



U.S. Citizenship  
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File: SRC 05 014 51665 Office: TEXAS SERVICE CENTER Date: **OCT 20 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)

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, Texas 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 Texas a corporation engaged in software sales, support and consulting services. The petitioner is a subsidiary of Enhanced Trading Consultants cc, located in Johannesburg, South Africa. The petitioner seeks to employ the beneficiary as its vice president, customer support for a three-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States 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, counsel for the petitioner asserts that the director “erroneously concluded that employees [or] staff are a requirement for L-1A eligibility. . . . contrary to its own regulations.” Counsel further contends that the director ignored evidence submitted to establish that the U.S. business can support the need for an L-1A executive manager for three years. Counsel submits a statement from the petitioner 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.

At issue in the present 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 October 20, 2004. The petitioner stated on Form I-129 that the company has one employee and seeks to employ the beneficiary as its vice president customer support for a three-year period. In an appended declaration, dated October 19, 2004, the petitioner provided the following description of the beneficiary's proposed duties:

The Beneficiary will manage the essential function for [the petitioner] of customer support. He will demonstrate the product to customers, research each customer's business process and document flow, and devise a project plan for each customer. He will utilize his technical expertise with software product *SysPro* to see how it best fits in with the specific requirements of the customer. The Beneficiary will further apply his business acumen and technical know-how to build strong trusting relationships with customers.

Initially, [t]he Beneficiary will manage this support function directly. He will further bear responsibility to oversee projects and the team of support staff. The Beneficiary has the authority to hire and fire personnel to come on board shortly and will function at the most senior level with respect to the support function, while exercising discretion over the day to day operations of the support function. As the Company grows, he will train and manage new staff to assist in implementations and providing support to customers. Once support staff comes on board, the Beneficiary will direct management of the support function for [the petitioner]. He will establish goals and policies for the support function and exercise wide latitude in discretionary decision making as to customer support. He will then receive general supervision from the President regarding support to the Company's customers.

The petitioner indicated that the U.S. company "must shortly fill a need to add other employees who will be additional technical support personnel." The petitioner noted that the beneficiary would first supervise the customer support function "and then the actual employees, after training them." The petitioner indicated that its president has been responsible for both acquiring new business and addressing "other customer issues" which have undermined his business development efforts. The petitioner stated that the beneficiary is needed to "take over the technical role and work the customer support function."

The petitioner submitted a copy of its July 2004 business plan, which further outlines the beneficiary's proposed role, at page 13:

Once [the petitioner's president] has generated the new customers, [the beneficiary] will step in and begin the technical process of demonstrating the product to the customer and researching the customers [sic] business process and document flow. A very crucial aspect of support is understanding the client's business, and once this has been analysed [sic], a project plan can be implemented . . . . In the early stages of the business [the beneficiary] can will [sic] do the be [sic] responsible for customer support while at the same time mentoring and training new staff to help with implementations and technical support. This will enable [the beneficiary] to oversee projects and the team of support staff.

The petitioner submitted an organizational chart for the U.S. entity which indicates that the beneficiary and the president jointly supervise three sub-contractors, CSI Technology, Inc. (CSI), Catalyst Evaluation Group, LLC, and Computer Consulting Group, Inc., as well as an administrative position. The chart indicates that the company is currently interviewing for a network consultant position. The petitioner also submitted an "independent subcontractor agreement" which indicates that the U.S. company actually serves as a subcontractor to CSI and provides "software application consulting services" to CSI's customers.

The director issued a request for evidence on November 2, 2004, instructing the petitioner to submit the following: (1) evidence of the staffing level in the United States, to include copies of state quarterly income tax returns for the past year; and (2) position titles, qualifications and duties of all employees of the U.S. company.

In a response dated January 20, 2005, the petitioner's president reiterated much of the information provided previously regarding the beneficiary's proposed role and indicated that "only now are we able to project employing additional workers at [the petitioner's] operations based on the volume of contracts which we have secured." The petitioner indicated that the proffered position "is a functional manager regarding the support function reporting directly to . . . the President." The petitioner further stated that the petitioner would ultimately hire degreed professionals who would report to the beneficiary.

The petitioner submitted a letter, dated December 9, 2004, from its tax consultant, who confirmed that the petitioner did not have any employees on its payroll during the first nine months of 2004, and indicated that the petitioner's president was "the only individual involved in the day to day operations of the corporation." The tax consultant further confirmed that no state or federal quarterly reports had been filed by the U.S. company in 2004.

