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File: LIN 05 051 51640 Office: NEBRASKA SERVICE CENTER Date: NOV 13 2000

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

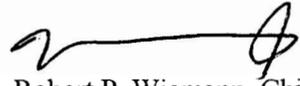
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 Michigan and is engaged in the software development and consulting business. The petitioner states that it is the affiliate of the beneficiary's foreign employer, [REDACTED] located in Ameerpet, India. The petitioner seeks to employ the beneficiary as its manager, human resources for a three-year period.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity; or (2) that the beneficiary has been employed by the foreign entity in a qualifying managerial capacity for at least one continuous year within the three years preceding the filing of the petition.

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 beneficiary has continuously served in a managerial capacity with the foreign entity and provides additional evidence related to former employees who were supervised by the beneficiary during his employment abroad. Counsel further asserts that the beneficiary will be employed in a primarily managerial capacity in the United States, and contends that the director failed to understand the petitioner's business structure and the "multinational dimension" of the positions supervised by the beneficiary.

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 capacity. The petitioner does not claim that the beneficiary will be employed in an 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.

The nonimmigrant petition was filed on December 10, 2004. In a supporting letter dated November 18, 2004, the petitioner stated that the beneficiary would perform the following duties in the offered position of manager-human resources for the U.S. company:

Our organization has identified [the beneficiary] as ideally suited to assist us to develop and oversee the implementation of strategic initiatives with respect to our corporate Human Resources goals and requirements. In this position, [the beneficiary] is expected to exercise a high degree of discretionary authority in leading our human resource department, establishing and implementing policies, procedures and operations based on the successful model he achieved in India.

While in the US, [the beneficiary] will report directly to the President and will have discretionary authority in coordinating, directing, and making decisions regarding the work of our organization. Specific areas of responsibility will include:

- Establishing compensation, benefits and performance policies for the company.
- Determining staffing needs and allocating human resources.
- Leading recruiting.
- Establishing and overseeing HR budget.
- Monitoring project managers and their use of staff resources.
- In cooperation with the President, helping to establish corporate objectives and ensure their implementation.

The director issued a request for additional evidence on January 26, 2005. The director advised the petitioner that the job description submitted with the petition was insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. Accordingly, the director instructed the petitioner as follows:

Please submit further documentary evidence to establish that the beneficiary qualifies under all four criteria stated below for either a Manager or Executive. The petitioner's response should not merely repeat the regulations cited below. Further such evidence must include an organizational chart that clearly identifies how the alien's current and proposed positions are specifically situated in relation to others in each company. . . . If the beneficiary has and will supervise employees you must identify these individuals by name, job title and job duties. You must also provide documentary evidence of their educational credentials.

\* \* \*

Please note that if the beneficiary has and will be managing an essential "function" for the petitioning entity . . . the petitioner must thoroughly document the "essential" nature of the "function" to the petitioning entity and submit additional evidence concerning the specific nature of the alien's involvement (including evidence that indicates the alien is in a high or senior-level position within an organizational hierarchy and/or with respect to the function). The L-1A petition must demonstrate that the beneficiary will be primarily managing or directing rather than performing, the function. The petitioner must also demonstrate that there are qualified employees to perform the function in the U.S.-based company so that the beneficiary is relieved from performing non-qualifying duties.

In a response dated April 25, 2005, the petitioner indicated that the beneficiary "will Head and lead the HRD department from US and manage all necessary HRD services for [the petitioner] and its Strategic Business Units (SBUs) based in India."

The petitioner indicated that the beneficiary would manage four staff, and described the scope of his proposed position as follows:

Head-HRD department is a Senior Managerial position for managing entire gamut of human resource development functions for [the petitioner]. The primary functions includes framing necessary HR policies related employment of HR. Planning, organizing, directing and controlling HRD program goals, objectives and Key Result Areas (KRAs) for each role, develop necessary and compatible HR interventions and processes to align individual and organizational goals and reporting results to the President & CEO.

Manager-HRD based in USA will also manage all necessary HRD interventions and services necessary to [the petitioner] and also to all its SBUs based in India thorough [sic] its offshore HRD units. Programs or functions includes Recruitment, Training and development, performance appraisal, benefits, wage and salary administration, discipline, employee relations, statutory compliance.

