

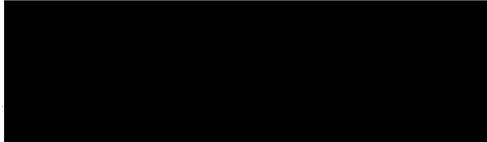
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File: EAC 04 030 53132 Office: VERMONT SERVICE CENTER Date: JAN 27 2006

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:



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, Vermont 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 president 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 corporation organized in the Commonwealth of Massachusetts that is engaged in the provision of specialized software and information technology management solutions. The petitioner claims that it is the subsidiary of Indosoft Systems Private Limited located in Mumbai, India. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will 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 did not consider all of the evidence presented and contends that the beneficiary will perform primarily executive-level duties. In support of these assertions, counsel submits a brief and additional evidence.

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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in the present 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.

In a letter dated November 6, 2003 submitted with the initial petition, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] continues to manage [the petitioner's] US operations as the company seeks to gain increased market penetration for its product and services offerings. As a result of [the beneficiary's] guidance and efforts in opening our United States office, [the petitioner] has established productive relationships with retailers and other potential customers. [The beneficiary's] efforts have resulted in [the petitioner's] sale of in excess of \$285,000.00 in products and services through September 30, 2003.

\* \* \*

In order to alleviate [the beneficiary] from the day-to-day operation of Indosoft US, we have recently hired a Chief Financial Officer, as well as a Director of Marketing, allowing [the beneficiary] to concentrate on developing strategies to increase the business as well as negotiate contracts with vendors and other partners. . . In addition, the recent hirings will allow [the beneficiary] to develop additional business from existing customers of Indosoft India[.]

The petitioner indicated on Form I-129 that it employed one worker at the time the petition was filed. The petitioner also submitted its Massachusetts Employer's Quarter Report of Wages Paid for the third quarter of 2003, which shows three employees: the beneficiary; the employee identified as the chief financial officer, who received wages of \$1,600; and a third individual, who received wages of \$2,000 for the quarter.

On November 21, 2003, the director requested additional evidence to establish that the beneficiary will be employed in a managerial or executive capacity in the United States. Specifically, the director requested: (1) a comprehensive description of the beneficiary's proposed duties and an explanation as to how the duties will

be managerial or executive in nature; (2) a breakdown of the number of hours devoted to each of the beneficiary's job duties on a weekly basis; (3) a list of all United States employees that identifies each employee by name and position title, along with a complete position description and a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis; (4) additional evidence showing the management structure of the organization, including the number of supervisors, their job titles and job duties; and (5) the executive/managerial skills required to perform the beneficiary's job duties, the amount of time the beneficiary devotes to executive duties, and how much time he allots to non-executive duties, and an explanation as to the degree of discretionary authority the beneficiary has over the petitioner's day-to-day operations.

In response, the petitioner submitted a letter dated December 12, 2003 in which it described the beneficiary's job duties as follows:

- [The beneficiary] continues to execute the Business Plan, adhere to the corporation's revenue goals and budget, and have ultimate responsibility for the success of the company's products and services in the United States.
- Directs and coordinates formulation of new business opportunities to provide new revenue in order to continue and expand operations to maximize returns on products and services, and to increase productivity.
- [The beneficiary] reviews activity reports and financial statements to determine progress and status in attaining sales and revenue objectives and revises those objectives and plans in accordance with current conditions.
- Responsible for hiring initial key staff and performing performance reviews.
- Meets with management at international headquarters in Mumbai, India in order to plan, develop, and establish policies and objectives for [the petitioner's] operations. [The beneficiary] then brings those policies and objectives to the United States and implements them.

The petitioner further stated that the beneficiary's "full time efforts are geared towards ensuring the continued success" of the petitioner and that he "will no longer be concerned with the routine day-to-day sales, technical and marketing functions" which the petitioner claims will be performed by the petitioner's employees and Indian headquarters. The petitioner also stated that the beneficiary's "primary focus will be in areas such as identifying emerging growth markets for [the petitioner's] products and services, identifying emerging technologies for new product development, and developing sound business strategies to implement both new and existing products and services into these growth markets."

The petitioner also stated that since filing the petition, the beneficiary had hired two additional employees and had one employee resign. As of December 12, 2003, the petitioner claimed to employ the beneficiary as president, a chief financial officer, and two sales engineers. The petitioner indicated that the sales engineers provide live product demonstrations, introduce complementary products and services at the point of purchase, and promote product and service offerings to potential and existing customers.

On December 22, 2003, the director denied the petition. The director determined that the petitioner had not established that the beneficiary will be employed in a qualifying executive capacity under the extended petition. The director specifically noted that the record does not show that the beneficiary will be managing a subordinate staff who will relieve him from performing non-qualifying duties.

