal ownership or relationship between any of these companies is included in the record.

On appeal, counsel states that Samas Electronics manufactures auto-parts and machinery for Hyundai Motors and that Samas Korea imports reliability test machines from Lansmont Corporation and sells to Hyundai Motors and other Korean corporations through Samas Electronics. Counsel also states that both Samas Electronics and Samas Korea share and operate under the same ownership. Counsel states that the petitioner, S & Mas, Inc. was established on July 20, 1999, in the State of California, through Samas Electronics.

The petitioner has submitted IRS Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business, in which the petitioner indicates that it is owned by Samas Electronics Co., Ltd., Chungnam-do, Korea.

In another document, the petitioner indicates that Samas Electronics, Inc., in Chungnam and Sandong, China, employs 400 individuals, and manufactures auto parts and "wire harness" for Hyundai Motors. The petitioner states that Samas Korea in Seoul is an import and export business that imports "Reliability Test Machines from Lansmont Company, U.S.A. and marketing in Korea," with exports indicated as "Gift items to the U.S.A."

The petitioner indicated that Samas Korea Co. was established in 1993, and that Samas Electronics, Ltd., was established in 1997. The beneficiary's resume indicates that he was "inaugurated as president" for each company.

A stock transfer ledger included in the record indicates the sole stockholder of the petitioner to be the Samas Electronics Company, Ltd., with a date of ownership indicated as November 22, 1999, through the purchase of 10,000 original shares. Also included in the record is a copy of a stock certificate indicating that the petitioner authorized 10,000 shares of common stock to be sold to the Samas Electronics Company, Ltd. On November 22, 1999.

While the petitioner and counsel indicate that a qualifying relationship exists between the petitioner and the foreign entity, this cannot be determined from the evidence included in the record.

The petitioner has provided insufficient evidence of the foreign entity or entities' legal creation and ownership. Only statements, self-attestations, and notarized translations of apparent self-generated documentation have been submitted. Further, no evidence of the allocation of funds by the foreign entity to purchase the petitioner's stock is included in the record.

Notarized documents submitted on behalf of Samas Electronics, Ltd., are all translations of what appear to be self-generated documentation and attestations, including those indicating payment of taxes, financial status, and rental of property. A notarized statement indicates that the foreign entity was created on September 19, 1997, while another document indicates its taxation in 1999 and 2000 only. The petitioner also has provided insufficient documentation to establish the date of the foreign entity's legal creation.

The petitioner has submitted a notarized, translated document of a self-generated letter, dated February 10, 2000, indicating that the beneficiary worked for Samas Electronics Co., Ltd. as president from September 19, 1997 through February 10, 2000.

Based on the evidence included in the record, it also is not possible to determine if the foreign entity was legally created at

least one year prior to the creation of the petitioner, and thus if the beneficiary has the requisite length of employment with a qualifying entity.

Finally, a discrepancy concerning the date of the petitioner's incorporation is evident in the record. The petitioner's Articles of Incorporation indicate that it was created in the State of California on November 22, 1999. Another document indicates that the Articles of Incorporation were filed in the State of California on July 20, 1999. This document indicates that the petitioner is a "close corporation," with the issued shares of all classes of the corporation to be held by no more than "2 persons." The official document from the State of California verifying the petitioner's incorporation, however, is not included in the record.

Also included in the record is the petitioner's Statement by Domestic Stock Corporation, Form SO-200 C, indicating that this form was due to be submitted no later than October 20, 1999. The document, however, is signed by the beneficiary and dated November 22, 1999. Evidence of the proper and timely filing of this document or the Articles of Incorporation is not included in the record.

Discrepancies throughout the evidence submitted are called into question in the petitioner's ability to document the requirements under the statute and regulations. Discrepancies and contradictions in the petitioner's submissions have not been explained satisfactorily. Doubt cast on any aspect of the evidence as submitted 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; any attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988). As the appeal will be dismissed on the grounds discussed, these issues will not be addressed 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.