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File: WAC 03 265 50534 Office: CALIFORNIA SERVICE CENTER Date: 12/28/14

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

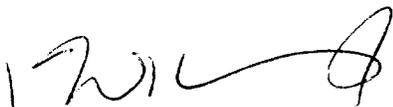
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN 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.¹ The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president and chief executive officer as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a provider of translation services, was incorporated in the State of California. The petitioner claims to be a wholly-owned subsidiary of Tranlation4me, Ltd., located in Harrowgate, England. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity by the United States entity.

On appeal, counsel for the petitioner asserts that the director erred in his conclusion denying the petition.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. 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.

¹ The record indicates that counsel for the petitioner timely filed a Form I-290B, Notice of Appeal, on February 23, 2004. *See* 8 C.F.R. §§ 103.3(a)(2)(i) and 103.5a(b). However, the director returned that form to the petitioner for correction on March 3, 2004 because it was not signed in the appropriate space. Consequently, the last date of receipt stamped on the petitioner's Form I-290B is March 9, 2004, 45 days after the date of the director's decision. In light of the fact that the Notice of Appeal was timely filed with signature in the first instance, however, the AAO will consider the petitioner's appeal to be timely.

- (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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in the present proceeding is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 did not submit with the initial petition a description of the beneficiary's job duties with the United States entity. In a Notice of Action dated November 13, 2003, the director requested further evidence to establish that the beneficiary has been and will be performing the duties of a manager or executive with the United States entity, including: an organizational chart and the total number of employees of the U.S. entity; descriptions of job duties, educational levels, and wages of all of the employees under the beneficiary's supervision; clarification regarding whether independent contractors are engaged by the United States entity, and copies of Form 1099 or other evidence of wages paid to those independent contractors; and evidence of wages paid to the petitioner's employees, such as Forms 941, Quarterly Wage Reports, and any payroll summaries.

In response to the director's request, the petitioner submitted, among other things, the following description of the beneficiary's duties and responsibilities:

Day to day management of both UK & US offices:

- Daily conference call with manager of UK office
- Daily morning meeting with staff in the US office
- Training of US staff
- Check Translate4me database to study jobs inputted the previous day by both offices
- Troubleshooting and assisting Project Managers with any queries they have regarding ongoing projects
- Oversee all staff
- Check all quotes prepared by members of staff and spot-checks on ongoing language projects.

Other responsibilities:

- All marketing activity for 2 offices (direct marketing, PR & advertising). Includes developing marketing strategies and liaising with vendors.
- Promotion of www.translate4me.com through internet optimization & 'pay per click' companies in UK & US
- Production & control of all corporate 'copy' & literature
- Oversee all sales activity for 2 offices
- Client meetings
- Training & staff development (compilation of Training Manual)
- Network meetings with [various professional organizations and associations]
- Responsible for various membership programs (e.g. Better Business Bureau, Institute of Translator & Interpreters and American Translator's Association).
- Hire & fire of staff and staff promotions
- Staff progress meetings
- Staff salaries and bonuses
- Control of Client Price Lists, Terms of Business and Translator Application forms
- IT upgrade & expenditure
- Set budgets & approval of expenditure for advertising, PR & IT
- Study of profit/Loss & Management accounts on a monthly basis
- Accounts: working with Accountants & book-keepers in UK & US for tax returns, payroll, end of year accounts
- Legals
- Final selection process for translator applications
- Pitching for new business and creating quotes/proposals
- Dealing with any complaints
- Tenders & bids
- Liaising with existing clients
- Final approval of vendors

In denying the petition, the director determined that the evidence does not demonstrate that the beneficiary's duties involve responsibilities that are primarily managerial or executive in nature. Specifically, the director found the record indicates that a preponderance of the beneficiary's duties will be directly providing the services of the business. Furthermore, the director determined that the evidence did not establish that the beneficiary supervises a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non-qualifying duties. The director noted that the petitioner failed to provide requested evidence of the employment of independent contractors/translators. Absent such evidence, and given that the descriptions of the duties of the petitioner's other employees do not indicate that they perform any translation work, the director found that it is unclear who is providing the translation service for the petitioner. The director also concluded that the record does not establish that the U.S. entity contains the organizational complexity to support an executive position.

On appeal, counsel for the petitioner asserts that the director's decision is in error, insofar as it is based "solely on the number of employees – or lack thereof – of the company during a specific period of time."

