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U.S. Citizenship and Immigration Services

D3

[redacted]

File: WAC 02 283 50722 Office: CALIFORNIA SERVICE CENTER Date: APR 4 2005

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as in the business of promoting the sales, marketing and technical support for the parent company's software solutions. The petitioner seeks to employ the beneficiary temporarily in the United States as the director of professional services and support. The director determined that the petitioner had not established that the beneficiary will be functioning in a primarily managerial or executive capacity.

On appeal, counsel asserts that the director's decision was an "arbitrary and unfair abuse of discretion." Counsel claims that Citizenship and Immigration Services (CIS) did not request additional evidence of managerial and executive capacity and, therefore, the petitioner is implicitly assumed to have satisfied that issue. Counsel claims there was a misapplication of regulatory procedure because CIS denied the petitioner the full and fair opportunity to provide additional evidence.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 United States petitioner was incorporated in 2001 and states that it wholly-owns Monosphere BVI, located in the British Virgin Islands which wholly-owns Monosphere Ltd., located in Israel. The petitioner stated on the

Form I-129 that it was established in 2001 and it employed two persons; it did not indicate a gross annual income. The petitioner seeks to employ the beneficiary for three years at an annual salary of $110,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means 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), provides:

> The term "executive capacity" means 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.

In its petition, the petitioner stated that the beneficiary will be a top technical manager and be responsible for implementing and overseeing a key division within the international operations of the Monosphere organization. The petitioner indicated that the beneficiary's job duties will encompass the following:

- Participate in pre-sale and post sale process – technical assistance to senior management . . . .
- Plan oversee and supervise all customer support services . . . .
- Managing support team to be recruited and hired in the US.
- Provide product technical assistance for the company's employees and customers.
- Supervise installation and customer sites.
- Responsible for the coordination and communication between US site and the R & D in Israel.
- Participate in product development in direct, ongoing R & D efforts conducted by the development center at Monosphere Ltd. in Israel.

On September 25, 2002, the director issued a request for additional evidence regarding the U.S. and foreign entities which stated, in pertinent part, the following:

> Manager or Executive: Submit the following evidence to establish that the beneficiary has been or will be performing the duties of a manager or executive with the U.S. company:
>
> - U.S. Business Organizational Chart: Submit a copy of the U.S. company's line and block organizational chart describing its managerial hierarchy and staffing levels. This chart should include the current names of all executives, managers, supervisors, and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list <u>all</u> employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties for all employees under the beneficiary's supervision. Finally, explain the source of remuneration of all employees and explain if the employees are on salary, wage, or paid by commission.
>
> - Form DE-6, Quarterly Wage Report: Submit copies of the U.S. company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last four quarters that were accepted by the State of California. The forms should include the names, social security numbers, and number of weeks for all employees.

Counsel for the petitioner responded to the request for evidence. The response included the U.S. organizational chart. This chart listed the following personnel: chief executive officer, account executive, executive vice president of products and technologies, director of marketing, and director of finance and administration (contractor). The beneficiary's proffered position was listed directly below the executive vice president of products and technologies as director of professional services and support. There were no positions listed as being supervised by the beneficiary's proffered position.

Additionally, the petitioner only submitted one EDD Form DE-6 Quarterly Wage and Withholding Report for the quarter ending September 30, 2002. Section A of the Form DE-6 indicated the full-time and part-time

employees who worked during this quarterly payroll period. The first month indicated zero employees; the second month indicated two employees; and the third month indicated four employees.

The petitioner also submitted several documents requested by the director regarding the U.S business and the foreign business.

On October 25, 2002, the director issued a notice denying the petition. The director stated that the evidence provided by the organizational chart and the DE-6 quarterly report demonstrates that the beneficiary's proposed position will have him engage in aspects of the operation that include day-to day non-managerial duties. The director determine that the petitioner has not demonstrated that the proffered position is one in which all of the beneficiary's duties are at the managerial or executive level. Therefore, the director concluded that the petitioner had not sufficiently established that the beneficiary will be functioning in a managerial or executive capacity as defined by the regulations.

On appeal, counsel states that the decision "reflects an arbitrary and unfair abuse of discretion". Counsel asserts that the request for evidence "made no inquiry into the managerial nature of the [b]eneficiary's position." Counsel states that through its misapplication of regulatory procedure, CIS denied the petitioner the full opportunity to provide additional evidence regarding the managerial nature of the beneficiary's intended position. Counsel asserts that the request for evidence made no inquiry into the "managerial nature of the intended position." Counsel states the "requirements of eligibility presented as the basis for denial were clearly presented in the original petition letter." Counsel asserts that if "more evidence were required in order to bolster the case, it should have been requested in the RFE on September 25, thus giving the petitioner the opportunity to meet its burden of proof."

In support of counsel's assertions, counsel refers to 8 C.F.R. § 103.2(b)(16)(i) *Derogatory information unknown to petitioner or applicant* which states, in pertinent part:

> If the decision will be adverse to the applicant or petition and is based on derogatory information considered by [CIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered. If the applicant or petitioner cannot reasonably be presumed to be already aware of the evidence, he or she must be given an opportunity to rebut the evidence before a decision is made.

Counsel requests that "at a minimum, the [p]etitioner should have been given the opportunity to rebut arguments presented by [CIS] regarding the transfer position and offer further clarification and evidence." Counsel asserts that the petitioner was denied due process to respond.

Counsel arguments are not persuasive. Counsel is incorrect in relying on the regulation 8 C.F.R. § 103.2 (b)(16)(i) as supporting his assertions that CIS did not give notice to the petitioner to present evidence. This regulation refers to evidence that is derogatory and unavailable to the petitioner or applicant. This regulation does not apply in this case. The petitioner was "put on notice" by the regulations at 8 C.F.R. § 214.2(l)(3)(ii)

which state the petitioner must provide evidence that supports the request for the benefit. This includes a detailed description of the job to be performed by the beneficiary.

Contrary to counsel's assertions, the director specifically requested additional evidence to establish that the beneficiary has been or will be performing the duties of a manager or executive with the U.S. company. Thus, the petitioner was put on notice that the information provided in the initial petition was not sufficient.

On appeal, counsel for the petitioner does not address the director's concerns that insufficient information was presented to establish that the beneficiary will be performing in a managerial capacity. Instead, counsel solely makes his argument that the petitioner was not made aware of the need to provide additional evidence to establish that the beneficiary would be performing in a managerial capacity.

However, upon review of the record, the AAO concurs with the director's conclusion that the petitioner has not demonstrated that the beneficiary will be performing in a managerial or executive capacity.

Though the petitioner did submit an organizational chart for the U.S. company, the petitioner did not indicate if the beneficiary would be managing any supervisory personnel or those positions' job descriptions as requested by the director. Additionally, though the director requested the Form DE-6 Quarterly wage reports for the last four quarters, the petitioner only submitted the most recent quarterly report. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner has not provided evidence that it employed any subordinate staff members that would perform the actual day-to-day, non-managerial operations of the company. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The record does not establish that a majority of the beneficiary's duties will be directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties will be directly performing the operations of the organization, that is, providing support for the services the petitioner provides its customers. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. Though the beneficiary may be a function manager instead of a staff manager, the petitioner must identify the essential function that the beneficiary manages. The petitioner vaguely states "[d]irects [e]ssential [f]unction" in the petitioner's letter as part of the beneficiary's job description. The petitioner does not indicate specifically what essential function the beneficiary manages. The fact remains that the petitioner has not provided sufficient evidence for the AAO to determine that the beneficiary's primary duties are in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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.