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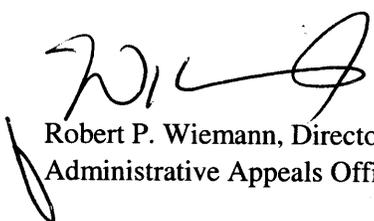
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is operating as a call center and e-services outsourcing organization specializing in providing service, sales, and collections support for the financial service industry. It seeks to temporarily employ the beneficiary in the United States as a chief technology officer, and filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee. The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed as a functional manager in the U.S. corporation.

Counsel for the petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel asserts that the beneficiary "will manage the technology function for the petitioner," and will be employed in a managerial capacity in the United States.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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 (l)(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.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue is whether the beneficiary will be employed in the United States in a primarily managerial capacity.

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.

In a letter submitted with the petition, the petitioner stated that the beneficiary would be employed as the chief technology officer, and would perform the following duties:

- Determine appropriate outsourcing strategies, establish strategic partnerships and manager service provider relationships to develop and support service arrangements.
- Plan and Implement Company Policy and Directive on the technology.
- To review and ensure the implementation of processes, [and] methodologies.
- To develop and maintain procedures for evaluating and improving customer satisfaction by monitoring quality service, cost, support services and future needs of the customer. He will also develop and maintain formal procedures for projects and resource estimation and

strategies for project execution. He will monitor adherence to international quality standards for deliveries made to international customers.

- To keep abreast of new technology and industry trends, including competitive business, and make recommendations for investments in new technology or participation in joint ventures when beneficial.

The petitioner explained that the beneficiary holds a Masters degree in Business Administration and a Bachelor's degree in Electronic-Telecommunication, and has fourteen years of experience in the telecom and paging industry. The petitioner also provided an organizational chart of the U.S. company, in which the beneficiary was identified as the chief technology officer, who reported to the president and chief executive officer of the corporation.

In a request for evidence, the director noted that the organizational chart did not reflect any employees subordinate to the beneficiary, but instead identified below the beneficiary a "Project" in Mexico, China and the Philippines. The director asked that the petitioner clarify whether the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees in the United States, and requested that the petitioner submit tax form DE-6 for the last four quarters.

In response, the petitioner explained that the organizational chart previously submitted is a "multinational chart for the whole organization," and included multiple offices in India and the United States. The petitioner stated that the beneficiary is presently employed in India as the chief technology officer and is responsible for projects in India, the Philippines and China.¹ The petitioner further stated that, in the United States, the beneficiary "will be working as functional head" and will have overall responsibility for the management of the technology function in the United States. The petitioner explained that the beneficiary would not have any subordinate employees in his position as chief technology officer in the U.S. entity. In regards to the petitioner's proposed position, the petitioner also noted that, as "a second level manager," the beneficiary would report to the president and chief executive officer, and would have complete discretion over the operation of the technology function. The petitioner claimed that "as a remote e-Services company, technology is a critical and essential function of the organization."

In his decision, the director outlined the requirements for managerial capacity, and specifically noted what is necessary to establish "the management of an essential function." The director stated that the petitioner must establish that the beneficiary will be primarily managing or directing a function, rather than performing the function or the day-to-day operations of the company. The director concluded that the record failed to demonstrate that there are qualified employees to relieve the beneficiary from performing the function, and therefore, the beneficiary is not managing an essential function through other employees within the organization. The director denied the petition.

On appeal, counsel asserts that "the beneficiary will not be engaged in the day to day operations but will develop the process, methodologies and identify technologies that is the lifeline of the operations of [the petitioning organization]." Counsel explains that "the implementation of the policy and methodology will be done by the

¹ While the organizational chart identified the countries in which the beneficiary would perform the project as Mexico, China, and the Philippines, the petitioner states in its response that the project is instead performed in India, the Philippines and China.

Operations and Center Managers in India. . . .” Counsel also states that within ninety days, the beneficiary will hire three subordinate managers to be employed in the United States. In addition, counsel claims the following:

1. [The beneficiary] will manage the technology function for the petitioner.
2. The technology function is not only important but is critical for the petitioner as it expands its presence in the United States.
3. The beneficiary is being hired at the second level of the management and will report directly to the President and CEO of the company and will thus function at a senior level; and
4. Finally [the beneficiary] will have complete autonomy in the functioning of the technology aspects, including hiring his team of managers as the company expands its operations.

On review, the record does not support a finding that the beneficiary will be employed in a primarily managerial position in the United States. Likewise, counsel’s assertions that the beneficiary would be employed as a functional manager in the U.S. entity are not persuasive.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In the present matter, the petitioner claimed in its response to the director’s request for evidence that the beneficiary will have total supervision, control, and “complete discretion” over the operation of the technology function. The petitioner, however, failed to address the two additional employees identified on the organizational chart as “SVP Technology” and “VP Technology, India.” The AAO acknowledges that the latter employee may be acting as the vice-president of technology in the foreign company, rather than in the U.S. entity. However, absent further evidence or clarification of the employment of the “SVP Technology,” it does not appear that the beneficiary will have “total supervision and control” of the technology function in the United States company. Consequently, both the petitioner and counsel have failed to identify with specificity the actual function to be performed by the beneficiary in the U.S. organization. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990).

Additionally, when examining the executive or managerial capacity of the beneficiary, the AAO will look to the petitioner’s description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Neither the petitioner nor counsel provided a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Although the petitioner outlined five job responsibilities of the beneficiary,

the petitioner neglected to identify who would actually perform the procedures developed by the beneficiary. On appeal, counsel explains only that the operations and center managers in India would implement the services of the petitioning organization. The record, however, does not contain any additional documentation of the existence of these overseas "call centers" or "Operations and Center Managers." It is therefore impossible to determine that the beneficiary would primarily manage the function rather than perform the duties relating to the function. Again, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International, supra.*

Finally, counsel asserts on appeal that the beneficiary anticipates hiring three subordinate managers within ninety days. Counsel fails to acknowledge the requirement that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Therefore, this evidence will not be considered.

For the foregoing reasons, the record does not demonstrate that the beneficiary will be employed in a primarily managerial capacity in the United States.

Beyond the decision of the director is the remaining issue of whether the petitioner established a qualifying relationship with the beneficiary's foreign employer. The petitioner noted on the petition that the beneficiary's foreign employer is a wholly owned subsidiary of the U.S. corporation. However, on the notes accompanying the U.S. company's financial statements, the foreign entity is identified as a 99.98% subsidiary of the petitioner. There is no documentation in the record, such as stock certificates or a stock ledger, establishing ownership and control of the foreign company by the U.S. corporation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Additionally, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As the appeal will already be dismissed on other grounds, this issue need not be further examined.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.