On appeal, counsel for the petitioner asserts that the director failed to consider all duties to be performed by the beneficiary and states that the petitioner submitted sufficient evidence to establish that the beneficiary's duties will be primarily managerial or executive in nature. Counsel further asserts that the director failed to take into account the reasonable needs of the organization in reviewing the petitioner's current staffing levels. Counsel states that the petitioner does not require significant staff at this time, and asserts that the chief financial officer relieves the beneficiary from performing non-qualifying duties. Counsel concludes that the beneficiary has met the "four-pronged test for executive capacity as described in section 101(a)(44) [of the Act.]"

Upon review of the petition and the supporting evidence, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition. 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.* Furthermore, 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 show 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).

On review, the petitioner has consistently claimed that the beneficiary will serve in an executive capacity. However, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary "directs and coordinates formulation of new business opportunities," "executes major policies, programs and objectives," and "achieves maximum efficiency and profit objectives." The petitioner did not, however, explain what specific tasks are involved in "coordinating formulation" of business opportunities such that this responsibility could be distinguished from the company's routine sales and marketing functions. Nor did the petitioner define the policies, programs or objectives "executed" by the beneficiary, or explain what duties the beneficiary performs to "achieve maximum efficiency." 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)). Reciting the beneficiary's vague job responsibilities or broadly-cast 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 does the beneficiary primarily do on a daily basis? The actual duties themselves will 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)."

Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as establishing the goals and policies of the organization, directing the overall management of the organization, exercising wide latitude in discretionary decision-making, and receiving only general supervision or direction from the board of directors. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Ayvr Associates Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

In the request for evidence, the director requested that the petitioner submit a comprehensive description of the beneficiary's duties, including a breakdown of the number of hours per week he allots to each job duty. The petitioner failed to submit this information in response and instead repeated the above-referenced vague job description. This evidence is critical as it would have established whether the beneficiary is primarily engaged in the claimed executive-level job duties. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The 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). Upon review of the record, the petitioner has provided no comprehensive description of the beneficiary's duties such that the AAO can determine whether they are primarily qualifying in nature. The job description does not establish that the beneficiary will primarily perform in an executive capacity as claimed by counsel. The AAO cannot be expected to accept a vague job description and speculate as to the related executive job duties. As noted above, the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Counsel correctly asserts on appeal that, pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

At the time of filing, the petitioner was a one-year-old software solutions and services company that claimed to have projected gross annual income of \$190,000. The firm employed the beneficiary as president, plus a chief financial officer. The petitioner also claimed to employ a director of marketing, who was hired in September 2003 and resigned in November or December 2003. Finally, in response to the director's request for evidence submitted on December 12, 2003, the petitioner indicated that it had hired two sales engineers subsequent to the filing of the petition on November 13, 2003. The petitioner did not submit any supporting

evidence to establish that it hired the additional personnel. Furthermore, 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.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Finally, on appeal, counsel states that the chief financial officer relieves the beneficiary from performing non-qualifying duties, but does not mention the petitioner's claimed sales engineers. The AAO cannot determine whether the petitioner actually employed these two individuals at the time the petition was adjudicated. Furthermore, the petitioner's forecasted statements of operations indicate that the petitioner only anticipates paying wages of \$14,000, \$15,000 and \$17,000 in the fiscal years 2003 through 2005. This document raises further questions about the petitioner's claim that it intends to employ a subordinate staff to relieve the beneficiary from performing non-qualifying operational duties.

Therefore, the AAO concurs with the director's determination that the petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and a chief financial officer. Although the petitioner indicates that some technical functions will be performed by the Indian parent company, the petitioner also indicated that the United States company requires staff to perform day-to-day sales, technical and marketing functions. It is not clear who would perform these functions, including such operational duties as project implementation and provision of training and other services to United States-based customers, if not the beneficiary. If the beneficiary is performing sales, marketing or technical duties, it must be noted that 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).

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of executive or managerial responsibility cannot be performed. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. In order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's duties and the staff of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity. CIS reviews the totality of the record, including the descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees and any other facts contributing to a complete understanding of a beneficiary's actual role in a business, when examining the managerial or executive capacity of a beneficiary. Neither the title of a position nor exercise of discretionary authority of a company

are, by themselves, indicators of managerial or executive capacity. In this matter, upon review of the totality of the record, the petition has not established that the beneficiary performs primarily executive or managerial duties.

The petitioner indicates that it plans to hire additional managers and employees in the future. However, 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.*, 17 I&N Dec. 248 (Reg. Comm. 1978). In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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.