

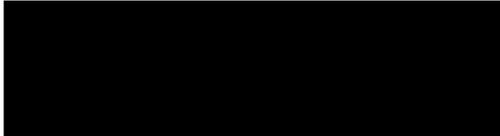
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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File: WAC 04 049 51990 Office: CALIFORNIA SERVICE CENTER Date: **OCT 04 2007**

IN RE: Petitioner:
Beneficiary:



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

IN BEHALF OF PETITIONER:

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, 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 seeks to employ the beneficiary temporarily in the United States 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 U.S. petitioner, a corporation organized in the State of California that is engaged in software design consulting services, seeks to employ the beneficiary as its vice president. The petitioner claims that it is the affiliate of Dugiesoft Private Limited (currently in the process of renaming to Triton Software Pvt. Ltd.), located in Bangalore, India. The beneficiary has been employed in the United States in L-1A status by Surya Soft-Tech, Inc. since May 2001. The petitioner states that it recently acquired the business of Surya Soft-Tech, Inc. and therefore seeks to amend and extend the beneficiary's L-1A status.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary would be employed in a primarily managerial or executive capacity; or (2) it maintained a qualifying relationship with the foreign organization.

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 petitioner did in fact establish its eligibility for the classification sought, and submits additional evidence to support this contention.

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.

This first issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The nonimmigrant petition was filed on December 11, 2003. In the initial petition, the petitioner provided a general overview of the beneficiary's proposed duties in the United States as well as an undetailed business plan discussing the potential growth of the U.S. entity. Specifically, with regard to the beneficiary's job duties, the petitioner provided the following list:

- Formulating business strategies
- Developing and maintaining strategic relations technology partners
- Overall planning and management of the company
- Coordinating market strategies to promote products and services in the U.S.
- Overseeing recruitment, evaluation, promotion and termination of technical, marketing and administrative personnel
- Monitoring the company's performance
- Reporting to the Indian company
- Participate in trade shows
- Negotiating and securing software agreements and contracts
- Negotiating and securing marketing arrangements for [unknown entity]
- Review analysis of activities, costs, and operations

The petitioner stated on Form I-129 that the U.S. company has one employee. On December 18, 2003, the director issued a detailed request for additional evidence. Specifically, the director requested evidence to support a finding that the beneficiary would in fact be employed in a qualifying managerial or executive capacity. Specifically, a more detailed description of the beneficiary's duties in the United States was requested, in addition to an organizational chart displaying all employees, their position titles and duties, and the level at which they functioned within the organization. Finally, the director requested evidence of wages paid to all U.S. employees in the form of payroll summaries or quarterly wage reports.

In a response dated March 2, 2004, the petitioner submitted a letter accompanied by additional evidence. With regard to the beneficiary's duties, the petitioner provided the following updated list:

- As Vice President he would head the Information Technology (Software / GIS) division and would be responsible to hire a specialized marketing team and technical team to increase the client base of [the petitioner].
- Continually acquire and maintain a keen understanding of the changing needs of [the petitioner's] client base, products and services and emerging trends in the GIS and software industry in order to contribute and assist with appropriate marketing strategies and tactics, formulate business strategies.
- Manage the whole business function of [the petitioner].
- Oversee and finalize, in conjunction with the rest of the marketing team, articles, white papers, brochures, internal and external newsletters, reports / recommendations and other marketing collateral.
- Supervise the team of Software and GIS (Geographic Information System) Analyst programmers and make sure the projects are delivered on time with the highest level of quality standards. This function would include having meetings with the concerned

programmers on a weekly basis to discuss about the project status and technical issues and address them effectively so that the deliverables are on track.

- Follow up / meet with customers on a regular basis and cater to their needs.
- Do performance reviews, [a]uthorize promotions, authorize personnel functions for all his sub-ordinates (leave of absence, vacation, etc.)
- Research and respond to questions about GIS and software technology, trends and applications in the industry with alliance partners.
- Negotiate and secure software and GIS contracts / agreements. Precursor to this would be a visit to the potential leads, benchmarking, presentations, and participation in tradeshow.
- Review analysis of activities, costs and operations with the President periodically and make reports about project profitability, company performance.
- Exercise discretion over day to day business activities of [the petitioner].
- Authority to hire and fire for all positions under him.

