



U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 01 243 53711 Office: VERMONT SERVICE CENTER Date: 11/17/11

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

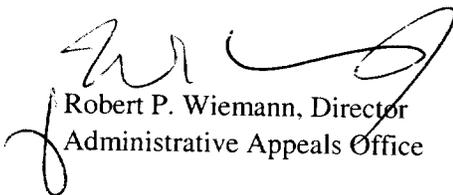
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Vermont Service Center, denied the petition for a nonimmigrant visa. On March 12, 2002, counsel for the petitioner filed a motion to reopen and reconsider and an appeal. The director granted the motion and affirmed the previous decision. The appeal was forwarded to the Administrative Appeals Office (AAO) for review. The AAO will dismiss the appeal.

The petitioner is providing management and computer consulting services. It seeks to employ the beneficiary as its president and chief technical officer, and filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee. The director denied the petition concluding that the beneficiary would not be employed in the U.S. entity in a primarily managerial or executive capacity.

Counsel subsequently filed a motion to reopen and reconsider. The director granted the motion, and concluded that the petitioner lacked sufficient staff to employ the beneficiary in a primarily managerial or executive capacity. The director likewise concluded that the petitioner did not establish that the beneficiary would be employed as a functional manager. The director affirmed the previous decision and denied the petition.

In an appeal dated March 12, 2002, counsel asserts that the director's denial was based upon the "application of the 'old,' less flexible definition" of the terms manager and executive, which existed prior to the amendment of the regulations in 1990. Counsel further asserts that the director failed to take into account the staffing levels and reasonable needs of the petitioning organization, and contends that the beneficiary would be employed in both a managerial and executive capacity. Counsel submits additional evidence in support of the appeal.

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) 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 in this proceeding is whether the beneficiary would be employed in the U.S. entity in a primarily 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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 July 26, 2001 letter submitted with the nonimmigrant visa petition, the petitioner stated that the beneficiary would serve in both a managerial and executive capacity as president and chief technical officer of the U.S. entity. The petitioner outlined the following job responsibilities of the beneficiary:

1. Periodic reporting to/from other Managers and Executives of The Promin Group regarding technical support issues, budget issues and optimization of the technical support function throughout the organization; and
2. Supervising technical support and administrative staff including sales representatives, technical support representatives (all levels) including assignments of employees to various projects; and
3. Evaluating staff performance and making recommendations for promotions. The individual will have independent responsibility for day-to-day hiring and firing decisions over employees in the U.S. business organization; and
4. Designing, developing, and implementing technical in-house and external educational programs for clients and for other departmental managers and staff; and
5. Developing and distributing written problem determination information on Promin products for customers and authorized product evaluators in the Western hemisphere; and
6. Distributing early warning information and evaluating strategic planning processes for implementation for North American Business Operations; and
7. Assisting Promin's professional staff to write cover material for all technical materials shipped by Promin for the purpose of resolving technical problems for clients in the Western hemisphere; and
8. Establishing technical standards and communicating same to The Promin Group's operational counterparts for Promin hardware and software for internal operations; and
9. Responsible for enforcing commercial software licensing compliance by Promin personnel; and
10. Initiating projects with sister companies and evaluating merger opportunities.

The petitioner also explained that the beneficiary would supervise the employees in the technical support department, would communicate with the foreign company's upper-level managers to develop strategic planning goals, and would continue to build the petitioner's client base while providing technical support to existing clients throughout the United States. The petitioner stated that the beneficiary's role in a managerial and executive capacity is further demonstrated by his membership in such organizations as the American Management Association (AMA), the Institute of Electrical and Electronics Engineers, and Rotary International. Additionally, the petitioner provided excerpts from the U.S. Department of Labor's Occupational Handbook and the Dictionary of Occupational Titles, and contended that each "conclusively demonstrates why the position of President and Chief Technical Officer is a position that requires an individual with executive/managerial experience."

In a Notice of Action dated September 24, 2001, the director noted that the petitioner had not previously provided a description of the positions held by the beneficiary's subordinates, and requested that the petitioner submit an organizational chart for the U.S. entity that includes the size of the organization.<sup>1</sup> The director also requested that the petitioner provide evidence that the U.S. organization has been doing business in the United States, and evidence establishing the financial status of the petitioning entity, such as the most recent corporate tax return and bank statements.