The petitioner also provided the requested detailed position description, which included the following areas of responsibility:

- Designing comprehensive Corporate HR and HRD program management in line with objectives of the company: Time allotted – 20%;
- Managing Manpower forecasting, Planning and Resourcing: Time allotted – 30%;
- Managing Performance evaluation and appraisals: Time allotted – 15%;
- Managing Training and Development: Time allotted – 10%;
- Managing Compensation and benefits: Time allotted – 15%;
- Managing Employee relations: Time allotted – 05%;
- Managing Discipline & Grievances: Time allotted – 05%

The petitioner submitted an organizational chart for the U.S. entity which indicates that the beneficiary will report to the general manager – operations, who in turn reports to the company president. The beneficiary is depicted as managing a four-person executive recruitment team, an "Executive i/c – Time, Record keeping, C&B" employee, an "Executive- Training & Development" employee, and an "Executive employee relations" employee all of whom are identified as "in India offshore unit." The beneficiary is also depicted as supervising a project manager and the head of business development "for people management and control." The record indicates that the beneficiary currently supervises the India-based employees in his role with the foreign entity.

The director denied the petition on May 5, 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 acknowledged the detailed job description and organizational chart submitted in support of the petition, but observed that all of the beneficiary's proposed subordinates are located in India. The director concluded that it is "unreasonable to assume that the beneficiary directly manages and controls these personnel given their locale and devotes a significant portion of his time to doing so." The director therefore determined that the beneficiary's indirect management of foreign employees would not contribute significantly to the beneficiary's overall managerial or executive responsibility.

The director noted that the petitioner had not demonstrated that the beneficiary will supervise or direct a subordinate staff of professional, managerial or supervisory personnel who will relieve him from performing non-qualifying duties, or that he will manage an essential function of the organization. The director determined that the beneficiary would instead be responsible for the day-to-day operations of the human resources function.

The petitioner filed the instant appeal on May 25, 2005. On appeal, counsel for the petitioner asserts that the offered position is managerial in nature, "as the beneficiary will be performing most of the same duties that he is currently performing with the overseas affiliate which the Service accepts to be managerial." Counsel asserts that the director failed to understand "the modern business structure of many businesses where offshore business is a large part of the business." Counsel further asserts that the overseas entity supports the U.S. company and that the positions have a "multinational dimension."

In addition, counsel contends that the level of authority to be exercised by the beneficiary in the United States is evidence, in and of itself, that the proffered position is managerial in nature, as the beneficiary will head "the whole gamut of HR functions" including overseeing a significant increase in U.S.-based personnel.

In support of the appeal, the petitioner submits a letter dated May 20, 2005, in which it states that the India-based positions reporting to the beneficiary in the United States will initially support his position and relieve him from performing non-qualifying duties as a "temporary measure." The petitioner states that the U.S. company is in the process of recruiting more resources for the positions that would report to the beneficiary directly in the United States to meet the petitioner's targeted growth plans for the current financial year.

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

Here, the petitioner has provided a detailed description of the beneficiary's duties that is sufficient to establish that he will possess a level of authority consistent with employment in a managerial capacity. However, the petitioner's description of the beneficiary's duties cannot be read or considered in the abstract. Rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties

represents a credible perspective of the beneficiary's role within the organizational hierarchy. While it is true that the beneficiary will have similar responsibilities to those he currently has in his role with the foreign entity, it cannot be overlooked that the beneficiary directly supervises twelve employees in the foreign entity's human resources department, most of whom are professionals. In contrast, based on the petitioner's representations, the beneficiary will be the sole U.S.-based employee in the petitioning company's human resources department, and the petitioner has not adequately documented or explained how the foreign employees would be able to relieve the beneficiary from performing the day-to-day, non-managerial functions of the department from the Indian office. 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)).

Counsel's assertion that the director "fails to understand the modern business structure," and claim that the positions have "a multinational dimension" do not assist in establishing that the beneficiary would be relieved from performing non-qualifying duties associated with the U.S. human resources function. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has not described the specific duties to be performed by the foreign employees in support of the U.S. company's human resources function, and without such explanation and evidence, the AAO will not assume that the foreign employees' duties extend to record-keeping, payroll, compensation and benefits administration, training and development, performance evaluation, and other routine human resources functions for employees located in the United States. On the contrary, many of these responsibilities would reasonably require direct access to the U.S.-based workforce and its external benefits and other service providers, access which would only be possessed by the beneficiary.

