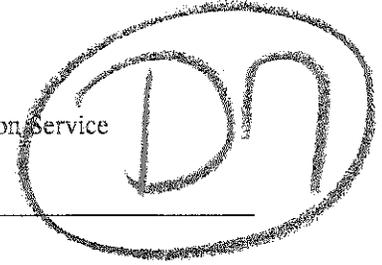




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U.S. Department of Justice
Immigration and Naturalization Service



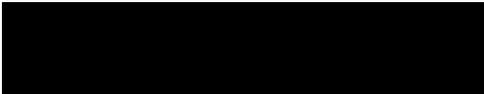
OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: SRC 01 182 52291

Office: TEXAS SERVICE CENTER

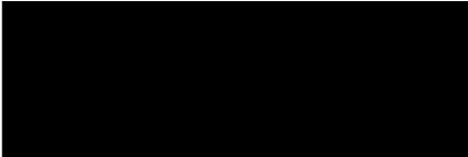
Date: JAN 22 2003

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:



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 THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert F. Wicmann, Director
Administrative Appeals Office

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

The petitioner is a software publisher that seeks to employ the beneficiary in the United States as a senior systems engineering manager. The director determined the petitioner had not established a qualifying relationship with the foreign entity. The director then determined that the petitioner had not established that the beneficiary had been employed abroad in a managerial or executive capacity.

On appeal, the petitioner's representative explains that Hosting [REDACTED] was formed when an Isle of Man company, [REDACTED] decided to outsource the support function of the company to Hosting Support Services LLC in the United Kingdom. The representative explains that the petitioner is being set up as a new American company that will operate utilizing the experience and maturity of the United Kingdom company. The representative states that a qualifying relationship exists between Hosting Support Services Ltd. and Activebytes Software LLC in that the majority shareholders own and control the majority share of [REDACTED]. The representative asserts that [REDACTED] have managerial control of all three companies, [REDACTED] Hosting Support Services Ltd., and Activebytes Software LLC.

The representative indicates that the purpose of the transfer of the beneficiary is to begin the operations of the petitioning company in the United States.

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.

The first issue in this proceeding is whether the petitioner and the foreign entity are qualifying organizations.

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

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

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

Parent means a firm, corporation, or other legal entity which has subsidiaries.

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

Branch means an operation division or office of the same organization housed in a different location.

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

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

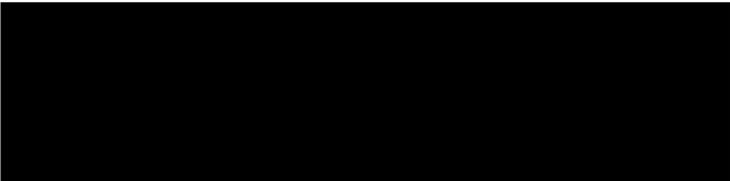
8 C.F.R. 214.2(l)(1)(ii)(L) states, in pertinent part:

Affiliate means (1) One of two subsidiaries both of

which are owned and controlled by the same parent or individual, or

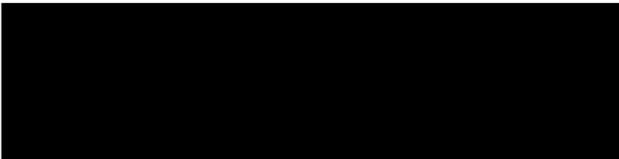
(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

In this case, the 100 outstanding shares of the petitioning firm are held by five individuals and companies as follows:



65 shares
10 shares
5 shares
10 shares
10 shares

The petitioner's claimed affiliate abroad, Hosting Support Services Ltd., has 99 outstanding shares that are held by four individuals and companies as follows:



40 shares
39 shares
10 shares
10 shares

The two entities are not owned by the same parent or individual, or by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity. Therefore, a qualifying relationship between the U.S. entity and the beneficiary's foreign employer has not been shown to exist. For this reason, the petition may not be approved.

The petitioner is a limited liability company that originated in the State of Delaware on March 12, 1999. The petitioner filed its petition on May 15, 2001. The record indicates that the petitioning firm had not required the transfer of any cross funding or capitalization from any other company because it has been profitable since the day of start-up. The record also contains bank statements showing that the petitioner was maintaining an active basic business checking account during the months of December 1999 and April 2000. Since the petitioner had been doing business for more than one year at the time the visa petition was filed, it shall not be considered under the regulations covering the start-up of a new business.

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 second issue in this proceeding is whether the petitioner has established that the beneficiary has been employed abroad for one continuous year within the three years preceding the filing of the petition in a primarily managerial or executive capacity by a qualifying organization.

On appeal, the petitioner describes the beneficiary's job duties abroad as follows:

██████████ has continuously occupied the position of Senior System Engineering Manager within our company

since March 28, 2000. His duties include the design, implementation and support of information technology systems for use by the company's extensive customer base. This also involved management of support team staff and liaison with third party company (sic) to provide resilient systems delivery. Furthermore, he was responsible for supervising professional Systems Engineers, Specialists and Analysts.

On appeal, the petitioner submits the resumes of the persons that the beneficiary supervised abroad. Based upon the record and the additional information provided on appeal, it is determined that the beneficiary was employed abroad in a managerial position that would have been found qualifying had the firm that he worked for been a qualifying entity.

The petitioner describes the beneficiary's proposed job duties in the United States as follows:

██████████ the beneficiary, will fill the position of Operations & Senior Systems Engineering Manager. His duties will include directing and coordinating activities of our Internet hosting operations. He will plan and develop policies and procedures for carrying out our operations. He will meet and supervise future U.S. professional employees to discuss progress of work, resolve problems, and ensure that standards for quality and quantity of work are met. He will adjust work priorities and staff assignments to ensure efficient operations are met, based on workload. He will review daily logs and reports to detect recurring slowdowns or errors. He will consult with software and hardware vendors and other establishment workers to solve problems impeding our hosting process. He will meet with users to determine quality of service and identify needs. He may meet with professionals to determine impact of proposed changes in our operations and services to users. He will evaluate new technologies to determine usefulness and compatibility with our operations. He will evaluate proposed projects to assess adequacy and recommend purchase of equipment. Mr. Hodge will also develop budgets and monitor expenditures.

██████████ will be responsible for establishing work plans and staffing for our operations and will arrange for recruitment of professional personnel that our company foresees to hire. Furthermore, he will supervise professionals in our area of expertise. He will also confer with personnel to provide technical advice. Finally, ██████████ will prepare reports and forecast the position of our company's operations.

On appeal, the representative submits an organizational chart

showing the proposed staffing for the petitioner and a lease for the office space the firm would occupy.

The petitioner's assertions concerning the managerial and executive nature of the beneficiary's future duties are not persuasive. Counsel's description of the beneficiary's proposed job duties is not sufficient to warrant a finding of managerial or executive job duties. It is noted that the assertions of counsel (or a representative) do not constitute evidence. Matter of Obaigbena, 19 I&N Dec.533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980). 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 record reveals that at the time of filing the petition, the petitioner did not have any staff to relieve the beneficiary from performing non-qualifying duties. The petitioner has provided no 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 company upon his entry into the United States. The petitioner has not shown that the beneficiary will be functioning at a qualifying senior level within an organizational hierarchy.

In this case, the evidence submitted is insufficient to establish the beneficiary will be acting in a managerial or executive capacity. The planned addition of new employees sometime after the beneficiary enters the United does not enhance the beneficiary's eligibility for this classification at the time the petition was filed.

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.