On November 15, 2001, counsel submitted a lengthy response. As the response is part of the record, it will not be entirely repeated herein. Counsel submitted an organizational chart for the U.S. company, which lists the following six positions: chief executive officer-chairman, vice-president, executive secretary, accounting & public relations, project & system support, and software development & web design. Neither the beneficiary nor any employees are specifically identified on the organizational chart as occupying any of the listed positions. Counsel also stated that, with regard to the beneficiary's role in the U.S. company as the president and chief technical officer, the beneficiary:

is in charge of the long-range attainment of operating goals, while at the same time still retaining managerial and executive responsibilities. The 'day-to-day' administrative responsibilities for which [the beneficiary] will be responsible should not diminish from the critical nature of his overall importance to the organization as a whole. The President and Chief Technical Officer has direct control over the day-to-day operating activities [and] over the other Professional and Technical staff within the organization. The President and the Chief Technical Officer develops policies, practices, and attains the operating goals of the organization.

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The manager/executive in the position of President and Chief Technical Officer at [the petitioning organization] shall be independently responsible for numerous managerial and executive responsibilities, which can only be undertaken by an individual who has exceptional and extensive managerial and executive experiences. The managerial and executive responsibilities shall include, but not be limited to: conducting staff meetings with professional operations personnel, directing organizational expenditures and asset deployments, interviewing and hiring new operations personnel, directing professional employee training programs to ensure efficiency and conformance with standard company policies and procedures, setting of short and long-run goals for the organization, and ensuring that various departments function together for the benefit of the entire international organization.

In a decision dated February 7, 2002, the director concluded that the petitioner did not establish that the beneficiary would be employed in the petitioning organization in a primarily managerial or executive capacity. The director noted that although the petitioner had submitted a large amount of documentation, the record did not specifically identify the beneficiary's subordinates. The director stated that it was therefore

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<sup>1</sup> The record does not contain a copy of the director's Notice of Action. The AAO therefore extracted information pertaining to the Notice from the petitioner's response, which outlined the director's specific requests for evidence.

impossible to determine whether the petitioner employs any individuals who would relieve the beneficiary from performing daily non-managerial and non-executive job duties. The director also noted that the petitioner did not provide any job descriptions for additional employees as requested in the notice for additional evidence. The director concluded that the record failed to demonstrate that the beneficiary would not be performing the tasks necessary to produce a product or provide a service. Consequently, the director denied the petition.

On appeal, counsel claims that the director applied the “less flexible” definition of manager and executive, which existed prior to the 1990 amendments of the regulations. Counsel states that the present regulations, which allow for employment as a functional manager, “are not intended to exclude from the duties of a manager or executive activities that are not strictly managerial, but are common to those positions, such as customer and public relations and lobbying and contracting.” Counsel further states that the regulations require Citizenship and Immigration Services (CIS) to consider the beneficiary’s primary activities, as well as the staffing levels in relation to the petitioner’s purpose and stage of development.

Counsel claims the beneficiary would be employed in both a managerial and executive position in the U.S. company, and would perform such duties as: (1) supervising the daily activities of the corporation’s general manager; (2) developing and negotiating consultancy agreements; (3) enforcing compliance of commercial software licenses; (4) designing, developing, and implementing technical in-house and external educational programs for staff and clients; (5) initiating projects with sister companies; and (6) evaluating merger opportunities. Counsel also notes that the beneficiary would be in charge of the long-range goals, and that “[t]he ‘day-to-day’ administrative responsibilities for which [the beneficiary] will be responsible shall not diminish from the critical nature of his overall importance to the organization as a whole.”

Counsel submits the following additional evidence on appeal and asserts that the documents “clearly demonstrate” that the beneficiary would serve in an executive and managerial capacity within the petitioning organization: leases for office space, furniture and equipment signed by the beneficiary for the petitioner; copies of three agreements signed by the beneficiary binding the petitioner to provide consultancy services; curriculum vitae for the corporation’s vice-president and three consultants; and the petitioner’s job advertisement for information technology professionals. Counsel also provides an updated organizational chart, which counsel states reflects positions that are not presently occupied, but in fact exist in the company. Counsel also states that while the director indicated that the previously submitted organizational chart appeared generic, the chart is part of the petitioner’s five-year projection plan.

On review, the record does not sufficiently demonstrate that the beneficiary would be employed in the U.S. corporation in a primarily managerial and executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner’s description of the job duties. *See* 8 C.F.R. § 214.2(1)(3)(ii). As required in the regulations, if a petitioner is representing the beneficiary is both a manager and executive, the petitioner must submit a detailed description to establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. *Id.* Additionally, case law establishes that the petitioner must demonstrate 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, the AAO will review the present matter based on the record of proceeding before the director at the time of his review.

In the present matter, although counsel submits a large amount of documentation related to the U.S. company, the record does not substantiate the petitioner's claim that the beneficiary would be employed as both a manager and an executive in the United States. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks. Counsel acknowledges on appeal that the beneficiary's "'day-to-day' administrative responsibilities . . . shall not diminish from the critical nature of [the beneficiary's] overall importance to the organization as a whole." Yet, counsel fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial, or administrative. This failure of documentation is important because several of the beneficiary's daily tasks, such as "designing, developing, and implementing technical in-house and external educational programs," "developing and distributing written problem determination information on [the petitioner's] products for customers," and providing technical support to the petitioner's clients do not fall directly under traditional managerial duties as defined in the statute. Furthermore, counsel fails to define what "administrative responsibilities" the beneficiary would perform on a daily basis. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive.

