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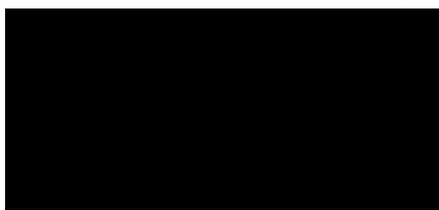
DA

File: WAC 04 241 50383 Office: CALIFORNIA SERVICE CENTER Date: **NOV 28 2005**

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. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary 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 is a California corporation that claims to be engaged in the design of computer accessories. The petitioner claims that it is the subsidiary of Rain Design, Pte. Ltd. located in Singapore. The petitioner seeks to employ the beneficiary as its technology director for a three-year period.

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

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 for the petitioner asserts that the director erred in finding that the beneficiary would not perform primarily managerial or executive duties, and claims that the beneficiary “performs the high level responsibilities that are specified in the definition of executive capacity.” Counsel claims that the director based his decision partially on the petitioner’s staffing levels without taking into account the reasonable needs of the organization. Counsel further notes that the director denied the petition without first requesting additional evidence, and requests a thorough review of the record. Finally, counsel contends that the director relied on case law “that is entirely unrelated to the instant case.” Counsel submits a brief and evidence in support of the appeal.

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.

- (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 first issue in the present matter 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.

In an August 27, 2004 letter appended to the I-129 petition, the petitioner described the beneficiary's proposed duties as "Technology Director" as follows:

[The beneficiary] will use his independent discretion and authority in identifying and cultivating our technology and services leads, and orchestrating the availability of resources required to progress toward the promotion of [the petitioner's] products. [The beneficiary] will be responsible for the branding of our product, ensuring the development of consisting [sic] messages and images, which may require him to work collaboratively with outside strategic consultants. He will be implementing and overseeing the company's entire IT operations and other web and networking services, with focus on enhancing our relationships with resellers, customers, and Apple Computer company, including managing departmental customers to include, but not limited to customer expectations/requirements and ensuring department budgets schedules and deadlines are met. His engagement with our U.S.-based facility is particularly critical to our business operations and expansion efforts as [the beneficiary] plays a major role in our staffing decisions, business development activities, and other management activities.

[The beneficiary] will routinely confer with other members of [the petitioner] to ensure that our corporate philosophy is understood and is accurately conveyed. [The beneficiary] continues to exercise authority in regarding to hiring, training, terminating of employment, delegating assignments, promoting, disciplining, and remuneration. In the capacity of Technology Director, [the beneficiary] is responsible for performance reviews of members of his staff and ensures all staff follows corporate procedures.

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[The beneficiary's] primary responsibility is to ensure corporate objectives are met. One of his duties as our Technology Director entails the strategizing and planning of new technologies, focusing on product development and positioning, allowing the company's growth and profitability. . . . He continuously reviews, develops, implements, and plans for the implementation of special activities to promote our technology. He has a thorough understanding of how crucial the process is to the growth of the company. To that end, [the beneficiary] uses his acumen and serves as our "clearinghouse" for information on trends, research, applications and effective practices as it relates to the use of expansion projects into the U.S. market.

The petitioner indicated on Form I-129 that it employs 13 individuals. The petitioner submitted an organizational chart identifying a CEO/CIO who supervises the beneficiary and a business development director. The chart shows that the business development director supervises an administration/accounts employee, a part-time business analyst, and a sales representative "to be hired." The beneficiary is depicted as "technology director" supervising a part-time computer analyst (who also serves as a business analyst), an unidentified part-time "warehouse operation" employee, and a computer security technician "to be hired."

The director denied the petition on September 10, 2004 concluding that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. The director observed that while the petitioner claimed that the beneficiary will "oversee" and "direct" the company's IT operations, the petitioner had yet to hire two of his three proposed subordinates. The director found that the one part-time employee currently assigned to the IT department would not relieve the beneficiary from performing non-qualifying duties. The director also determined that the petitioner had not established that the beneficiary would supervise a subordinate staff of professional, managerial or supervisory personnel, or that he would manage an essential function of the organization.

On appeal, counsel for the petitioner asserts that the director denied the petition based on the petitioner's staffing levels without considering the reasonable needs of the petitioner. Counsel also contends that the director utilized the size of the petitioning company as the determining factor in denying the petition without considering the beneficiary's duties. Counsel claims that the beneficiary performs the high-level responsibilities that are specified in the definition of executive capacity in that he "will be implementing and overseeing [the petitioner's] entire IT operations and other web and networking services, establishing goals and policies, exercising discretion over [the petitioner's] operations and working independently." Counsel further describes the beneficiary's proposed responsibilities as technology director:

In the proffered position, the Beneficiary will be managing [the petitioner's] technology operations and oversee[ing] the international development activities and coordinating development and service delivery regarding IT planning. He will plan and implement key strategies as they pertain to technology, and direct the professional development and training of staff, and supervise three other employees [redacted], Computer Security Technician, [redacted] Operations, and [redacted] Computer Analyst). He will monitor the development, documentation and support of company products and services, and recruit, hire, train, promote, and terminate the employment of staff, including the recruitment, interviewing and recommending of applicants for open positions in IT.

