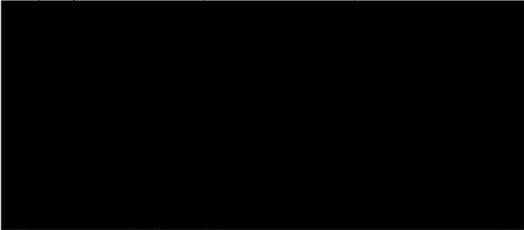




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FILE: Office: CALIFORNIA SERVICE CENTER Date: APR 26 2006

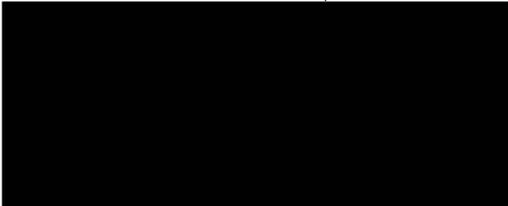
WAC 05 034 51778

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, California Service Center, denied the employment-based petition. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a company organized in the State of Delaware in April 2000 and registered to conduct business in the State of California in August 2000. It provides technology management services including software development and consulting services. It seeks to employ the beneficiary as its project manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the U.S. petitioner.

On appeal, counsel for the petitioner: (1) references Citizenship and Immigration Services (CIS) two previous approvals of the beneficiary's classification as an intracompany transferee; (2) asserts that the beneficiary manages a project and an employee; and (3) contends that the beneficiary manages a team in India. Counsel submits a brief and additional evidence in support of the appeal.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive

capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established that the beneficiary's position for the United States entity would be in a managerial capacity 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 a November 4, 2004 letter appended to the petition, the petitioner indicated that:

[A]s a Project Manager[,] [the beneficiary] will be working at our clients [sic] sites and manage both onsite and offshore projects for the client. He will design, develop and analyze product specification software. [The beneficiary] will be responsible for imparting training on the product to the team of engineers at the offshore office using Internet and electronic documentation. He will supervise engineers with product customization related projects on ongoing basis. He will be involved in exploring queries and response packets on User Datagram Protocol (UDP) networks, decode the packets and list out all the missing responses on the network. Furthermore, his duties will include development of international software business plans and analysis of the US software market, analysis of future trends and requirements in the software industry, and representing the company at seminars and association meetings. Finally, [the beneficiary] will lead and manage a team of professionals to ensure effective compliance with project objectives. These are very similar to the duties he is performing at our company in India.

The petitioner also provided its organizational chart showing the beneficiary in the position of project manager over four programmer/analyst positions with only one of the positions filled.

On May 24, 2005, the director requested, among other things, a more detailed description of the beneficiary's duties in the United States including an approximate percentage of time the beneficiary would spend in the listed duties; a list of all employees the beneficiary would direct including their job title and position description; an explanation regarding the beneficiary's location in Massachusetts as the petitioner's office was located in California; an organizational chart; and copies of state wage reports for the petitioner's employees.

In an August 11, 2005 response, counsel for the petitioner provided a revised organizational chart showing the beneficiary in the same position with only one subordinate position filled but also noting that the beneficiary coordinated with the development team in India for U.S. projects. The petitioner indicated the beneficiary's duties as project manager included:

- Client Management, Expectation, Escalation, Account Growth, Strategic Direction on Accounts.
- Manage execution of various projects.
- Preparation of software/user requirement specifications.
- Provide technical solutions and guidance to the team.
- Adhere to required process and product compliance to ensure high quality deliverables to the client.
- Perform project management activities to ensure project execution within estimated effort, schedule & cost budgets.
- Feasibility study and technical proposal preparation for new opportunity/prospects.

- Prepare technical value propositions for prospective customers.
- Lead multiple technology competence building
- Time Schedules, Team management, Process Implementation, Improvements and Optimization.
- Quality Focus
- Knowledge Management
- Offshore-Onsite Co-ordination, Strengthen Dual (Onsite-Offshore) Business Model.

