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File: WAC 05 080 51563 Office: CALIFORNIA SERVICE CENTER Date: NOV 27 2006

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

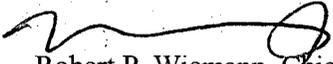
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

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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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend employment of its vice president 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, a California corporation, is engaged in software development and consulting. The petitioner states that it is the affiliate of [REDACTED] located in Hyderabad, India. The beneficiary has been employed by the petitioner in L-1A status since January 2002 and now the petitioner seeks to extend his status for three additional years.

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 asserts that the director misread and misinterpreted the beneficiary's stated job duties and failed to appreciate the organizational complexity of the U.S. company in determining that the beneficiary would not serve in a primarily managerial or executive capacity. The petitioner submits a brief and additional evidence in support of the appeal.

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 under the extended petition.

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 January 26, 2005. The petitioner noted on Form I-129 its intention to employ the beneficiary as vice president of the three-person software development company. In a letter dated January 22, 2005, the petitioner described the beneficiary's job duties as the following:

In this position [the beneficiary] has been responsible for promoting the business of the company, development of software for customers in USA and other countries and has also been responsible for marketing the software products of the company.

* * *

[The beneficiary] . . . is in-charge of the US office and is building and supervising the software sales, support and development team. He provides the necessary impetus to add customers for *QuickRules* and implement the plans accordingly for expanding the team.

* * *

The duties of [the beneficiary] as the overall in-charge of the entity in USA include, liaison with software development customers, study of requirements of the prospective customers, estimation by way of costs and efforts involved, providing product support to the customers and liaison and coordination between the US company and its parent Indian organization to ensure adequate planning and management of the software projects being carried out both in India and US. As in India, he is responsible for both the human resources as well as technical resources and heads a team of software engineers, programmers and other software and sales staff at various levels (stationed both in US & in India) to carry out his responsibilities. [The beneficiary] has extensive authority for business development, secure contractual assignments for the corporation, oversee its execution, plan and arrange the infrastructure required, arrange the finances required, devise the pricing structure, hire staff as are required, and supervise and manage the day to day operations.

The petitioner submitted its California Form DE-6, Quarterly Wage and Withholding Report, for the fourth quarter of 2004, which confirmed the employment of the beneficiary and two other employees, all of whom received a salary of \$15,000 for the quarter.

The director issued a request for additional evidence on February 18, 2005, in part instructing the petitioner to submit the following evidence in support of its claim that the beneficiary would be employed in a managerial or executive capacity: (1) the total number of employees in the United States; (2) a detailed organizational chart identifying each employee under the beneficiary's supervision by name and job title; (3) a brief description of job duties, educational level, annual salaries/wages and immigration status for all employees under the beneficiary's supervision, as well as the source of remuneration for all employees; and (4) a more detailed description of the beneficiary's duties including the percentage of time spent in each of the listed duties.

In a letter dated May 11, 2005, the petitioner confirmed that the total number of employees in the United States is three, and noted that the company was in the process of hiring another two employees "in the next few weeks." The petitioner further noted that two employees in the foreign entity are working exclusively for the U.S. company and noted that all employees are supervised by the beneficiary. The petitioner stated that the beneficiary also coordinates the work of outside professional agencies responsible for accounting, payroll

and legal functions. With respect to the beneficiary's duties, the petitioner reiterated the job description submitted with the initial petition and added the following:

The beneficiary being the Vice President of the US organization has the ultimate authority to manage the organization. To this end he has full authority to sign Software contracts for the corporation, oversee its execution, plan and arrange the infrastructure required, arrange the finances required, devise the client fee structure, hire staff as are required, and supervise and manage the day to day operations. He has the ultimate right, authority and responsibility for each managerial and executive decision in the organization. Although in this capacity it is difficult to classify each of his job duties as separate duties and assign percentage of time spent in each of the jobs, a rough estimate of time spent by him in specific roles required by you is given hereunder:

Planning & developing Policies

The beneficiary spends about 15% of his time on these issues. He coordinates with the Board of Directors and lays down plans and policies to achieve Management's objectives.

Directing Legal affairs

The beneficiary spends approximately 15% of his time on these matters. He takes consultation from [sic] [REDACTED] (A Legal organization), [REDACTED] (CPAs) and IBS, Inc[.] in these matters.

Planning, directing & supervising customized Software solutions

The beneficiary spends about 25% of his time on planning, directing and supervising customized software solutions and services. The team of software engineers, both in India and the US implement solutions under direction from [the beneficiary].

Marketing & Business Development – the beneficiary spends about 25% of his time as overall in-charge of new business development and Marketing of company's products and services.