Counsel contends that the offered position is "sufficiently complex and senior for an intracompany transferee Petition because the Beneficiary performs tasks that are primarily managerial or executive in nature." Counsel claims that the beneficiary's subordinates perform "day-to-day activities" and relieve him from performing non-qualifying duties.

Counsel provides the following descriptions for the beneficiary's claimed subordinates:

Mr. [redacted] will set up and ensure software application[s] run properly. He will take directions from [the beneficiary] to ensure compliance of [the petitioner's] network and physical security, and on-line store security. He will also be responsible for the data identity theft precaution and firewalls set-up.

Mr. [redacted] will take his direction from [the beneficiary] and be responsible for the automation and set up of [the petitioner's] logistic systems, including order processing, shipping, inventory control and product returns systems.

Ms. [REDACTED] is a full-time employee of [the petitioner] and divides her time up, working approximately 50% as a Computer Analyst, taken [sic] directions from [the beneficiary] and the other 50%, working as a Business Analyst, taken [sic] directions from [the petitioner's chief executive officer]. Ms. [REDACTED] sets up and ensures the efficient function of hardware and software, including workstation, internet connection, office equipment and management information system.

Counsel further contends that much of the case law cited by the director is "entirely unrelated to the instant case," "are not supportive of the Service's decision," and "have no authority." Counsel attempts to distinguish the facts of the following cases from the instant matter: *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988), *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988), *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Izummi*, 22 I&N Dec. 1969 (Assoc. Comm. 1998), and *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Finally, counsel notes that the director denied the petition without issuing a request for additional evidence, and requests that the AAO review the facts of the instant case "to ensure denial is not based on erroneous judgment."

Upon review, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity. As a preliminary matter, the AAO notes that the regulation at 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. The director did not deny the petition based on insufficient evidence of eligibility.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, the petitioner has in fact supplemented the record on appeal, and the new evidence will be considered in this proceeding. Finally, as will be discussed below, the AAO has identified a deficiency not discussed by the director that renders the beneficiary clearly ineligible for this visa classification. The deficiency cannot be cured through the submission of additional evidence; therefore, it would serve no helpful purpose to remand the petition to the director.

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 has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "identifying and cultivating our technology and services leads," "implementing and overseeing the company's entire IT operations and other web and networking services," "orchestrating the availability of resources," and exercising responsibility for "the branding of our product." The petitioner

did not, however, clarify who performs routine marketing tasks inherent in product branding, or identify what specific duties are entailed by “identifying and cultivating” technology leads or “orchestrating” resource availability, nor did it indicate who performs the routine tasks associated with the “overall IT operations.” The petitioner also indicated that the beneficiary “reviews, develops, implements and plans for implementation of special activities” and serves as a “clearinghouse” for technology information but failed to clarify how these responsibilities meet the definition of managerial or executive capacity. 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).

On appeal, rather than clarifying these duties, counsel merely paraphrases the statutory definition of executive capacity by indicating that the beneficiary will “establish policies and procedures,” “exercis[e] discretion over [the petitioner’s] operations,” and “work independently.” See section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44). However, conclusory assertions regarding the beneficiary’s employment capacity are not sufficient to meet the petitioner's burden of proof. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Without a detailed description of the beneficiary’s daily tasks, the AAO is unable to determine whether the beneficiary will primarily perform managerial or executive duties.

The AAO acknowledges counsel’s assertion on appeal that the director based his decision partially on the size of the enterprise and the number of staff, but failed to take into consideration the reasonable needs of the enterprise. 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. In this case, the director’s review of the number of subordinates supervised by the beneficiary was necessary, given the petitioner’s claim that the beneficiary will have personnel responsibility over all employees in the IT department and will “monitor” and “oversee” all aspects of the department. An analysis of the nature of the petitioner’s business makes it unclear who would be performing operational duties related to the company’s IT operations, if not the beneficiary

At the time of filing, the petitioner was a two-year-old computer product design company. The petitioner claimed to employ thirteen employees, but submitted an organizational chart identifying only five employees by name, including the beneficiary. Based on the petitioner’s representations, the petitioner’s IT operations will require employees to implement and maintain a web site and on-line store, internal networks and information systems, and logistics systems for order processing, shipping and inventory. At the time of filing, the petitioner’s organizational chart identified only one part-time employee, a computer analyst, among the beneficiary’s proposed subordinates. Based on the petitioner’s representations, it does not appear that the reasonable needs of the petitioning company’s technology department might plausibly be met by the services of one technology director performing primarily managerial duties and one part-time computer analyst. Accordingly, as concluded by the director, it would be necessary for the beneficiary, as technology director,

to perform the non-qualifying duties of the proposed “computer security technician” and “warehouse operations” positions until such employees were hired. Rather than “overseeing” and “monitoring” the implementation of the company’s IT operations, the beneficiary would be performing technical duties related to providing the company’s IT services. 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).