The petitioner allocated the position's percentage of work distribution as: 35 percent to project management; 25 percent to technical knowledge including analysis and design techniques and keeping up to date with relevant technology and its impact on business; 20 percent to commercial endeavors such as business strategy, preparation of proposals/contracts, vendor management, and customer relationship management; 10 percent to managing people processes such as interviewing, training, conflict management, counseling and mentoring; 5 percent on quality management; and 5 percent on communication including technical presentations, interactions with clients through conference calls, networking and relationship building, as well as offshore-onsite coordination.

The petitioner explained that the beneficiary's primary responsibility included management of clients in and around the Burlington, Massachusetts area as a project manager, which required day-to-day interaction with customers. The petitioner also provided a job description for the programmer/analyst position subordinate to the beneficiary and substantiated the petitioner's employment of this individual.

On September 14, 2005, the director denied the petition, determining that the petitioner's evidence was insufficient to prove that the beneficiary held a managerial position. The director commented on the petitioner's two offices with the beneficiary located in the Massachusetts office and his subordinate located in the California office and determined it was unclear how the beneficiary could manage and supervise the subordinate as they were in different areas. The director determined that the petitioner's description of the beneficiary's duties indicated that the beneficiary would be performing the necessary tasks to provide a service or to produce a product. The director also determined that it was reasonable to believe, based on the petitioner's organizational structure that the beneficiary would be assisting with the day-to-day non-supervisory duties and that the performance of those menial tasks precluded the beneficiary from being considered a manager or an executive. The director further determined that the petitioner had not demonstrated that the beneficiary managed or directed the management of a function rather than performing the routine operational activities of the entity. The director concluded that the petitioner had not provided sufficient evidence to demonstrate that the beneficiary had been or would be employed in a primarily executive or managerial position.

As observed above, counsel for the petitioner: (1) references Citizenship and Immigration Services (CIS) two previous approvals of the beneficiary's classification as an L-1A intracompany transferee; (2) asserts that the beneficiary manages a project and an employee; and (3) contends that the beneficiary manages a team in India.

Counsel's assertions are not persuasive. 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. § 204.5(j)(5). The petitioner's first iteration of the beneficiary's duties indicated that the beneficiary would be

performing operational tasks, such as designing, developing, and analyzing product specification software, working with clients onsite, exploring queries and response packets on UDP networks and decoding the packets and listing the missing responses on the network. These duties are not traditional managerial or executive duties but rather operational duties. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). The remainder of the description contained generalities making it difficult to determine whether the duties were managerial, executive, administrative, or operational duties.

The director properly requested a more detailed description of the beneficiary's duties and the allocation of the beneficiary's time to those duties so that CIS could ascertain whether the beneficiary would be performing primarily non-qualifying tasks or a mix of non-qualifying tasks and managerial or executive tasks, or primarily managerial or executive tasks.

The petitioner's second iteration of the beneficiary's duties confirmed that the beneficiary would be primarily performing operational tasks for the petitioner. The petitioner indicated that the beneficiary would spend 35 percent of his time on project management that seemingly included tasks such as designing, developing, and analyzing product specification software, working with clients onsite, ensuring project execution within estimated efforts, schedules, and cost budgets, and preparing software/user requirement specifications. An additional 25 percent of the beneficiary's time would be spent on technical knowledge including analysis and design techniques, keeping up to date with relevant technology, providing technical solutions and guidance to the team, adhering to required process and product compliance, and preparing technical value propositions for prospective customers. The beneficiary's personal involvement with these operational tasks and services occupies the majority of the beneficiary's time. In addition, the beneficiary also prepares proposals/contracts and is involved in vendor and customer relationship management. However, operational or administrative tasks associated with preparing contracts, customer service, and public relations again are not managerial or executive tasks. Upon review of the description of the beneficiary's duties, the description fails to persuade that the beneficiary's position is in a primarily executive or managerial capacity.

The petitioner has not provided other evidence that the beneficiary performs primarily executive duties. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* The petitioner has not established that the beneficiary's position includes these essential elements.

The petitioner has not provided other evidence that the beneficiary primarily performs managerial duties. The petitioner, when allocating the beneficiary's time does not indicate that the majority of the beneficiary's time is spent on supervising other employees. The petitioner indicates that the beneficiary spends 10 percent of his time interviewing, training, conflict management, counseling, and mentoring. The AAO acknowledges that a portion of the beneficiary's time spent on project management may also include some supervisory tasks. However, the petitioner has not substantiated that the beneficiary spends a majority of his time interacting with the programmer/analyst or a programming team in India; nor has the petitioner established that the beneficiary supervises these individuals rather than coordinates their work with the work required of the petitioner's clients. The petitioner has not established that the beneficiary's duties comprise primarily the supervision of professional, managerial, or supervisory employees. See § 101(a)(44)(A)(ii) of the Act.

