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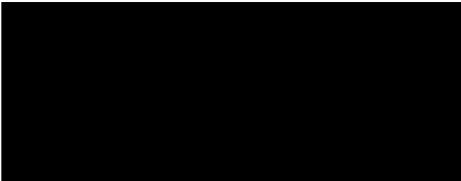


FILE: WAC 02 220 52303 Office: CALIFORNIA SERVICE CENTER Date: **APR 19 2004**

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

The petitioner is a Delaware corporation and is claimed to be the parent company of Aduva, Inc., located in Israel. The petitioner is engaged in the business of facilitating the adoption and deployment of Linux by providing automated system administration services. It seeks to hire the beneficiary permanently as its chief technology officer. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a managerial or executive capacity.

On appeal, counsel refutes the director's findings and provides a statement from the petitioner in support of her argument.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in this proceeding is whether the beneficiary has been and will be performing in a managerial or executive 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 the initial filing, the petitioner described the beneficiary's prospective duties as follows:

[The beneficiary] will direct the management of our technological products and departments. Furthermore, [he] will establish goals and policies within the company. In accordance with the development of the Linux market and technology, he will observe new and emerging trends (as well as problems), and will find ways of utilizing [the petitioner's] core technologies to answer those problems. [The beneficiary] will design ways to integrate those solutions into [the petitioner's] line of products and services. [He] will utilize his knowledge and experience to make corporate decisions and to establish those goals and policies which he believes in his discretion to be the best for the company.

As Chief Technology Officer, [the beneficiary] will exercise wide latitude in discretionary decision making. [He] will use his discretion in assessing the feasibility of implementation, that is, he will use his own judgment and decide which features and products are possible to implement in a given constraint set. Furthermore, [the beneficiary] will use his discretion to provide technological solutions in making decisions as to what technology will be used in any aspect of the company's technological infrastructure and services. In addition, [he] will use his sole discretion to decide which equipment to purchase (computers, servers, storage, etc.). Finally, [the beneficiary] will use his discretion regarding supported services, that is, he will determine which technologies our company will support, and when.

The petitioner additionally stated that the beneficiary would supervise the manager of advanced technology and two technology researchers.

On October 1, 2002, the director instructed the petitioner to submit its organizational chart identifying the beneficiary's position and the names and job titles of his subordinates. The petitioner was also asked to provide an additional description of the beneficiary's job duties, as well as the job duties and educational levels of the employees under the beneficiary's supervision.

The petitioner provided the following additional list of the beneficiary's proposed duties:

1. Technological Leadership
 - a. Assist Product Management in technological areas, such as features, market directions, possible co-operations, etc.
 - b. Assist R&D in resolution of key engineering issues, bugs, technological decisions, designs, etc.
 - c. Assist Product Management and R&D in mapping out product roadmap, feature-set, etc[.]
 - d. Assist Product Management and Business Development in mapping out competition
 - e. Continuously on the lookout where help is needed in technological areas
2. Field Support
 - a. Support field activities as needed (mostly in strategic accounts). This includes install[ation], Customer Support, etc.
 - b. Assist R&D in analyzing field customer issues and facilitate expedited resolution
 - c. Assist Business Development in strategic activities
3. Vision

- a. Map out technological vision of company
- b. Prototype of new generation products/features for feasibility study
- c. Participate and represent company in industry forums pertaining to company's business
- d. Map out industry roadmap, and how company can/should participate

The director denied the petition, noting specifically several of the beneficiary's duties which the director concluded were not of a qualifying nature. The director also stated that although the petitioner indicated in the statement submitted in support of the appeal that the beneficiary would be supervising a manager of advanced technology and two researchers, neither position was included in the petitioner's organizational chart. In fact, the organizational chart does not name any subordinate employees under the beneficiary's supervision.

On appeal, the petitioner explained that despite the director's interpretation of the beneficiary's duties, the beneficiary would not actually do any drafting or designing, and claimed that those tasks would be performed by qualified engineers whose work the beneficiary would merely be overseeing. While the petitioner offers a plausible explanation, 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). In the instant case, the petitioner has not submitted any documentary evidence to support its claim. Moreover, even when requested to submit a list of the beneficiary's subordinates, the petitioner submitted an organizational chart, which did not list any employees under the beneficiary's supervision.

The petitioner also admits that because it is in the "early sales stage" the beneficiary is the person who has to address many customer support issues by actually going to the site of the problem. While this may be a reasonable need of the petitioner in light of its stage of development, the reasonable needs of the petitioning organization do not override the petitioner's burden of establishing that the beneficiary performs *primarily* managerial duties. To the contrary, if the petitioner's reasonable needs are such that the beneficiary is required to be directly involved in running its daily operations, that factor in itself suggests that the petitioner has no need for a primarily managerial or executive position.

Furthermore, even though 8 C.F.R. § 204.5(j)(4)(ii) instructs CIS to consider the "reasonable needs" of the petitioning entity, such consideration in no way suggests that CIS should relax the petitioner's statutorily-imposed burden of establishing that the beneficiary's duties are primarily managerial or executive.

Finally, the petitioner explains that rather than employing two researchers under the beneficiary's position as previously indicated the company would hire the researchers based on the beneficiary's need. However, the petitioner provided no evidence to confirm this claim; nor is there evidence in the record that would indicate that any researchers were ever hired to relieve the beneficiary from having to perform such non-managerial tasks. As previously stated, 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, supra*.

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant case, the beneficiary's job description indicates that a large portion of his job involves assisting others. However, the description is too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis. Furthermore, the petitioner has already indicated that in such areas as customer support, the beneficiary would have to be directly involved due to the petitioner's stage of development. Thus, at least in certain circumstances, it appears that the beneficiary would actually be performing non-managerial duties.

On review, the record contains insufficient evidence to demonstrate that the beneficiary has been and will be employed in a primarily managerial or executive capacity. Nor does the record sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel, or that he will be relieved from performing non-qualifying duties. CIS is not compelled to deem the beneficiary to be a manager or executive simply because he possesses a managerial or executive title.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to allow CIS to conclude that the beneficiary was employed abroad for at least one year by a qualifying entity in a position that was primarily executive or managerial. The petitioner submitted the foreign entity's organizational chart that indicates that the beneficiary supervised an electrical engineer and another individual with a bachelor's degree in computer science. Although the petitioner also indicates that the job descriptions of these two positions are attached, the AAO has been unable to locate these descriptions anywhere in the record. In fact, the petitioner did not indicate the position title of the individual with the computer science degree. Merely providing an individual's educational level does not give any insight as to the actual job that individual performed; nor does it indicate how that individual relieved the beneficiary from having to perform non-qualifying tasks. However, as the appeal will be dismissed on grounds discussed above in the director's decision, this issue need not be addressed further.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.