The AAO notes that on appeal, counsel identifies two additional employees who would work under the beneficiary’s supervision. The petitioner neither claims nor provides evidence that these additional employees were working for the petitioner as of the date this petition was filed. 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). Absent evidence that the petitioner employed the computer security technician and “operations” employee at the time of filing, these employees need not and will not be considered for the purpose of this analysis.

Regardless, since the petitioner claims that the beneficiary will oversee the operations of the IT department through the supervision of subordinate employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. The petitioner has not established that any of the proposed positions would require a bachelor’s degree, such that they could be classified as professionals. Nor has the petitioner shown that any of the beneficiary’s proposed subordinates would supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary’s subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties relate to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

Here, the beneficiary evidently will exercise discretion over the petitioner’s IT operations, but the petitioner has not shown that the majority of his time would be allocated to operational or policy management, the supervision of managerial, supervisory or professional employees, or management of an essential function. The petitioner’s description of the beneficiary’s job duties does not establish what proportion of the beneficiary’s duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). CIS reviews the totality of the record, including the descriptions of a beneficiary’s duties and his or her subordinate employees, the nature of the petitioner’s business, and any other facts contributing to a complete understanding of a beneficiary’s actual role in a

business, when examining the managerial or executive capacity of a beneficiary. In this matter, upon review of the totality of the record, the petitioner has not established that the beneficiary performs primarily executive or managerial duties. Rather it appears that the majority of the beneficiary's time would necessarily be devoted to the performance of designing, implementing and maintaining the petitioner's IT systems.

Counsel asserts that the director improperly relied upon several decisions cited in the Notice of Denial, including: *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Izummi*, 22 I&N Dec. 1969 (Assoc. Comm. 1998), and *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The *Matter of Church Scientology Int'l* decision remains a valid precedent decision that is binding on all CIS officers in the enforcement of the Act. See 8 C.F.R. 103.3(c). Specifically, in *Matter of Church Scientology*, the AAO examined the claimed managerial capacity of a member of the Church of Scientology. After citing to the regulations and noting that the beneficiary's duties must be "primarily at the managerial or executive levels, the AAO stated: "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. at 604. The AAO continued to examine the specific job duties and concluded that the beneficiary appeared to function as a staff officer or specialist and not as a manager or executive.

The director's citation to *Matter of Treasure Craft of California*, *Matter of Obaigbena*, *Matter of Ramirez-Anchez* and *Matter of Laureano* is supportive of the overriding proposition that the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; see also, *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998). The director's citation to *Matter of Izummi* also relates to the petitioner's burden of proof, specifically, the requirement that the petitioner establish eligibility at the time the petition is filed. See, e.g., 8 C.F.R. § 103.2(b)(12) (requiring that an application or petition be denied where evidence submitted in response to a request for initial evidence does not establish eligibility at the time of filing). A review of the record and the adverse decision indicates that the director properly applied the statute and regulations, as well as relevant case law, to the petitioner's case. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulations.

Based on the above discussion, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the beneficiary completed at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition as required by 8 C.F.R. § 214.2(l)(3)(iii). In its August 27, 2003 letter, the petitioner stated: "[The beneficiary] has been continuously employed with [the foreign entity] in Singapore since April 30, 2003 immediately preceding the filing of this petition."

Citizenship and Immigration Services (CIS) records show that the beneficiary was admitted to the United States in B-1 nonimmigrant status on May 2, 2003 and subsequently filed an I-539 Application to Extend/Change Nonimmigrant Status on October 1, 2003, as a result of which he was granted an extension of stay until May 1, 2004 (WAC 04 002 52784). On April 28, 2004, the petitioner submitted an I-129 Petition for a Nonimmigrant Worker requesting H-1B temporary worker classification on behalf of the beneficiary (WAC 04 146 52734). The petitioner indicated on Form I-129 that the beneficiary's last date of admission at the time of filing was May 2, 2003. Accordingly, the beneficiary was in the United States from May 2, 2003, two days after he purportedly commenced employment with the foreign entity, until at least April 28, 2004. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The regulation at 8 C.F.R. § 214.2(l)(ii)(A) states:

Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.

As the instant petition was filed on September 1, 2004, the beneficiary could not have accumulated more than approximately four months of continuous employment abroad with the foreign entity. As such, he does not qualify for this visa classification. Furthermore, willful misrepresentation in these proceedings may render the beneficiary inadmissible to the United States. Section 212(a)(6)(C) of the Act. For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.