The petitioner has also failed to establish that the beneficiary performs primarily as a function manager. 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. The term "essential" is commonly defined as "inherent" or "indispensable." *Webster's II New College Dictionary* 384 (2001). Accordingly, based on the plain meaning of the word "essential," the petitioner must establish that the function managed by the beneficiary is inherent and indispensable to the petitioner's operations rather than a non-essential or superfluous task.

If a petitioner claims that the beneficiary is primarily managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in that capacity, 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. If a petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). In addition, the petitioner's description of the beneficiary's daily duties must clearly demonstrate that the beneficiary primarily *manages* the function rather than *performs* the duties related to the function. Again, 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 Int'l*, 19 I&N Dec. at 604; see also, *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991); *Boyang Ltd. v. INS*, 67 F.3d 305 (Table), 1995 WL 576839 at *5 (9th 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).

In this matter, upon review of the totality of the record, the petitioner has not established that the beneficiary is primarily serving as a function manager. First, the petitioner has not identified the particular function pertinent to this matter. Second, the petitioner has not established that the beneficiary primarily manages the function rather than performs the operational and administrative tasks necessary to provide the petitioner's services to its clients.

The petitioner has not established that the beneficiary will perform in a primarily managerial or executive capacity for the U.S. petitioner. For this reason, the petition will not be approved.

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed in a managerial or executive capacity for the foreign entity for one year prior to entering the United States as a nonimmigrant.

The petitioner provides a similar description of the beneficiary's duties for the foreign entity as for the petitioner. The description is insufficient to establish that the beneficiary's duties were primarily managerial or executive. In addition, although the record contains the foreign entity's organizational chart, the organizational chart is not sufficiently detailed to allow a conclusion that the beneficiary's subordinates hold professional, managerial, or supervisory positions. Further, the record does not provide evidence establishing that the beneficiary's tasks for the foreign entity were duties comprising the duties of a functional manager or an executive. Finally, the petitioner states that the beneficiary was employed by the foreign entity from April 18, 2000 to March 3, 2001, a time period of approximately ten and one-half months. Although the petitioner asserts that the beneficiary's prior foreign employer¹ was part of a holding group and that the prior foreign employer held a 49 percent interest in the beneficiary's immediate foreign employer, the assertion is not supported by documentary evidence. 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 has not established that the beneficiary's position for the foreign entity was a managerial or an executive position or that the beneficiary held the position for one year prior to entering the United States as a nonimmigrant. For this additional reason, the petition will not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. 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); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The AAO acknowledges counsel's reference to previously filed L-1A nonimmigrant petitions that have been approved on behalf of the beneficiary.² With regard to the similarity of the eligibility criteria, the AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. See §§ 101(a)(44)(A) and (B) of the Act; 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted,

¹ The petitioner claims that
April 17, 2000.

employed the beneficiary from July 1, 1988 through

² The AAO notes that the beneficiary was initially approved for employment with the petitioner as an H-1B temporary worker (WAC 01 035 54231) from January 29, 2001 to May 21, 2003.

ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

In general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Accordingly, many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Moreover each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. *See* 8 C.F.R. § 103.8(d). The approval of a nonimmigrant petition does not guarantee that CIS will approve an immigrant petition filed on behalf of the same beneficiary. As the evidence submitted with this petition does not establish eligibility for the benefit sought, the director was justified in departing from previous nonimmigrant approvals by denying the immigrant petition.

In addition, if the previous nonimmigrant petitions were approved based on the same information 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).

Further, 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 petitioner has not provided evidence or argument on appeal sufficient to overcome the director's decision.

Finally, the AAO observes that as the director was justified in departing from the previous nonimmigrant approvals in this matter; the director should review the previous nonimmigrant approvals for revocation pursuant to 8 C.F.R. § 214.2(l)(9)(iii).

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. . .