The petitioner also submitted an organizational chart, and indicated that the beneficiary would be hiring IT consultants, a GIS programmer analyst, a vice president of marketing, an account executive, an office manager, and an office receptionist. In addition, the petitioner provided a quarterly wage report for the last quarter of 2003 as well as a payroll summary for the month of January 2004. These documents indicated that Suman Margam, the petitioner's president, was the petitioner's only employee.

On March 23, 2004 the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity while in the United States. Specifically, the director noted that although the petitioner relied on its intended future expansion and its intent to hire additional employees in the future, the director concluded that at the time of filing, the proposed position in the United States did not satisfy the requirements of a primarily managerial or executive position. On appeal, the petitioner alleges that the director's decision was erroneous.

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties and the absence of any subordinate employees, the petitioner has failed to establish that it will support the beneficiary in a capacity that is primarily managerial or executive in nature. In addition, the AAO notes that the description of duties was too vague to ascertain whether the beneficiary will be acting in a primarily managerial or executive capacity. While the beneficiary is the intended vice-president of the company, there is insufficient evidence to show that he will be acting primarily in a managerial or executive capacity during his U.S. employment.

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(1)(3)(ii). In this case, the petitioner vaguely described the beneficiary's duties but failed to provide a specific overview of how he will refrain from performing non-qualifying tasks. This omission, coupled with the lack of subordinate staff members to relieve him from performing day-to-day tasks, fails to adequately show when and how the beneficiary would be relieved from performing non-qualifying duties.

On appeal, the petitioner restates its previous list of duties and contends that it has satisfied the regulatory requirements. The AAO disagrees.

There are two problems with the beneficiary's stated duties. First, the beneficiary's proposed duties include numerous non-managerial tasks that are essential to the daily operations of the business. Specifically, the assertions that the beneficiary will follow up with and meet customers on a regular basis, negotiate contracts, and participate in trade shows suggests that he will be performing many undertakings that would normally be delegated to sales representatives or other non-managerial personnel. In this case, it is clear that the proposed duties include many practical obligations that would normally be delegated by a manager or supervisor to a subordinate staff. 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).

Secondly, the description of his duties is vague and not specific enough to clearly establish the beneficiary's role in the company. For example, the initial description of duties provided listed only general tasks, such as "overall planning and management of the company" and "formulating business strategies." When asked for additional details regarding the exact nature of these tasks in the request for evidence, the petitioner responded by merely adding additional generic overviews of the beneficiary's intended duties, such as "manage the whole business function of [the petitioner]" and "exercise discretion over day to day business activities of [the petitioner]." These descriptions are insufficient to clearly document the exact role of the beneficiary in the petitioner's organization. Reciting the beneficiary's vague job responsibilities or broadcast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What will the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1108.

On appeal, the petitioner seeks to overcome the basis for the denial by providing two arguments. First, the petitioner claims that due to the petitioner's recent formation and lack of staff at the time of filing, the petitioner and beneficiary should have been afforded lenience due to the early stages of development of the newly-created entity and the beneficiary's responsibility to establish the petitioner as a viable company. However, the record indicates that the newly-formed petitioner was the product of the petitioner's acquisition of Surya Soft-Tech, and was therefore not a new office. As such, rules governing a new office, which recognize the need for a beneficiary to perform many non-qualifying duties to establish a business in its fledgling stage, do not apply to this matter. At the time of filing, the petitioner was not a new office as contemplated by the regulations, and had no additional employees to relieve the beneficiary from performing non-qualifying duties.

Second, the petitioner claims that since the initial L-1A petition on behalf of the beneficiary was based on the exact same description of duties provided in the instant petition, the AAO should act in accordance with the initial decision in this matter and approve the petition. This argument is not persuasive. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. 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).

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 size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* In this matter, the petitioner claims that the beneficiary is employed primarily as a manager or executive, yet has no subordinate staff to assist him with day-to-day tasks. Furthermore, the description of duties provided fails to specifically articulate what duties the beneficiary performs on a day-to-day basis, and furthermore does not explain how the beneficiary will refrain from non-qualifying duties of the petitioner's software design consulting business without a subordinate staff to relieve him. The petitioner, therefore, has failed to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner and the foreign organization are qualified organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation defines the term "qualifying organization" as a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

Additionally, the regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides:

- (I) "Parent" means a firm, corporation, or other legal entity which has subsidiaries.
- (J) "Branch" means an operating division or office of the same organization housed in a different location.
- (K) "Subsidiary" means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.
- (L) "Affiliate" means
 - (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
 - (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.
 - (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

On the L Classification Supplement to Form I-129, the petitioner claimed that the foreign entity with which it maintained a qualifying relationship was Dugiesoft Private Limited (currently in the process of renaming to Triton Infotek Pvt. Ltd.), located in Bangalore, India. The petitioner claimed that Dugiesoft was formed in 2003, after acquiring the interests of another company identified as Surya (India). Minimal information with regard to the ownership of the petitioner and the claimed foreign entity was provided.