Counsel contends that the number of employees supervised by the beneficiary is not determinative of her eligibility for an L-1A visa. Counsel further asserts that it has been clearly evidenced that the majority of the beneficiary's actual daily duties will be and have been managerial or executive in nature.

On reviewing the petition and the evidence, the AAO agrees with the director's conclusion that the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity by the United States entity. Counsel's arguments on appeal are insufficient to overcome the director's determination on that issue.

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(l)(3)(ii). The petitioner's description of the job duties 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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. In this instance, the AAO notes that the petitioner did not clarify in the petition or supplementary materials whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or in executive duties under section 101(a)(44)(B) of the Act, with respect to the United States entity.

In addition, the record supports the director's conclusion that the beneficiary appears to be substantially involved in directly providing the services of the business. 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). Counsel argues that the beneficiary is not engaging directly in a translating function, since a subordinate staff on commission performs that function. Therefore, the beneficiary is relieved from performing the day to day operational services of the company. However, based on the job description provided by the petitioner, the beneficiary is responsible for tasks such as checking daily jobs inputted by the offices, spot-checking ongoing language projects, all marketing activities, production of corporate literature, IT upgrade and expenditure, accounting tasks, tenders and bids, and client liaison. These are tasks necessary to provide the company's service or product, and as such, cannot be considered managerial or executive in nature.

While the job description divides the beneficiary's job duties into two categories, "day to day management duties" and "other responsibilities," as discussed above, not all of the duties listed in the first category are managerial or executive in nature. Moreover, the petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive in nature and what proportion would not. This failure of documentation is important since a number of the beneficiary's duties do not fall under traditional managerial duties as defined in the statute. Without a clear proportional breakdown of duties, the AAO cannot determine whether the beneficiary will be employed by the United States entity *primarily* in a managerial or executive capacity. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Counsel asserts on appeal that "any non-managerial/ executive duties performed by the beneficiary would be performed on a minimal basis and only require a small percentage of time," and that "[i]t has been clearly evidenced that the majority of the beneficiary's actual daily duties will be and have been managerial or executive in nature." However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence.

Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, contrary to counsel's contention, the director's denial of the petition is not based *solely* on the number of persons employed by the United States entity. Moreover, it is appropriate for the Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

As required by section 101(a)(44)(C) of the Act, 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. The reasonable needs of the petitioner do not, however, supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

While counsel claims that the petitioner's failure to provide Forms 1099 as requested by the director was "clearly addressed in the response to the Request for Evidence," the AAO finds no such explanation in the petitioner's response, dated December 9, 2003. The petitioner also did not explain in that response why it failed to provide any other evidence of employment of, or payment of wages to, independent contractors/translators, as the director requested. This evidence is material, as it would have established, in part, whether the beneficiary indeed has a subordinate staff to carry out the day to day operations of the company. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, the petitioner submitted copies of a number of IRS Forms 1099, evidencing payment of wages to certain independent contractors. In the appeal brief, counsel asserts that the Forms 1099 did not exist, and could not have been issued, at the time of the director's request for evidence. However, as noted above, the director clearly requested Forms 1099 *or* other evidence of payment of wages to contractors. At that time, the petitioner neither provided the evidence requested nor explained why it was not available. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Finally, based on the current record of proceeding, the AAO agrees with the director's conclusion that the record does not indicate that the petitioner has reached the point where it can employ the beneficiary in a

predominantly managerial or executive position. The petitioner indicated in its letter of July 29, 2003 that the beneficiary's services are needed "because of ambitious expansion plans that are currently being taken by [the company]." However, 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). Furthermore, 8 C.F.R. § 214.2(i)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no regulatory provision that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

Based on the foregoing, the AAO concludes that the petitioner has failed to establish that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

The AAO notes that based on correspondence from the petitioner's congressional representative to the AAO, the petitioner has made certain allegations of ineffective assistance of counsel in connection with the filing of the petition in this proceeding. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Since the petitioner has not asserted a claim of ineffective assistance of counsel in the present appeal, or taken steps to meet the above requirements, the AAO will not address that issue at this time.

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.

CIS records reflect that the petitioner has filed two additional L-1 petitions subsequent to the denial of this petition, and that one petition (WAC 04 094 51511) remains pending. The AAO notes that the deficiencies in the current petition are primarily the result of an inadequate response to the director's request for evidence. The dismissal of this appeal does not preclude the director from making a favorable finding with respect to any subsequent or pending petition.

ORDER: The appeal is dismissed.