Therefore, although the petitioner has provided a detailed description of the beneficiary's proposed duties and the percentage of time he will devote to each broad area of responsibility, the record is insufficient to establish that his actual duties will be primarily managerial. 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). While the petitioner indicates that the beneficiary will devote a total of 50 percent of his time to performing managerial duties such as designing a comprehensive corporate human resources policy and managing manpower forecasting and planning, the petitioner has not established that it has anyone on its staff to perform duties related to employee recruitment, training and development, record-keeping, time-keeping and benefits and compensation-related tasks, as well as general administration functions for the department. It is reasonable to assume, and it has not been shown otherwise, that the beneficiary would be required to devote a substantial portion of his time to performing these day-to-day functions of the human resources department, and these duties would clearly not be incidental to his managerial responsibilities. 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 Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner's breakdown of the beneficiary's duties therefore appears to provide an incomplete representation of the actual duties to be

performed by the beneficiary in the United States on a daily basis, and thus the record does not contain a credible breakdown of how the beneficiary's duties will be allocated among managerial and non-managerial tasks.

The statutory definition of "managerial capacity" allows for both "personnel managers" and a "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(ii)(B)(3). Here, the petitioner asserts that the beneficiary will manage off-shore professionals, as well as a U.S.-based project manager and the head of business development in the United States. As discussed above, the petitioner has not persuasively demonstrated that the beneficiary will manage the foreign-based human resources professionals. With respect to the U.S.-based managerial employees, the petitioner has stated that the beneficiary will have indirect authority over these employees "for people and management control." Without further explanation, it appears that the beneficiary's duties would be limited to advising the project manager and head of business development on personnel issues, rather than actually supervising these employees. The petitioner has not established that the beneficiary will serve as a "personnel manager" as contemplated by section 101(a)(44)(A)(ii) of the Act.

The petitioner states for the first time on appeal that the petitioner's use of overseas employees to perform non-qualifying duties of the U.S. human resources function is a "temporary measure" and that the U.S. company is in the process of recruiting additional employees for positions that would report directly to the beneficiary in the United States. However, 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).

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 detailed job description that identifies the function with specificity, articulates the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 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. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. As discussed above, although the beneficiary will exercise the requisite level of authority over the petitioner's human resources function, the petitioner has

failed to show that non-qualifying duties associated with the function will not constitute the majority of the beneficiary's time.

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

The remaining issue in this matter is whether the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity for at least one continuous year within the three years preceding the filing of the petition, as required by 8 C.F.R. §§ 214.2(l)(1)(3)(iii) and (iv).

In its supporting letter dated November 18, 2004, the petitioner indicated that the beneficiary has served in the position of Manager-HRD with the foreign entity since July 2000 with responsibility for managing the HRD, consulting and IT training divisions of the foreign entity. On April 12, 2005, in response to the director's request for additional evidence, the petitioner submitted a detailed position description for the beneficiary's foreign position, an organizational chart depicting the beneficiary's supervision of twelve subordinate employees, and offer letters and evidence of educational credentials for nine of these employees. Eight of the nine offer letters for the beneficiary's subordinates were dated between January 2004 and March 2005.

The director denied the petition on May 5, 2005, concluding that the petitioner had failed to establish that the beneficiary was employed in a managerial or executive capacity for the required one-year period. The director acknowledged that although the beneficiary could currently be considered to be performing in a managerial or executive capacity, the evidence submitted showed that many of the beneficiary's subordinates were hired less than one year before the petition was filed, or even subsequent to the filing of the petition. The director concluded that prior to the hiring of the subordinate staff, the beneficiary would have been required to perform the day-to-day duties of the human resources function, rather than primarily managing the function. Thus the director determined that the beneficiary had been performing primarily qualifying duties for less than one year.

On appeal, counsel for the petitioner asserts that the list of subordinate employees submitted in response to the director's request for evidence were current employees of the company, and did not include employees who have left the company. Counsel states that the beneficiary has supervised the same subordinate positions throughout his employment with the foreign entity and has always maintained a managerial position with the foreign entity. In a letter dated May 20, 2005, the petitioner further clarifies that the petitioner did not submit, nor did the director request, evidence or records of former employees who were previously supervised by the beneficiary in his role with the foreign entity. In support of this statement, the petitioner provides a list of twelve former employees who previously worked under the beneficiary's supervision in the foreign entity's HRD Department between July 2000 and December 2004, along with copies of their offer letters and educational qualifications.

Upon review, the petitioner has established that the beneficiary has been employed in a qualifying managerial capacity with the foreign entity for more than one continuous year in the three years preceding the filing of the instant petition. The evidence and explanation provided on appeal is sufficient to establish that the beneficiary has consistently been charged with supervising professional staff during his tenure with the

foreign entity, and has cured the specific deficiency noted by the director. The AAO is satisfied that the beneficiary has had a sufficient subordinate staff to relieve him from performing the majority of the non-qualifying duties associated with the foreign entity's human resources activities such that he could focus primarily on the overall management of the department, and development of human resources policies and processes. Accordingly, the director's decision with respect to this issue only will be withdrawn.

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.