

PUBLIC COPY

U.S. Department of Homeland Security

Immigration and Naturalization Service

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy.**

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



JUN 03 2003

File: EAC-02-034-53408 Office: Vermont Service Center Date:

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)

ON 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 Bureau of Citizenship and Immigration Services (Bureau) 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 P. Wiemann, Director
Administrative Appeals Office

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

The petitioner, a computer software company, seeks authorization to employ the beneficiary temporarily in the United States as president and CEO of its new office. The director determined that the petitioner had not established that there is a qualifying relationship between the U.S. and foreign entities or that the beneficiary had been employed abroad or would be employed in the United States in a primarily managerial or executive capacity.

On appeal, the petitioner argues that there is a qualifying relationship between the U.S. and foreign entities and that the beneficiary has been and will be 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.

Title 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 U.S. petitioner states that it was established in 2000 and that it is a subsidiary of KLG Finance (P) Ltd., located in India. The petitioner projected the hiring of 5 employees during the first year and a gross annual income of approximately \$100,000. The petitioner seeks to employ the beneficiary for a three-year period at an annual salary of \$25,000.

The first issue in this proceeding is whether there is a qualifying relationship between the U.S. and foreign entities.

Regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

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 (l)(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.

Regulations at 8 C.F.R. § 214.2(l)(1)(ii)(I) state:

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

Regulations at 8 C.F.R. § 214.2(l)(1)(ii)(J) state:

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

Regulations at 8 C.F.R. § 214.2(l)(1)(ii)(K) state:

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.

Regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L) state, 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.

The record contains stock certificate number 1 which demonstrates that on October 1, 2001, 51 percent of the beneficiary's shares of stock in the U.S. company, Indiansoft Solutions, Inc., were transferred to the foreign company, KLG Finance, Pvt. Ltd. The record also contains a copy of a stock ledger and Minutes from Meeting of October 1, 2001, reflecting the transfer. The evidence submitted is sufficient to demonstrate that a subsidiary relationship exists between the U.S. and foreign entities. The petitioner has overcome this portion of the director's objections.

The second issue to be addressed 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 initially described the beneficiary's duties for the foreign entity, in pertinent part, as follows:

At the parent company, [the beneficiary] currently serves in the capacity of Chief Executive Officer and has full responsibility for overseeing Software Consultancy [sic] Division. His responsibilities include:

General Management activities such as overseeing projects, setting policies and procedures for project management;
 Directing, coordinating and supervising project teamwork;
 Company/Corporate activities such as training project teams;
 Managing personnel who maintain infrastructure of the company;
 Exercising complete day-to-day authority over the organization as well as hiring and firing professional staff.

The qualifications of the Transferee

[The beneficiary] is an exceptionally qualified individual with a Masters In Business Administration, a Law degree, and a Bachelors degree in commerce. Additionally, he is certified by a compute academy for having advanced knowledge of Oracle applications. Additionally, he has worked for three years at the foreign company in a managerial capacity and has adequate experience to function in the capacity of President. The duties [the beneficiary] is currently performing are essentially similar to the duties he will be performing as President & CEO of the U.S. Company. [The beneficiary's] vast experience in the parent company will enable him to execute this assignment in conformity with the company standards, which is the principal reason for seeking his transfer.

The petitioner initially described the beneficiary's proposed duties for the United States entity, in pertinent part, as follows:

[The beneficiary] will fill the position of President and CEO at the Parlin, New Jersey, office of Indianasoft Solutions, Inc. He will have full responsibility for the overall functioning of the U.S. market. He shall maintain record[s], market products, manage clients and induct new employees as needed. He shall act as a technical link for the developers in India and perform managerial and legal duties in U.S.A.

JOB DUTIES PERCENTAGE OF TIME

Hire and supervise individuals responsible for the information Technology, Corporate Strategy and Production departments of the company. Delegate responsibilities to them and oversee day-to-day operations.

30%

Establish policies/plans for undertaking all technical projects and operation support processes including:

Defining the project and its life cycle;

Project organization and structure and management;

Selecting the project team;

Financial issues in project management.

30%

Manage an effective recruitment program to ensure that qualified personnel are hired; Prepare an employment manual and develop hiring guidelines.

20%

Establish a training program for employees to improve their systems integration, network installation, design and software development skills.

10%

Determine Corporate Strategy for:

Market and Business Development;

Industry Opportunity & Entry;

Product Development Assessment and Planning;

Customer Selling.

