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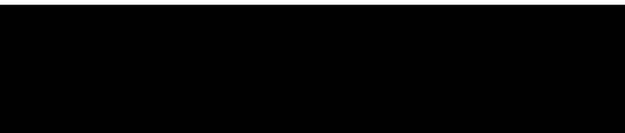
FILE: LIN 04 250 52245 Office: NEBRASKA SERVICE CENTER Date: **AUG 04 2006**

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, Chief
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to extend the employment of its manager¹ 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, an Nevada corporation, claims to be the subsidiary of Sourcecode Technology Holdings, (Pty) Ltd., located in Johannesburg, South Africa. The petitioner is engaged in technology development. 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 the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that the director's decision failed to take into account "the nature, scope, extent and totality of the petitioner's business activities," and alleges that if the director had reviewed the evidence more thoroughly, he would have concluded that the beneficiary was in fact involved in the overall management of the petitioner's business and was thus employed in a primarily managerial or executive capacity.

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)(14)(ii) 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;

¹ The AAO notes that in the initial petition, the beneficiary's position was described as a manager. In response to the request for evidence, however, the petitioner referred to the beneficiary as regional director for the Western region.

- (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 managerial or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The primary issue in this 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 undated statement submitted in support of the petition, the beneficiary's duties were described as follows:

[The beneficiary] will continue to oversee policies for the operation of the enterprise and their implementation, and in so doing will perform activities that directly relate to the management of the organization, including the overseeing of activities of employees within the organization. In the course of his responsibilities he will exercise discretion and independent judgment as required.

In addition, the petitioner explained that it currently maintained two offices in the United States (the beneficiary's place of employment in Washington and a second office in Illinois), and that the beneficiary would be stationed in the Washington office. An organizational chart submitted as part of the petitioner's plan for the fiscal year 2005 indicated that in addition to the beneficiary, the petitioner employed Bill Pitts as a business development manager working under the beneficiary's supervision. The chart further indicated that the petitioner planned to hire additional managers and technical specialists in the future.

On September 13, 2004, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request specifically asked the petitioner to submit a more detailed description of the beneficiary's duties, as well as a list of all subordinates of the beneficiary, with a description of each person's position title, their duties, and their educational backgrounds. The petitioner was also asked to submit copies of invoices or other documentation to establish that it had been doing business for the previous year.

In a response submitted on December 2, 2004, the petitioner responded to the director's request. With regard to the director's request for a more specific description of duties, the following statement was provided:

The management role performed by the Beneficiary is critical to the Petitioner's ongoing operations and activities. The Beneficiary is employed in a key managerial role and specifically as Regional Director, Western Region for Petitioner in the United States. A copy of Petitioner's Organizational Employee Chart containing current employees and positions to be filled is attached.

* * *

The Beneficiary will continue to oversee implementation of goals and policies for the operation of the Petitioner and their implementation. In so doing he will perform activities that directly relate to the management of the organization, including the overseeing of activities of employees and the hiring of new employees for Petitioner. The Beneficiary, in the course of his management responsibilities, will be vested with the right to discharge employees and oversee employee responsibilities in the areas of business development and technical support. The Beneficiary is vested with authority and discretion over day-to-day operations possessing wide latitude with respect to discretionary issue[s] and decision making

thereof. The Beneficiary in performance of his duties receives only general supervision from the board of directors of Petitioner.

Additionally, the petitioner quoted a letter from the foreign parent company, dated June 30, 2003, which was submitted in support of the initial new office petition. The relevant section stated:

“[The beneficiary] will direct the management of the organization; establish its goals and policies, and in so doing will exercise wide latitude in discretionary decision making. In performance of his responsibilities he will receive only general supervision from the board of directors of the parent organization[.]”

Additionally, the same organizational chart submitted with the petition was submitted in response to the request for evidence. No additional information regarding other staff members was provided.

On December 6, 2004, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a managerial or executive capacity. The director concluded that the documentary evidence submitted did not establish that the beneficiary was managing a subordinate staff of professionals. In addition, the director concluded that based on the information contained in the record, it appeared that the beneficiary was responsible for performing the tasks necessary to provide the petitioner’s services, and thus was not functioning in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner provides an overview of the petitioner’s current status and its potential plans for continued expansion in the future. Counsel reasserts, briefly, the general responsibilities of the beneficiary, and asserts that if the director had considered the totality of the petitioner’s business, a finding in favor of the beneficiary’s managerial or executive capacity would have been entered.

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 initial description of duties provided by the petitioner in these proceedings did little to describe the beneficiary’s actual duties, nor did it describe the nature of the beneficiary’s day-to-day tasks. Instead, it merely provided a vague overview of the nature of his duties. As previously stated, the initial evidence submitted was insufficient to warrant approval, and consequently, the director requested more specific information, including a more specific description of the beneficiary’s duties. The petitioner responded to this request, and in addition to describing the beneficiary’s duties in further detail, the petitioner resubmitted an organizational chart showing that the beneficiary oversaw one subordinate employee in the Washington office of the petitioner.

The AAO, upon review of the record of proceeding, concurs with the director’s finding that the petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity.

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 fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as solely managerial and/or executive in nature, but appears to merely paraphrase the regulatory definitions. The petitioner fails to quantify the time the beneficiary spends on each duty on a weekly basis, despite the director's specific request for such information. This failure of documentation is important because given the fact that only two persons are employed at the petitioner's Washington office, it is unclear what an average day consists of for the beneficiary without further information. 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).

Additionally, the petitioner failed to address the director's request for additional information regarding the beneficiary's fellow employees and subordinates. This omission on behalf of the petition is important because the stated duties of the beneficiary include supervising other employees. Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

Though requested by the director, the petitioner did not provide any additional information regarding the staffing of the U.S. operation or the specific position titles and duties of its other employees. Any 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). Thus, by declining to address the director's query, the petitioner has not established that the one identified subordinate employee possesses or requires an advanced degree, such that he could be classified as a professional. Nor has the petitioner shown that this employee supervises subordinate staff members or manages a clearly defined department or function of the petitioner, such that he could be classified as a manager or supervisor. Thus, the petitioner has not shown that the beneficiary's subordinate employee is supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act..

The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Counsel asserts on appeal that the petitioner's infancy should be considered when assessing the beneficiary's active role in the performance of company duties. The AAO disagrees. The regulation at 8 C.F.R. § 214.2(l)(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 provision in Citizenship and Immigration Services (CIS) regulations 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

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.

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ORDER: The appeal is dismissed.