Supervising Financial & Administrative matters

[The beneficiary] spends about 20% of his time taking care of financial. He works in coordination with [REDACTED] (CPA) of [REDACTED] is a professional organization who are rendering us professional services and assistance in several matters including federal and state tax matters, corporate matters, payroll and other matters.

The petitioner submitted an organizational chart depicting the beneficiary as vice president supervising a senior developer and senior consultant based in the United States, a senior developer and solutions architect based in India, and outsourced companies responsible for payroll, legal, finance and accounting, and office facilities/administration functions. The organizational chart depicts an open business development manager position and open developer positions. The petitioner indicated that the beneficiary's subordinates are responsible for customer support, customer solutions, proof of concept, new product prototype, product

training, and product implementation services. The petitioner indicated that both of the beneficiary's U.S.-based subordinates possess bachelor's degrees, are in the U.S. in H-1B nonimmigrant status, and are compensated at an annual salary of \$60,000.

The director denied the petition on August 25, 2005, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director found that the beneficiary's job description was too broad and general to demonstrate that his duties would include primarily managerial or executive tasks. The director further found that the beneficiary's responsibilities "largely comprise sales, customer service and other duties or responsibilities for which the beneficiary primarily performs the tasks." The director declined to consider the beneficiary's responsibility for supervising overseas-based staff in determining whether the beneficiary would be performing in a primarily managerial or executive capacity in the United States. The director determined that the beneficiary would not be primarily supervising a subordinate staff of professional, managerial or supervisory personnel who provide relief from the performance of non-qualifying duties, nor would he manage an essential function or operate at a senior level within an organizational hierarchy, other than in position title.

On appeal, the petitioner asserts that the director "has erred in not recognizing the managerial and supervisory duties being performed by the beneficiary." The petitioner emphasizes the beneficiary's supervision of information technology professionals both in the United States and overseas, and notes that the beneficiary is also responsible for "supervising and passing instructions for the job functions which are being performed through outside companies/agencies." The petitioner further asserts that the director "erred in its appreciation of the organizational complexity of the US entity" and contends that the beneficiary is primarily involved in managerial duties and not in day-to-day activities. The petitioner asserts that the director failed to identify the basis of his conclusion that the beneficiary "will be performing many aspects of the day-to-day operations of the business," and failed to explain why he determined that the stated duties were not managerial in nature. The petitioner emphasizes that the beneficiary "is not involved in production of any goods or services, but rather supervises and directs professional and technical staff in the organization."

The petitioner provides the following description of the beneficiary's duties on appeal:

[The beneficiary] primarily manages the US organization as its overall incharge, and also supervises and controls the work of other technical, executive level professional personnel and has full authority to hire and fire the staff or make effective recommendations. He directs management of the US organization and under his charge controls all the functions of the organization, establishes its goals and policies, exercises wide latitude in discretionary decision-making, business development decision making, plan and arrange the infrastructure required, arrange the finances required, devise the pricing structure, hire or fire staff as are required and overall supervise and manage the operations, besides supervising and instructing the accounting, legal and other such functions which are outsourced to various professional organizations in the US. His position is the top level executive position in the organization and works under only the general direction of the Board of Directors.

The petitioner addresses the U.S. company's staffing levels, asserting that the director overlooked the petitioner's statement that it was in the process of hiring two additional employees. The petitioner asserts that the U.S. company now has five employees, as well as a full-time consultant, and also expects to transfer the two foreign-based staff to the United States in H-1B status "in the next few weeks." In support of the appeal, the petitioner submits an updated organizational chart indicating that the company now employs two developers and an administrative manager in addition to the staff previously mentioned.

Finally, the petitioner addresses the financial success and growth of the petitioning company and emphasizes that it renders highly technical services requiring extensive and complex planning sufficient to warrant the employment of an executive position. The petitioner asserts that the director did not understand the nature and complexity of the organization's business and needs.

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. The description suggested that the beneficiary performs both qualifying managerial duties and non-qualifying duties in his role as vice president. While the beneficiary is responsible for hiring staff and overseeing the day-to-day operations of the company, the petitioner also indicated that the beneficiary's duties include liaison with software development customers, studying customer requirements, estimating costs, and providing product support. The petitioner did not, however, clarify how any of these duties would fall under the statutory definitions of managerial or executive capacity, as defined at sections 101(a)(44)(A) and (B) of the Act. Rather, these duties are more indicative of an employee who is responsible for sales, marketing and customer support services. The petitioner indicated that the beneficiary "heads a team of software and sales staff at various levels," but never actually identified any sales staff who would work under the beneficiary's supervision. 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 beneficiary's responsibility for "business development" and

securing contractual arrangements would further support a conclusion that he is responsible for marketing and selling the petitioner's products and services. 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).