10%

In response to a Bureau request, dated December 14, 2001, for additional information, the petitioner submitted an organizational chart identifying the beneficiary as the director of information technology of the foreign company as well as an appointment letter offering the beneficiary the aforementioned position at a salary of 7,000 rupees per month on December 1, 1999. Also in response to the Bureau's request, the petitioner stated, in pertinent part, that:

The beneficiary was employed for one continuous year in the last three years prior to November 1, 2001,. Please find enclosed as **Exhibit D**, pay slips of the beneficiary from November 1998 through November 1999 as proof of his

employment with KLG Finance (Indian company) for one year within the last three years immediately preceding the filing of this petition.

The petitioner submitted pay slips dated from July 1998 to August 1999, although they reflect payment from July 1998 through November 1999. Six of the pay slips are dated on consecutive days from July 5, 1999 through July 10, 1999, although they reflect five separate monthly pay periods. The pay slips indicate that the beneficiary was paid 7,500 rupees per month until July 1999, at which time his purported salary became 8,000 rupees per month.

The petitioner submitted a list of job duties for the beneficiary's United States position. The list provided the following information.

JOB DUTIES

PERCENTAGE OF TIME

Hire and supervise individuals responsible for the Information Technology, Corporate Strategy and Project departments of the company. Delegate responsibilities to them and oversee day-to-day operations.

30%

Establish policies/plans for undertaking all technical projects and operation support processes including:

Defining the project and its life cycle;

Project organization and structure and management;

Selecting the project team;

Financial issues in project management.

30%

Create and manage an effective recruitment program to ensure that qualified personnel are hired; Prepare an employment manual and develop hiring guidelines.

20%

Develop a training program for employees to improve their systems integration, network installation, design and software development skills.

10%

Formulate Corporate Strategy for:

Market and Business Development;
Industry Opportunity & Entry;
Product Development Assessment and Planning;
Customer Selling.

10%

On appeal, counsel argues that the beneficiary has demonstrated that he has been functioning in a managerial capacity for the foreign entity. With respect to the beneficiary's United States position, counsel states, in pertinent part, that:

By virtue of the fact that the employer is a start up concern, the Service acknowledges that up until the time that the beneficiary establishes a fully functional office, he may have to perform certain tasks that are hands on until people are hired to take over the function. The beneficiary would thereafter supervise these individuals.

Counsel submits a copy of the beneficiary's job duties, previously submitted in response to the Bureau's request for additional evidence.

The evidence of record regarding the beneficiary's employment abroad, submitted in response to a Bureau request for such information, is conflicting and contradictory. On the one hand, the evidence reflects that the beneficiary was employed as early as May 1998 at a monthly salary of 7,500 rupees per month, while other evidence indicates that he was offered a position of director of information technology in December 1999 at a monthly salary of 7,000 rupees. The pay statements contained in the record indicate that, on a least five occasions, they were created several months before the payment was purportedly made. As such, the credibility of the pay statements is questionable at best. Further, it cannot be concluded exactly what the beneficiary did before December 1999, if he did, in fact, work for the foreign entity from May 1998 to December 1999. Nor is it clear exactly what the beneficiary did after December 1999 as director of information technology. The petitioner has not resolved conflicting information regarding the beneficiary's employment abroad. Accordingly, it cannot be determined 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. For this reason, the petition may not be approved.

Further, the record as presently constituted does not contain persuasive evidence to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would persuasively demonstrate that the

beneficiary has been and will be primarily engaged in managing or directing the management of a function, department, subdivision or component of the U.S. company. Simply stating that the beneficiary will hire and supervise individuals, establish policies/plans for undertaking all technical projects and formulate corporate strategy, without further elaboration and clarification, is not sufficient in demonstrating the beneficiary's managerial and executive responsibilities. In addition, some of the beneficiary's other duties such as managing an effective recruitment program, preparing an employment manual, developing hiring guidelines and establishing a training program for employees to improve their systems integration, have not been sufficiently demonstrated to be managerial or executive duties. Counsel's argument that the beneficiary must perform some non-supervisory tasks in a start-up operation notwithstanding, the record does not contain any detailed plans to hire subordinate employees, or evidence that any attempt has been made to add additional employees to relieve the beneficiary from performing the day-to-day functions of the U.S. company.

Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity. For this additional reason, the petition may not be approved.

Further, the petitioner has not established that it will have sufficient growth during its first year of operation to require the services of a manager/executive, nor has the petitioner established that there has been sufficient foreign investment in the U.S. company to support such position.

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.