The director denied the petition on February 8, 2005, concluding that the petitioner had failed to establish that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity. The director referenced the petitioner's response to the request for evidence, and noted "it appears that there are no employees on staff for the beneficiary to manage or supervise as required." The director further stated that "the proposed plan for this business as described would probably be acceptable if the petitioner were applying for a 'new office.'" However, the director noted that as an established business already in operation for over one year, the petitioner had failed to show that the business "can support the need for an L-1A executive/manager for a period of 3 years."

The petitioner filed the instant appeal on March 11, 2005. In a declaration submitted in support of the appeal, the petitioner emphasizes the U.S. company's need for the beneficiary to manage the customer support function as part of the company's long-term growth strategy. The petitioner states that it has hired an additional degreed employee to provide technical support services, who is to be trained and managed by the beneficiary. The petitioner submits a copy of an employment contract for the employee, dated January 1, 2005, and a copy of his resume.

The petitioner further asserts that the director erroneously concluded that the beneficiary is required to supervise employees in order to qualify for L-1A classification in a managerial or executive capacity. The

petitioner reiterates that the beneficiary will initially manage the customer support function for the U.S. company and is therefore not required to supervise employees. The petitioner emphasizes that the definition of managerial capacity includes managers who manage an essential function rather than supervising employees. The petitioner also cites an unpublished decision in which the sole employee of a company was found to qualify as a "functional manager."

The petitioner further notes that the U.S. company "employs CSI to provide it certain services," and again emphasizes that the company now has a direct employee who serves in a professional position and will work under the beneficiary's supervision.

Finally, the petitioner asserts that the director ignored "the substantial number of contracts, invoices . . . and projected growth" which establish that the business can support the need for an L-1A executive/manager for a three-year period.

Upon reviewing the petition and the evidence, the petitioner has not established that the beneficiary will be employed by the petitioner in a primarily managerial or executive capacity. As a preliminary matter, the AAO acknowledges that the director appears to have denied the petition solely on the basis that the beneficiary would not be supervising a subordinate staff, without considering the petitioner's assertion that the beneficiary would manage an essential function of the organization. As the AAO's review is conducted on a *de novo* basis, the AAO will herein address the petitioner's evidence and the beneficiary's eligibility as both a "personnel manager" and a "function manager." See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.* Here, the petitioner has consistently claimed that the beneficiary will serve in a managerial capacity, specifically as a "function manager" responsible for the customer support function.

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 describing the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 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 the instant matter, based on a review of the petitioner's description of the beneficiary's duties and a review of the totality of the record, it is evident that the beneficiary would be required to personally provide customer

support services to the petitioner's clients, and would also be required to work as a subcontracted technical consultant to other companies' customers pursuant to the petitioner's independent subcontractor agreements. In other words, the beneficiary would be primarily performing the duties related to the customer support function, rather than managing the function.

For example, the petitioner states that the beneficiary will demonstrate products to customers, research customers' business processes and document flow, and devise project plans utilizing his technical expertise with the software products sold and supported by the company. The petitioner repeatedly emphasized that the beneficiary will initially perform this support function directly. In addition, the petitioner has provided evidence that the company currently earns a substantial portion of its revenue by providing sales and implementation services to at least two other companies, serving as subcontracted independent technical consultants on those companies' projects. As the petitioner has also emphasized its desire to have its president and sole employee devote more of his time to sales and marketing activities rather than technical work, it is reasonable to assume that the beneficiary would also provide consulting services pursuant to the terms of the submitted subcontractor agreements. The petitioner has not explained how any of these duties could be considered managerial in nature, pursuant to the statutory definition at section 101(a)(44)(A) of the Act. Based on the petitioner's job description for the beneficiary, he will be primarily providing the services of the organization, rather than managing a function of the organization. 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).

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).

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. As discussed above, the record does not demonstrate that the beneficiary would initially perform any managerial duties, much less be engaged in primarily managerial duties. Rather, the beneficiary and the president will be the only employees providing the day-to-day services of the petitioner's service-oriented business. The fact that the beneficiary would personally undertake most or all of the petitioner's considerable customer support activities does not elevate his position to that of a function manager.