Although the petitioner provided the percentage of time the beneficiary allocates to his various duties in response to the director's request for evidence, the job duties included in the breakdown bear little resemblance to the initial position description discussed above. For example, the petitioner indicated that the beneficiary allocates a total of 50 percent of his time to planning and policy-making, supervising financial and administrative matters, and "directing legal affairs." However, none of these duties were included in the initial account of the beneficiary's job duties. Further, in responding to the director's request for evidence, the petitioner did not include the beneficiary's previously stated responsibilities for liaising with customers, studying customer requirements, or providing product support in its account of how the beneficiary's time is allocated. In sum, the initial description appeared to have the beneficiary participating more directly in the day-to-day operational tasks of the company, while the second iteration of the job description focuses more on the beneficiary's responsibility for supervising outside resources and developing policies "to achieve Management's objectives." At best, the job description provided in response to the request for evidence appears to portray an incomplete representation of the beneficiary's actual duties.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, 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 its 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). The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. The petitioner did not describe in any detail the policies or objectives developed by the beneficiary, or provide evidence of the type or scope of the services provided by the petitioner's outside attorneys and accountants, in support of its assertion that these duties require 50 percent of the beneficiary's time. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will 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).

Further, the AAO notes that although the petitioner indicates that the beneficiary "supervises" financial and administration matters, the petitioner does not have any staff who are responsible for day-to-day administrative and financial tasks, such as bookkeeping, accounts payable and receivable, managing the company's bank accounts, handling correspondence, or issuing invoices, and there is no evidence that the contracted CPA firm would be involved in these routine matters. Accordingly, it is reasonable to assume, and

has not been shown to be otherwise, that the beneficiary would be required to perform these non-qualifying tasks associated with operating the petitioner's office on a day-to-day basis.

The petitioner indicated that the beneficiary spends an additional 25% of his time on new business development and marketing the company's services. Again, there is no evidence in the record that anyone else in the U.S. company performs any duties related to "business development" or marketing, thus suggesting that the beneficiary himself is required to perform these duties. Further, if the beneficiary is the only employee in the petitioner's office performing these duties, and the primary purpose of the office is sales and marketing, it is implausible that he devotes only 25 percent of his time to sales and marketing functions. While the petitioner's products are technically complex, the petitioner has not established that every aspect of the sales and marketing function is so critical or so complex that it requires the personal attention of a managerial or executive employee. The petitioner has failed to establish any clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary with respect to the company's sales and marketing activities, and it is reasonable to assume, and has not been shown otherwise, that many aspects of this broad responsibility require the beneficiary's direct participation in routine sales and marketing tasks.

The AAO acknowledges that the beneficiary supervises a total of four professional employees within the U.S. and Indian companies, and pursuant to section 101(a)(44)(A)(ii) of the Act, this responsibility will be considered managerial. However, based on the petitioner's representations, the beneficiary is not primarily engaged in the supervision of these employees and in fact devotes only 25 percent of his time to supervising his subordinates. Furthermore, the petitioner has not established that these employees would relieve the beneficiary from performing non-qualifying duties. While the petitioner's lower level employees may perform the majority of the day-to-day duties associated with providing software consulting services to customers, the beneficiary's job duties performed in connection with the business' sales, marketing, finances and general administration may be deemed non-qualifying if they involve the performance of non-managerial duties. As previously discussed, it is evident that the beneficiary himself performs duties related to sales, marketing, requirements gathering, and product support, rather than managing or supervising the performance of these routine duties by other subordinate employees.

The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The record must establish that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization. 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 representation of the beneficiary's role within the organizational hierarchy. While company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other such pertinent factors as the nature of the petitioner's business, which, together, can be used as indicators which help determine whether a beneficiary can remain focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day to day operations.

The petitioner also indicates that additional staff have been hired subsequent to the filing of the petition, and that additional staff will be hired 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 2000 and claims to offer a variety of software products and software development consulting services. At the time of filing, the company employed a vice president, a senior consultant, and a senior developer, and utilized outside resources for accounting, tax filing and legal services. 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 related to sales, marketing, financial and administrative functions. 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) of the Act. As discussed above, the beneficiary, at the petitioner's current stage of development, will initially be required to perform a wide variety of operational and administrative duties that will preclude him from performing the high-level duties contemplated by the statutory definitions.

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.

The AAO acknowledges that CIS previously approved two L-1A petitions filed by the petitioner on behalf of this beneficiary. The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of the beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). It must be emphasized that each nonimmigrant petition filing is a separate record of proceeding with a separate record and a separate burden of proof. See 8 C.F.R. § 103.8(d). Due to the lack of evidence of eligibility in the present record, the AAO finds that the director was justified in departing from the previous approvals by denying the present request to extend the beneficiary's status.

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency

must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.