



U.S. Citizenship
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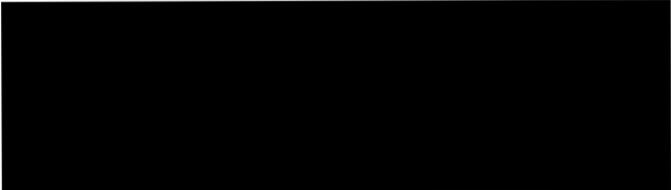
File: EAC 04 022 51433 Office: VERMONT SERVICE CENTER Date: JUN 02 2006

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)

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa, and upheld the decision after a subsequent motion to reopen was filed by the petitioner. 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 extend the employment of its director of business development 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 corporation organized in the State of New Jersey that is engaged in medical transcription services. The petitioner claims that it is a branch of [REDACTED], located in Hyderabad, India. 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 for an additional three years.

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 a motion to reopen, which was granted by the director. Upon review, the director found that the petitioner had not overcome the grounds for the denial and upheld the previous decision. On appeal, counsel for the petitioner asserts that the director failed to adequately consider the abundance of evidence submitted in support of the beneficiary's qualifications. In support of this assertion, counsel submits additional evidence.

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

The 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 October 17, 2003 letter of support submitted with the initial petition, the petitioner states that the beneficiary manages the function of business development for the U.S. petitioner, and claims that this role is executive in nature. Specifically, the petitioner describes her duties as follows:

Besides successfully completing incorporation formalities, she has arranged for office accommodation, and has negotiated and developed complex relationships with our clients.

* * *

[The beneficiary's] position will require management of a function – that of business development, and is primarily in the nature of an executive role. However, should our clientele base and market share increase, as it is expected to within the next year, she will perform some managerial functions in the future, mainly connected with directing the work of additional employees to be engaged in the installation and implementation of our software at client sites, training client personnel, completing login procedures, and maintaining servers. She has already placed some advertisements with this end in view.

[The beneficiary] will not be concerned with non-managerial, day-to-day operations involved in producing a product or providing a service. At the present stage of our business, she does not have any day-to-day operations to speak of, other than the occasional installation and implementation of our software at new client sites, training new client personnel, and completing login procedures for new clients. These non-managerial functions she has performed on only a few occasions in the past year, where we have secured new clients through her efforts. Due to her efforts we also have several additional potential clients in the

pipeline, and hope to secure their orders in due course. At a future date, depending on the expected expansion of our business, she will also be involved in purchases, and hiring of employees to perform day-to-day operations as would be necessitated by amplified growth.

The petitioner further stated that the beneficiary personally met with potential clients such as hospital managers, practicing doctors, and hospital document administrators to assess their individual needs.

In addition to the description of duties, the petitioner submitted a brochure of the petitioner which presented an overview of the petitioner's business plan and which claimed that the first year of operations would consist primarily of marketing, both directly and by telemarketing. No staff projections or specific business objectives were provided, but copies of ads placed in local papers seeking qualified personnel were submitted in support of the petitioner's attempts to staff the operation. Finally, copies of numerous contracts between the petitioner and medical providers for transcription services were submitted.

On January 13, 2004, the director requested additional evidence. Specifically, the director requested that the petitioner submit more detailed information regarding the beneficiary's duties and the manner in which they were managerial and/or executive in nature. Specifically, a complete description of duties was requested, including a list of all subordinate staff members and their positions and duties within the organization. Finally, copies of the petitioner's Forms 941, Employer's Quarterly Federal Tax Returns, were requested for the previous two quarters.

In response, counsel for the petitioner submitted a detailed list of the beneficiary's duties, and indicated that the beneficiary had since appointed a marketing consultant, a marketing manager, and an administrative assistant. Copies of employment agreements dated December 18, 2003, January 8, 2004, and March 30, 2004, respectively, were submitted in verification of their employment.