The AAO acknowledges the petitioner's assertions that the beneficiary will "bear responsibility to oversee projects and the team of support staff"; have authority to hire and fire personnel "to come on board shortly"; will "function at the senior most level with respect to the support function, while exercising discretion over

the day to day operation of the support function”; “will train and manage new staff”; and “will establish goals and policies for the support function and exercise wide latitude in discretionary decision making as to customer support.” However, the majority of these duties relate to the training and management of staff who have not yet been hired. 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).

Therefore, while the record indicates that the beneficiary will exercise the appropriate level of managerial authority over customer support matters for the U.S. company, this fact alone is insufficient to overcome the fact that his actual duties for the foreseeable future would be directly providing consulting services to other companies and performing customer implementation and support services of the petitioning organization. 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). Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirement that the beneficiary perform primarily managerial duties as of the date the petition is approved.

In the case of a function manager, the AAO recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager’s supervision. It is the petitioner’s obligation to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary. The addition of the concept of a “function manager” by the Immigration Act of 1990 eliminated the requirement that a beneficiary must *directly* supervise subordinate employees to establish managerial capacity. Despite the changes made by the Immigration Act of 1990, the statute continues to require that an individual “primarily” perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word “primarily” is defined as “at first,” “principally,” or “chiefly.” *Webster’s II New College Dictionary* 877 (2001). **Where an individual is “principally” or “chiefly” performing the tasks necessary to produce a product or to provide a service or other non-managerial, non-executive duties, that individual cannot also “principally” or “chiefly” perform managerial or executive duties.**

Moreover, federal courts continue to give deference to CIS’s interpretation of the Immigration Act of 1990 and the concept of “function manager,” especially when considering individuals who primarily conduct the business of an organization or when the petitioner fails to establish what proportion of an employee’s duties might be managerial as opposed to operational. *See Boyang Ltd. v. INS*, 67 F.3d 305(Table), 1995 WL 576839 at \*5 (9<sup>th</sup> Cir. 1995 (unpublished)(citing to *Matter of Church Scientology Int’l* and finding an employee who primarily performs operational tasks is not a managerial or executive employee); *see also, IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999); *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C.Cir. 1991). For the reasons discussed above, the beneficiary does not qualify as a “function manager,” as contemplated by section 101(a)(44)(A) of the Act.

On appeal, the petitioner submits evidence that the U.S. company has hired one employee on a contract basis as of January 2005. The petitioner indicates that this employee will provide technical support services and would be trained and managed by the beneficiary. The petitioner further states that the petitioner “employs CSI to provide it certain services in addition to [its] direct employee.” The petitioner suggests that the beneficiary would accordingly “fill a direct personnel management function.” The petitioner’s assertions are not persuasive. With respect to the petitioner’s new employee, the AAO notes that he was hired subsequent to the filing of the petition. Again, 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., supra*. Further, a review of the employment contract and the new employee’s resume suggest that he would be engaged in sales, rather than customer or technical support functions. The AAO notes that the employee’s sole source of remuneration would be a percentage of gross profit generated through sales and sales leads. Further, the employee’s resume indicates that he is a specialist in the business development field with no technical background in software support services. For these reasons, the AAO will not consider this new employee, whose actual duties have not been defined, a subordinate of the beneficiary for the purposes of determining whether the beneficiary would serve in a managerial capacity.

In addition, the petitioner’s assertion that CSI provides services to the U.S. company, and suggestion that such services would be overseen by the beneficiary, is not supported by evidence in the record. To the contrary, the evidence submitted shows that the petitioner serves as a sub-contractor to CSI and provides technical consulting services to CSI customers. The petitioner has not submitted evidence that it currently utilizes the services of independent contractors or direct employees to perform the day-to-day duties of its customer support function. 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)). Rather, the petitioner indicates that these duties are currently performed by its president, and that they would be directly performed by the beneficiary upon approval of the petition.

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

In sum, the record does not establish that a majority of the beneficiary’s duties will be primarily managing an essential function of the petitioning organization. The record indicates that a preponderance of the beneficiary’s duties will, at least initially, be operational duties necessary to provide support to the petitioner’s customers and to fulfill its obligations to provide consulting services under the terms of its subcontractor agreements with other companies. Although the petitioner claims that the beneficiary’s department will be staffed in the future, 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). Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

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, the petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.