In the request for evidence, the director requested definitive documentation to establish the ownership of the U.S. and foreign entities and to demonstrate the nature of the relationship between the two companies. The director specifically requested documentation showing that the shares of stock in the U.S. entity had been

issued in exchange for monetary consideration. In response, the petitioner submitted meeting minutes and stock certificates for the U.S. entity, demonstrating that 3,000 shares had been issued, with the beneficiary owning 2,400 and Srinivas Duggi owning 600. As evidence of the payment for these shares, deposit slips, which failed to identify the source of two cash deposits in the amount of \$4,390 and \$3,610, were submitted by the petitioner. Bank statements of the petitioner were also submitted, as well as a statement entitled "Explanation of Deposits Made for Stock Purchase."

A supplemental statement submitted in response to the request for evidence claimed that out of this \$8,000, \$3,000 was allotted for the purchase of stock. The source of all funds, according to unverifiable sources, was the beneficiary. The petitioner also submitted the foreign entity's articles of association, indicating that the beneficiary owns 1,000 of 1,250 shares issued by the company.

The director subsequently denied the petition, finding that the evidence submitted identified neither the source nor the purpose of the deposits in question, and therefore the director was unable to conclude that the beneficiary in fact owned the claimed majority interest in the petitioner. On appeal, the petitioner alleges that it has submitted sufficient documentation to establish the ownership and the acquisition of ownership of the petitioner, and resubmits the deposit slips and transaction history from the petitioner's bank account in support of this contention.

The AAO, upon review, agrees with the director's ultimate conclusion, but notes numerous other discrepancies in the record. The AAO concurs that the source of funds allegedly submitted for the purchase of stock is questionable. Furthermore, it is noted that the beneficiary allegedly paid for all 3,000 shares of outstanding stock, although it is alleged that he only owns 2,400 shares personally. No explanation for why he allegedly purchase the 600 shares allotted to Srinivas Duggi has been submitted. Furthermore, the articles of incorporation for the alleged foreign parent, Dugiesoft, indicate that the beneficiary owns 1,000 shares and that Srinivasulu Duggi owns 250. Again no evidence of payment has been submitted for these shares.

The insufficient evidence of payment rendered for these share interests prohibits a finding that the two entities maintain a qualifying relationship, and the AAO affirms the director's conclusion on this issue. In addition, there is another basis for denial related to the qualifying relationship issue that has not been addressed by the director. The beneficiary's eligibility for an amendment and extension of his existing L-1A status as an intracompany transferee is dependent in large part upon the petitioner's claim that the beneficiary's current L-1A employer, Surya Soft-Tech, Inc., and his last foreign employer, Surya Soft-Tech Pvt. Ltd., have been acquired by the petitioning company and its claimed foreign affiliate, respectively. While the simultaneous acquisition of both companies by the same international organization may preserve the beneficiary's ability to maintain L-1A status, the petitioner has not documented the claimed acquisition of either company, nor adequately explained whether the claimed acquisition took the form of a stock purchase, asset acquisition, merger or other corporate transaction. Rather, the petitioner has ambiguously stated that both new companies were "formed by acquiring the business of Surya," and has offered no documentation in support of its claims. 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 petitioner claims that the foreign entity is Dugiesoft, and that Dugiesoft acquired the interests of Surya (India). Dugiesoft was established one week prior to the filing of the petition in this matter. No evidence of the foreign entity's acquisition of the interest of Surya (India) has been submitted, nor has sufficient evidence been submitted to link the beneficiary with Surya (India), since the record contends that he has been working in L-1A status in the United States since May 2001. 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). Absent documentary evidence that the petitioner and foreign entity can be considered true successors to the beneficiary's current L-1A employer and previous foreign employer, the petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. 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).

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.