With regard to the beneficiary's duties, counsel provided a more detailed list addressing the specific nature of the beneficiary's duties, and provided the following breakdown of time devoted to each class of duties in an average 40 hour workweek:

- Follow up with prospective clients/Marketing: 15 hours
- Answering e-mails: 5 hours
- Trouble shoot and tech support: 5 hours
- Updating the directors in India/net meeting: 5 hours
- Daily meeting with the sales person: 10 hours

On June 7, 2004, the director denied the petition. The director determined that the beneficiary was not employed in a primarily managerial or executive capacity and that, since the evidence suggested she was the petitioner's sole employee, it was indisputable that she was required to perform firsthand the essential tasks necessary for the continued operation of the business.

On July 2, 2004, counsel for the petitioner filed a motion to reopen and asserted that the beneficiary's role in developing the business in fact consisted of qualifying duties. Counsel resubmitted some of the previously submitted documentation to reiterate the points previously addressed with regard to the beneficiary's duties.

On August 6, 2004, the director affirmed the previous decision, noting that upon review of the motion and the evidence submitted therein, there was no evidence to establish that the beneficiary's day-to-day duties were in fact managerial. Counsel then filed the instant appeal with the AAO.

Upon review, the AAO concurs with the director's previous decisions in this matter. 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.¹

On appeal, counsel resubmits a description of the beneficiary's duties, and refers the AAO to the numerous documents previously submitted in support of the petition. The AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not demonstrated that the beneficiary will be employed in a primarily managerial or executive capacity. Whether the beneficiary is a manager 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 claims that the beneficiary's duties are exclusively managerial and/or executive, yet the identified duties of the beneficiary in the record include numerous non-qualifying tasks. For example, the petitioner states that the beneficiary has and will continue to enter into contracts for transcription services, personally installs and implements the petitioner's software in client businesses, and spends 30% of her time on marketing functions each week. Such duties are not included in the definition of either managerial or executive capacity, which counsel so strongly urges the AAO to consider. The record contains no additional evidence or explanation with regard to the duties of the beneficiary. Merely claiming that the beneficiary is a manager or an executive is insufficient to establish eligibility in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In addition, counsel refers to the response to the request for evidence, indicating that the beneficiary now oversees three subordinate personnel and that she is relieved from performing non-qualifying duties, except in

¹ The AAO notes that the petitioner alleges that the beneficiary manages an essential function of the business, i.e., business development, which falls under the definition of managerial capacity. The petitioner, however, claims that such a duty is executive in nature. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. The AAO will allot equal consideration to whether the beneficiary qualifies under either definition, but cautions the petitioner to be more specific with this issue in the future.

limited circumstances as needed. The AAO notes that based on the three employment agreements executed by the beneficiary and each employee, it appears that all of these employees were hired *after* the extension was filed and after the one-year period of stay had expired. Consequently, this evidence is not persuasive in establishing the beneficiary's qualifications, since 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). While the petitioner continually alleges that the business is getting to a stage where other employees can relieve the beneficiary from performing non-qualifying duties, the relevant stage of the petitioner was that of the time of filing. The AAO notes that the beneficiary's signature appears on all of the contracts, and since she was the only employee during the petitioner's first year of operation, it is clear that she performed an abundance of non-qualifying duties; otherwise, the petitioner's business would not be in a profitable state of growth. Finally, it is undisputed that the beneficiary is engaged in client-related services, and personally visits clients and meets with clients to assess their needs. 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 fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitutes significant components of the duties performed on a day-to-day basis.

On appeal, counsel argues that "it would be far more an implementation of the intent of the L-1 regulations to scrutinize the managerial content of the beneficiary's role at the time of adjudicating the next petition, and justifiably so, since by the end of the three years, the business would have had a fair opportunity to expand operations, staff and managerial functions." Counsel's assertion is contrary to both the law and the regulations. Specifically, 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 CIS regulations that allows for an extension of this one-year period. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this additional 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.

ORDER: The appeal is dismissed.