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File: LIN 05 143 54794 Office: NEBRASKA SERVICE CENTER Date: NOV 13 2006

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

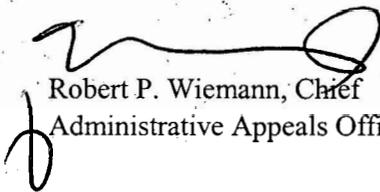
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 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 corporation organized under the laws of the State of Delaware and claims to be engaged in software development. The petitioner states that it is the affiliate of IT Techie, Ltd. located in Kerala, India. The petitioner seeks to employ the beneficiary as its chief operating officer for a three-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed by the U.S. entity 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, the petitioner submits additional evidence related to the petitioner's current staffing levels and hiring plans in support of its assertion that the beneficiary will be employed in a 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)(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 this matter is whether the petitioner established that 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 nonimmigrant petition was filed on April 11, 2005. The petitioner noted on Form I-129 its intention to employ the beneficiary as chief operating officer of the two-person software development company. In a supporting letter appended to the petition, the petitioner stated that the beneficiary, in her proposed role as

chief operations officer, would "retain complete accountability for business operations in the U.S. Company." Specifically, the petitioner indicated that the beneficiary would perform the following duties:

- Hire and manage a team of software professionals (Programmers) to work with clients in the product development area, SDRM and enterprise application arena (40%)
- Assign, out-source and manage software professionals from both the team in India and the US to client sites after obtaining client specifications. (30%)
- Develop a training program for employees to improve their skills. Supervise and coordinate employee assignments to ensure efficient and timely service to clients. (20%)
- Monitor test scenarios and oversee the quality of deliverables. (10%)

[The beneficiary] will supervise employees and will report directly to the CEO. Additionally, she will have the authority to hire and fire all employees that she supervises.

The petition indicated that the U.S. company was incorporated in 2002 and "is still in a start up mode." The petitioner submitted its Illinois Form UI-3/40, Employer's Contribution and Wage Report, for the fourth quarter of 2004, which confirmed the employment of two employees.

The director issued a request for additional evidence on April 19, 2005. The director noted that the beneficiary's responsibilities for collecting client specifications, monitoring test scenarios and training software professionals did not appear to be managerial in nature. The director further observed that the petitioner had not established that the beneficiary would supervise any personnel, as the other employees of the U.S. company appear to be the co-owners of the company, along with the beneficiary. The director requested that the petitioner explain how the beneficiary's duties would be distinguished from those of the other owners of the company. The director further requested an organizational chart showing the beneficiary's proposed position in relation to others in the company, as well as information concerning the job titles and job duties of the beneficiary's proposed subordinates.

The petitioner submitted a response to the director's request on May 18, 2005. In response to the director's request that the petitioner explain how the beneficiary's duties would be distinguished from those of the other owners of the company, the petitioner stated: "The proposed duties . . . of [the beneficiary] in a managerial capacity would be similar to those she had in the foreign entity." In addition, the petitioner submitted a proposed organizational chart for the U.S. company and asserted that the chart "shows how [the beneficiary] manages a large part of the organization, supervises other professionals and has authority in personnel actions and exercises discretion over day-to-day operations."

The proposed organizational chart submitted identifies the beneficiary in four different positions as chief operating officer, "Vice President, TechIndex Portal," "Chief Financial Officer/Administration, Accounting," and "Vice President, Executive Management." The functions managed by these positions include vendor contents listing, strategic partnerships (shown as an open position), search engine submission, "PR, Branding, Awards" (shown as an open position), internal reporting, budget control, stock evaluation, project management, human resources, legal and accounting. The chart also depicts a chief executive officer, a vice president, enterprise services, a chief technology officer, a "Vice President, Summit," and a vice

president, sales position, which is listed as "open." The petitioner did not provide information regarding the job title and job duties of the beneficiary's proposed subordinates.

As evidence of its staffing, the petitioner submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2005, which indicates that the company had two employees as of March 31, 2005. The petitioner submitted copies of partially completed, un-executed IRS Forms I-9, Employment Eligibility Verification, for the employees identified as vice president, enterprise services and vice president, Summit. In addition, the petitioner submitted copies of two offer letters issued to un-identified prospective employees for the position of "consultant," with employment to commence on August 14, 2005.

The director denied the petition on June 7, 2005 concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial capacity in the United States. The director noted that the petitioner currently has two employees whose duties and level of responsibility had not been established, and therefore had failed to demonstrate that the beneficiary would manage supervisory, professional or managerial employees in the United States. The director further found that the petitioner indicated that the beneficiary would fill a total of four different positions within the organization, but had failed to provide any detail regarding the duties to be filled in each position.

In addition, the director noted a discrepancy between the petitioner's quarterly wage reports, which named two employees, and the petitioner's organizational chart, which identifies four employees by name. The director observed that the submitted unexecuted Forms I-9 and job offer letters were inadequate to establish the petitioner's staffing levels as of the date the petition was filed. Accordingly, the director concluded that the U.S. entity does not have sufficient staff to relieve the beneficiary from performing significant non-managerial duties. The director acknowledged the petitioner's intention to hire additional staff in the future, but noted that the petition could not be approved based on the company's future hiring plans.