Specifically, counsel has not demonstrated that the beneficiary would supervise and control the work of other supervisory, professional, or managerial employees or would direct the management of the organization. As noted by the director, the record is devoid of evidence that the petitioning organization employs any individuals other than the beneficiary. Even though requested by the director, counsel neglected to submit documentation verifying the employment of any subordinate employees who the beneficiary would supervise or manage. *See* 8 C.F.R. § 103.2(b)(14) (failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition). Counsel merely asserted in response to the director's request for evidence that documentation pertaining to the beneficiary's subordinates was included in the response. Yet, the only documentation was resumes for four individuals, one of whom it appears is presently employed by the beneficiary's foreign employer and three who are employed at separate, unrelated companies. Additionally, the organizational chart submitted by counsel lists job titles only, and fails to identify the employees occupying these positions. Moreover, the petitioner's Internal Revenue Service (IRS) Form 1120-A, U.S. Corporation Short-Form Income Tax Return, indicates that no salaries or wages were paid in years 1997, 1999, and 2000. No other documentation, such as employer's quarterly wage reports or employee records that would confirm the employment of subordinate employees was submitted. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO, therefore, cannot conclude that the beneficiary supervises and controls the work of supervisory, professional, or managerial employees, or directs the management of the petitioning organization.

While counsel submits an updated organizational chart on appeal, and claims that the beneficiary supervises the daily activities of the general manager, this evidence will not be considered. Again, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel also states on appeal that following the 1990 amendments to the regulations, CIS recognizes the concept of functional manager, "which was implemented to restore flexibility and to make the use of the [L-1A] category more accessible." Counsel asserts that the beneficiary is a functional manager responsible for the U.S. operation. Counsel, however, fails to recognize the requirements for establishing employment as a functional manager. 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.

In the present matter, counsel claims that the beneficiary is both managing an essential function and supervising a subordinate staff. Counsel's assertions are contradictory. Counsel also fails to explain with specificity what essential function in the organization the beneficiary is managing. As the sole employee of the petitioning organization, it is reasonable to conclude the beneficiary is instead providing the services of the business. Additionally, counsel acknowledges on appeal that the beneficiary is performing administrative tasks of the petitioning organization. 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 this matter, counsel has not provided evidence that the beneficiary manages an essential function.

Counsel correctly notes on appeal section 101(a)(44)(C) of the Act, which states that if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Counsel claims that the director did not consider the staffing levels or stage of development. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. At the time of filing, the petitioning organization was a four-year old management and computer consultancy company that employed the beneficiary as president and chief technical officer. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-qualifying operations of the company. Nor did the petitioner demonstrate that it would employ the beneficiary as a functional manager. As a corporation that has been doing business for four years, it would be logical to assume that the reasonable needs of the organization would require the employment of additional employees other than a president and chief technical officer. See 8 C.F.R. § 214.2(l)(3)(v)(C) (requiring that the U.S. operation within one year of approval of the petition support a managerial or executive position). The petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. 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).

Furthermore, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to

sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Finally, counsel claims on appeal that the beneficiary's position as a manager or executive is further confirmed by his membership in organizations that offer educational courses in management. Specifically, counsel states that the beneficiary participates in AMA, the Institute of Electrical and Electronics Engineers, and Rotary International. The AAO acknowledges that the beneficiary's participation in AMA and the Institute of Electrical and Electronics Engineers may contribute to the beneficiary's work performance in the U.S. entity. However, counsel's assertion that the beneficiary's membership "supports the proposition that [the beneficiary] is recognized as continuing to possess credentials that establish him as a multinational executive and manager" is inaccurate. Following a review of the organizations' pamphlets, which counsel submitted, it does not appear that the organizations require one to be a manager or executive in order to participate, nor does one's membership qualify him as a manager or executive. For purposes of the L-1A nonimmigrant visa, the regulations clearly outline the requirements for establishing employment in a primarily managerial or executive capacity. The AAO is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title and participates in programs designed to provide management education. Also, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

The AAO recognizes counsel's claim on appeal that the beneficiary may be considered an "important employee" in the foreign and U.S. organizations. The record, however, fails to demonstrate compliance with the statutory requirements set forth in the definition for executive and the definition for manager. For the foregoing reasons, the AAO cannot conclude that the beneficiary would be employed in the petitioning organization in a qualifying capacity. The petition is therefore denied.

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.