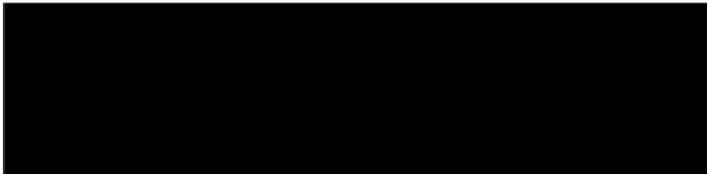


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D7

FILE: WAC 04 160 50346 Office: CALIFORNIA SERVICE CENTER Date: JUL 12 2006

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, Chief
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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its general manager for western support and implementation 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 Illinois corporation, claims to be the subsidiary of [REDACTED] located in Mississauga, Ontario, Canada. The petitioner is engaged in the distribution of payment processing software and hardware. 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 was erroneous, and that the beneficiary in fact is a qualified function manager and thus is employed in a primarily managerial 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;
- (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.

No supporting documentation was submitted with the initial petition with regard to the beneficiary's duties. Instead, the petitioner provided a brief description of the beneficiary's duties on the I-129 petition, which indicated that the beneficiary was the manager of customer support and product implementation, and that his duties included hiring, managing, training, and product development.

On August 5, 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 its quarterly tax returns for the previous four quarters.

In a response dated September 1, 2004, the petitioner, through counsel, responded to the director's request. With regard to the director's request for a more specific description of duties, the following statements were provided:

**Manager of Western Support and Implementation
Job Description**

This position is responsible for the management of the Western Region customer support and implementation. This will include coordinating / handling of all incoming customer support calls and queries. Post sales support is an integral part of customer satisfaction and how well a company handles a problem is equally or more so important than if they have an issue or not. As such [the petitioner] will look to [the beneficiary] to resolve or manage the resolution of the client issues within our predetermined customer support levels.

Performance will be measured based on customer satisfaction and [the beneficiary's] problem solving capabilities i.e. solving an issue with the least disruption to the customer and involving other team members only as required. [The beneficiary] will be responsible for management of the Santa Ana office and building a viable ongoing support and supplies business in the Western Region.

Help Desk:

- Understanding nature of issues and categorize according to customer support document
- Resolve customer issues within predetermined customer support levels
- Liaison with other departments as required and ensure issues are resolved
- Walk through installation with customers
- Management of the issue until closure
- Track and monitor hardware support calls to NCR, place call and follow up with customer to ensure issue is resolved and closed, with the assistance of designated individual
- Ensuring all calls are logged into [the petitioner's] help desk / customer support tracking system
- Report monthly to upper management on support calls, number closed and details of those outstanding

Train and mentor Installers and Help Desk Personnel as hired in Western Region:
Provide training on NCR hardware setup and maintenance

- Provide training on RP\$ and Image application setup
- Provide training on RP\$ and image application software
- Inform upper management of any personnel related issues

Manage upcoming implementations:

- Schedule all tasks related to the implementation
- Assigning resource(s) to each of the tasks as required, particularly customization work
- Monitor for completion and ensuring customer commitments are met
- Ensuring quality of implementation
- Ensure implementation is completed on time
- Hold regular status meetings with [the beneficiary's] team, as required

Change Request / Bug Fixes:

- Prepare statement of work and obtain customer approval
- Review with Manager of Technical Services assignment of resources for completion
- Follow up to ensure commitment given to customer is met or exceeded
- Escalate any issues as required
- Ensure change request has been tested and documented prior to sending to customer
- Walk customer through implementation
- Update internal documentation in customer file

Support Admin:

- Ensure all calls are logged in [petitioner's] help desk / customer support tracking system
- Adhoc support for sales representatives as requested
- Coordinate quarterly after sales support calls for the Western Region
- Survey customers on [the petitioner's] after sales support
- Keep customer data base current i.e. complete list of customers, equipment, software they have etc.

Additionally, an organizational chart submitted showed that the petitioner's organization was overseen by a president, [REDACTED]. Under the president, there were three departments: sales, administration, and CS & Implementation. There were three sales associates listed under the sales department, one administration manager under the administration department, and the beneficiary under the CS & Implementation. No subordinate employees were listed under the beneficiary's supervision or control.

On October 5, 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 an essential function for the petitioner. 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 asserts that the beneficiary's duties are essential functions of the petitioner, and thus the beneficiary is in fact functioning in a primarily managerial or executive capacity. Furthermore, counsel asserts that the petitioner is still in its infancy, thereby explaining the need for the beneficiary to perform most of the essential duties of the company.

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). 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 provided an organizational chart showing that the beneficiary did not oversee any subordinate employees.

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 including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because many of the beneficiary's daily tasks, such as "coordinating / handling of all incoming customer support calls and queries," "walk through installation with customer[s]," "provide training," and "ensur[e] all calls are logged into [the petitioner's] help desk / customer support tracking system" do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

On appeal, counsel asserts that the record clearly shows that the beneficiary is acting as a function 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). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., 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. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

To allow the broad application of the term "essential function" to include any minor or low-level function within a business would render the term meaningless. The term "essential" is defined as "inherent" or "indispensable." *Webster's II New College Dictionary* 384 (2001). Accordingly, the petitioner must establish that the function is inherent and indispensable to the business rather than a low-level collateral task that is superfluous to the company's essential operations. In this matter, the description of duties provides indicates that the beneficiary is actively performing the customer service tasks himself, without any assistance from subordinate employees or colleagues. In fact, the evidence in the record indicates that out of the four other employees, only one, the administration manager, is based in Santa Ana with the beneficiary. Although she is apparently present at the beneficiary's worksite, no description of her duties has been provided, so it cannot be determined that she relieves the beneficiary from performing the non-qualifying tasks attributed to his position as Western Support and Implementation Manager. As stated above, 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.

Finally, the AAO notes some discrepancies with regard to the beneficiary's alleged position in the organizational hierarchy of the petitioner. In response to the director's request for evidence, the petitioner submitted an organizational chart showing that the beneficiary was the manager of the western support and implementation division. The organizational chart did not indicate that the beneficiary oversaw or supervised any subordinate employees. In fact, all employees listed on the chart were lateral in relation to the beneficiary's position in the organizational hierarchy, including the administration manager, who was the only other employee listed as being stationed in the beneficiary's Santa Ana office. On appeal, however, an updated organization chart is submitted, which now has the beneficiary directly supervising the administration manager, and adds two additional departments under her direct supervision, namely, US Sales Santa Ana and US Support. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner, therefore, has failed to establish that the beneficiary is employed in a primarily managerial or executive capacity. 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.

Beyond the decision of the director, the minimal documentation of the petitioner's ownership raises the issue of whether there is a qualifying relationship between and U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In this matter, the petitioner's indication on Schedule L and Statement 5 of its Forms 1120, U.S. Corporation Income Tax Return for 2001 and 2002 is the only documentation that the foreign entity in fact owns the U.S. entity. As general evidence of a petitioner's claimed qualifying relationship, stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. For this additional reason, the petition may not be approved.

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).

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.