The petitioner filed the instant appeal on July 7, 2005. On appeal, the petitioner asserts that the company is in the process of "rebuilding the team" in the United States office and will be recruiting local candidates. The petitioner states that the beneficiary will be employed in a managerial capacity, and as chief operating officer, will be responsible for the "corporation's operations." The petitioner indicates that the beneficiary will also "look after issues related to marketing, sales, production, and personnel," as well as "completion of projects within the given time schedules and the smooth flow of the organization in all divisions."

The petitioner submits a chart outlining the beneficiary's areas of responsibility and the duties of the various "teams" to be managed by her. The petitioner states that the two vice presidents identified on the petitioner's organizational chart will join the company on July 15, 2005 and will be managed by the beneficiary initially, along with the company's chief technology officer. The petitioner submits executed Forms I-9 and offer letters for both prospective employees. The petitioner states that the company is making initiatives to expand its organization in the United States and submits a business plan which briefly identifies the projected staffing levels of the company through 2007.

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

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.*

Furthermore, 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 prove 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 are related to operational or policy management, not to the supervision of lower-level employees or the performance of the duties of another type of non-managerial or non-executive position.

The petitioner's initial description of the beneficiary's duties was insufficient to establish that the beneficiary would perform primarily managerial or executive duties. Based on the petitioner's representations, the majority of the beneficiary's time would be devoted to managing and training software professionals assigned to different client projects, as well as performing some non-qualifying duties including obtaining client specifications, and monitoring test scenarios. As observed by the director in the request for evidence, it was unclear who the beneficiary would supervise, as the company had only two employees at the time of filing and it was not established that they would actually work under the beneficiary's supervision. Upon review, it appears that the petitioner simply utilized exactly the same job description for the proposed U.S. position as it utilized for the beneficiary's former position as a project leader for the foreign entity, rather than outlining the beneficiary's actual proposed duties as chief operations officer of the U.S. entity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990).

The petitioner's response to the director's request for evidence confirmed that the U.S. company had only two employees as of the date of filing, and indicated that the beneficiary, at least initially, would actually be fulfilling multiple roles within the organization, many of which would require the performance of non-qualifying operational and administrative duties. For example, the petitioner proposes that the beneficiary will fill the open position of chief financial officer, with responsibility for administrative and accounting functions. As the petitioner does not employ a bookkeeper, administrative assistant or other staff to perform the routine duties of this department, it is evident that the beneficiary would be required to perform non-qualifying duties associated with the company's administration, human resources, and finances. Similarly, the petitioner indicated that the beneficiary will concurrently serve in the role of vice president over the "Techindex Portal" team. Since there is no "team" in place, it is reasonable to assume, and has not been shown otherwise, that the beneficiary will perform the "team duties" described by the petitioner, which include the day-to-day technical aspects of the business. Finally, the petitioner indicated that the beneficiary

would serve as vice president of "executive management" responsible for "monitoring all projects" and "work assignments." Again, as the record does not establish that the petitioner has staff in place to carry out projects or other work assignments, it is unclear how the beneficiary would manage these activities. Other than submitting an organizational chart briefly outlining the functions of its un-staffed departments, the petitioner did not elaborate upon the beneficiary's duties or otherwise clarify how the beneficiary's position would fall under the statutory definition of managerial or executive capacity. Therefore, in spite of the petitioner's assignment of various managerial or executive job titles to the beneficiary, the record failed to establish that the beneficiary would be relieved from primarily performing the non-managerial, non-executive duties associated with operating the business. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

On appeal, the petitioner indicates that the beneficiary will initially supervise the company's chief technology officer, who was employed as of the date of filing, and the two employees identified on the petitioner's organizational chart as vice president, enterprise services and "Vice President, Summit," who the petitioner claims will join the company on July 15, 2005. The petitioner submits signed offer letters from these employees, indicating that they are being hired as consultants and will commence employment with the company on August 14, 2005, thus raising questions regarding the actual nature of their intended employment. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Regardless, the petitioner has not established that these employees were employed as of the date of filing, or that they would relieve the beneficiary from performing non-qualifying duties associated with the company's administration, finances, or technical functions associated with the "Techindex Portal" department, all of which would apparently fall under the beneficiary's direct responsibility.

The petitioner also indicates that additional staff will be recruited by the U.S. company in the near future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for 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).

The petitioner was established in 2002 and claims to offer a variety of software development support resources for information technology companies. It employs a chief executive officer and a chief technology officer and now proposed to employ the beneficiary as a chief operating officer. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company that the beneficiary will purportedly manage and monitor in her role as chief operations officer. Based on a review of the totality of the record, it does not appear that the petitioner has a reasonable need for the beneficiary's services in a primarily managerial or executive capacity. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the beneficiary will initially be required to perform a wide variety of operational and administrative duties that will preclude her from performing the high-level duties contemplated by the statutory definitions. Even though the enterprise claims to be in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, it is noted that the petitioner indicated under penalty of perjury in Part 4 of the Form I-129 petition that the beneficiary had never been denied the requested classification. This petition was filed on April 11, 2005. Citizenship and Immigration Services' records show that the petitioner previously filed an I-129 petition requesting L-1A classification for the beneficiary on April 21, 2004, and the petition was denied on May 20, 2004 (WAC 04 136 53141). The regulations at 8 C.F.R. § 214.2(l)(2)(i) state that "[f]ailure to make a full disclosure of previous petitions filed may result in a denial of the petition." As the petitioner indicated on the form that the beneficiary had never been denied the requested classification, and the petitioner failed to fully disclose the previously filed petitions, this petition will be denied as a matter of discretion.

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.