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U.S. Citizenship and Immigration Services

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[redacted]

JAN 27 2005

FILE: WAC 03 060 52035 Office: NEBRASKA SERVICE CENTER Date:

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)

ON 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 Director, Nebraska Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its project manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a branch of the beneficiary's foreign employer, located in Bangalore, India, and is operating as a software development and solutions company. The petitioner seeks to extend the beneficiary's stay for three years.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary had been employed abroad in a qualifying capacity for the requisite time period; and (2) that the beneficiary was presently employed by the petitioning organization. The director noted that the beneficiary's job duties in the United States were comparable to those performed by a software designer and developer, rather than a manager.

Counsel subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, counsel claims that the director erroneously denied the petition based on the beneficiary's employment abroad. Counsel contends that neither the statute nor the regulations "states that the beneficiary who seeks to enter the United States temporarily in a managerial or executive capacity should have been employed by the overseas entity in a managerial or executive capacity." Counsel claims that the beneficiary's foreign employment satisfies the eligibility requirements, which require only that "the beneficiary should have been employed with the overseas entity continuously for a period of one year." Counsel submits a brief in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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.

Counsel fails to comprehensively address on appeal the beneficiary's present employment in the United States entity. Counsel merely states:

> In addition to the response dated May 12, 2003, the petitioner has provided detailed evidence of the role being performed by the beneficiary and the details of the professional employees supervised by him.

The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Accordingly, the AAO affirms the director's finding that the petitioner failed to substantiate the beneficiary's present employment in the United States entity in a primarily managerial capacity.

The AAO will address the issue of whether the beneficiary was employed abroad in a primarily managerial or executive capacity for the requisite period of time.

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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner filed the nonimmigrant petition on December 13, 2002, noting on the petition that the beneficiary had been employed by the foreign entity from May 1997 through January 2000. In an attached resume, the beneficiary noted the following regarding his job responsibilities abroad:

> During this time, I worked on Audio Applications, Graphics Applications on Windows 95/NT and Win CE, my role being design, development and at times, the lead role in the team. During this time, I also worked in E-mu Technologies, California (part of the Creative Multimedia group) for 3 months.

The beneficiary also outlined on his resume the various projects on which he worked. As the beneficiary did not include specific dates reflecting the time period he was assigned to each project, it is unclear whether the beneficiary completed each while employed by the foreign entity or during his employment with other companies. The petitioner submitted the beneficiary's diploma reflecting his completion of a bachelor of engineering degree.

The director issued a request for evidence on February 19, 2003. The director stated that the beneficiary's resume reflects that he had been primarily designing and developing applications and programs while employed abroad. The director noted that some of the beneficiary's work while employed abroad was performed on an individual basis while at other times the beneficiary was the team leader. The director determined that the beneficiary was employed abroad as a software developer rather than a manager, and asked that the petitioner submit evidence demonstrating otherwise.

Counsel responded in a letter dated May 9, 2003. Counsel explained that the beneficiary began his employment with the foreign entity on May 12, 1997, during which he worked as a software developer. Counsel stated that the beneficiary was subsequently promoted to project manager in October 1999. Counsel further stated that while employed abroad, the beneficiary supervised a team of three software engineers, who, counsel noted, hold degrees and are professionals. Counsel explained that the team provided consulting and development services to clients from off-shore development centers in India. Counsel provided company letters for each of the beneficiary's subordinate employees verifying their employment as systems engineers. Counsel also submitted transcripts of each employee's educational background.

The director determined in a decision dated August 1, 2003 that the petitioner had failed to establish that the beneficiary had been employed abroad in a qualifying capacity for the requisite time period. The director

noted that the beneficiary was appointed to the position of project manager in October 1999, and was subsequently transferred to the United States as a nonimmigrant intracompany transferee on January 16, 2000. The director stated:

> Regulations require that a beneficiary of an L petition have at least one year continuous experience abroad in a qualifying position. However, in the case of a Blanket petition the requirement is reduced to six months with the addition of a degree. In the case of the beneficiary, he only spent three and ½ months in the allegedly managerial position of project manager.

The director determined that the beneficiary had not worked abroad in a managerial position for a continuous six-month period. Accordingly, the director denied the petition.

In an appeal filed on September 2, 2003, counsel challenges the director's finding that the beneficiary is not eligible for classification as an intracompany transferee due to his limited employment abroad in the position of project manager. Counsel cites section 101(a)(15)(L) of the Act and states:

> There is nothing in this section which states that the beneficiary who seeks to enter the United States temporarily in a managerial or executive capacity should have been employed by the overseas entity in a managerial or executive capacity. The eligibility requirement to enter the United States as manager or executive is that the beneficiary should have been employed with the overseas entity continuously for a period of one year.
>
> Similarly per the provisions of Section 214.2(l)(1)(ii) of 8 C.F.R. an intra-company transferee means an alien who at the time of application has been employed abroad continuously for a period of one year by an affiliate entity and is entering to render his services in a managerial capacity. There is no requirement that the employment with [the company] abroad should have been in a managerial capacity.

Counsel contends that Citizenship and Immigration Services (CIS) erred in interpreting the eligibility requirements for an intracompany transferee.

On review, the petitioner has not demonstrated that the beneficiary was employed abroad in a qualifying capacity for the requisite time period. Despite counsel's claims, the regulations require that the beneficiary's prior year of employment abroad be in a qualifying capacity. The regulation at 8 C.F.R. § 214.2(l)(3)(iv) specifically states that the petitioner is required to submit with the nonimmigrant petition "[e]vidence that the alien's *prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge*." (emphasis added). Additionally, as correctly noted by the director, the statute provides that "[i]n the case of an alien seeking admission under section 1101(a)(15)(L) of this title, the 1-year period of continuous employment required under such section is deemed to be reduced to a 6-month period if the importing employer has filed a blanket petition under this subparagraph and met the requirements for expedited processing of aliens covered under such petition." Section 214(c)(2)(A) of the Act, 8 USC 1184.

Here, as acknowledged by counsel on appeal, the beneficiary was employed abroad as a project manager for three and ½ months prior to being transferred to the United States. The beneficiary's brief period of employment in a managerial capacity fails to satisfy the eligibility requirement outlined in the statute and

regulations. The petitioner has therefore failed to demonstrate that the beneficiary qualifies as a nonimmigrant intracompany transferee. 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, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.