

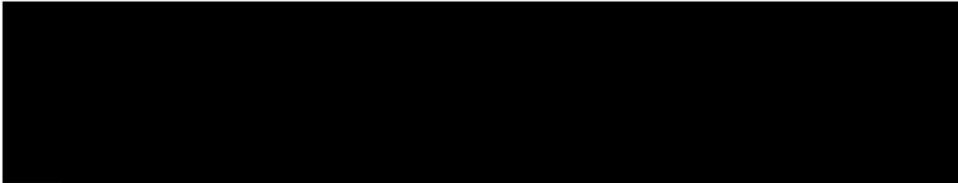
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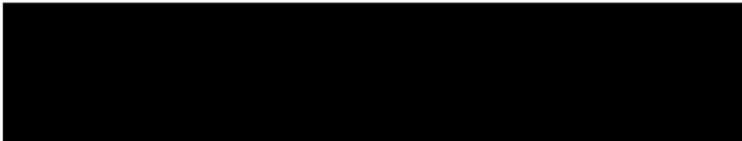
File: EAC 04 044 51155 Office: VERMONT SERVICE CENTER Date: JUL 10 2006

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)

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  
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**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 employ the beneficiary 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 engaged in computer software development and information technology consulting services. It is an affiliate of the beneficiary's last foreign employer, Cognizant Technology Solutions India Ltd., located in Chennai India. The beneficiary is currently employed by the petitioner in L-1B status and the petitioner now seeks to amend and extend his L-1 status so that he may continue to serve as a systems analyst for an additional two years.

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 stated no lawful basis for denial of the petition and relied on irrelevant information and unfounded speculation in determining that the beneficiary would not be employed in a managerial capacity. Counsel asserts that the director failed to consider that the beneficiary's duties involve the day-to-day management and direct supervision of other professionals, and misunderstood the nature of the petitioner's business. Counsel submits a brief and additional evidence in support of the appeal.

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. Finally, counsel contends that the beneficiary's organizational structure is sufficiently complex to support the beneficiary in a position that is primarily managerial.

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 issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial capacity. The petitioner does not claim that the beneficiary will serve in an 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.

The nonimmigrant petition was filed on December 3, 2003. In a November 21, 2003 letter submitted in support of the petition, the petitioner stated that the beneficiary is employed in the managerial position of "Systems Analyst" and primarily:

- Manages the JPMC T&SS Investor Services LOB project for JP Morgan Chase, an important client of [the petitioner]
- Supervises and controls the work of other professionals;
- Has the authority to recommend that those individuals be retained or fired based on their performance as well as the ability to recommend other personnel actions including promotion and pay adjustments; and

- Exercises discretion over the day-to-day activities of [the petitioner's] JPMC T&SS Investor Services LOB team.

The petitioner further described the U.S. project and the beneficiary's role as follows:

The JPMC T&SS Investor Services LOB project involves providing Application Value Management Services for the Investor Services division of JP Morgan Chase. It involves maintenance and enhancement of the Global Production Services (GPS) Organization of the Investor Services Division. The purpose of this current assignment is to provide maintenance, enhancement, production support, performance tuning and capacity planning services for core account and warehousing applications of JP Morgan Investor Services. The application runs with COBOL, DB2, VSAM, WebSphere, Java, JSP and Servlets. The platforms are IBM Mainframes and web technologies.

Although management of this project involves a great deal of specialized technical knowledge, [the beneficiary's] work will be primarily managerial in nature. He is not directly involved in creating the product delivered to our important client. Instead, he is primarily responsible for managing the onsite and offshore activities of [the petitioner's] professionals and managing communications with JP Morgan Chase on this project. His duties will include: managing his team; managing the project; delegating assignments to team members; interacting with the client to gather requirements; establishing good communication between both offshore and onsite teams; providing onsite coordination; managing shifts for 24/7 production support.

[The beneficiary] will also be responsible for the day[-]to[-]day activities of five degreed professionals, all of who possess at least a Bachelors degree. He will have the ability [to] recommend that individuals be included in the project or released to other duties based on their performance.

Finally, the petitioner submitted a copy of the beneficiary's resume, which outlines his education, areas of technical expertise, and employment history. Although the petitioner noted the beneficiary is currently assigned to a different client project in the United States in L-1B status, the petitioner indicated that he has been performing the same claimed managerial duties since his admission to the United States in February 2002. According to his resume, the beneficiary has "around 19 months of experience in onsite co-ordination for mainframe and J2EE projects." The resume indicates that since June 2003, he has provided "onsite co-ordination" for a banking industry client:

[The beneficiary] has been involved in design, development, testing and code movement for [the client's] stored value platform.

He was managing the work of 6 people offshore.

Executing these activities: -

- Work with clients to gather requirements

- Design, develop and implement solutions with the help of offshore developers
- Set up efficient lines of communication between onsite and offshore teams.
- Project and/or team management
- Review of work being delivered to client
- Conduct quality inspections with onsite team.

The resume provides essentially the same job description for the beneficiary's initial U.S. project assignment with the petitioner, to which he was assigned from March 2002 to June 2003, again noting that he "designed, developed and implemented solutions with the help of offshore developers."

On January 27, 2004, the director issued a request for additional evidence instructing the petitioner to answer the following questions:

How many [of the petitioner's] employees are onsite at JP Morgan worksite in Dallas?

What are the job titles of the [the petitioner's] employees at the JP Morgan Dallas worksite?

How many of [the petitioner's] employees at the Dallas worksite are working in a managerial or executive capacity?

What is the job title of the beneficiary's first-line supervisor? Is that first-line supervisor at the Dallas worksite?

What are the job titles and approximate salaries of the five degreed professionals whose day-to-day activities the beneficiary is responsible for? Are those five employees all at the Dallas worksite?

In an April 14, 2004 letter, the petitioner responded to the director's specific questions as follows: (1) the petitioner has 95 professionals working at the client's site in Dallas and 125 offshore resources assigned to the client's Dallas projects; (2) the job titles of the employees working at the Dallas worksite are engagement manager, production services manager, application group leaders, onsite team coordinators and onsite team members; (3) the petitioner has 27 employees working in a managerial or executive capacity at the client worksite; (4) the beneficiary's first-line supervisor is an application group leader working on-site in Dallas; and (5) the beneficiary is responsible for the day-to-day activities of three offshore team members, one offshore team leader, and one on-site team member.

The petitioner further clarified the beneficiary's role within the project as follows:

[T]he beneficiary is engaged exclusively in managerial duties related to the JP Morgan Chase project. The beneficiary is not directly involved in creating the company's work product. Rather, he is the petitioner's managerial liaison to the client's management counterparts, and is responsible for working with the client to define its needs and then ensuring that the professionals whom the beneficiary supervises create the desired product. In carrying out

these duties, the beneficiary exercises wide discretion over the day-to-day operation of his team, and does so under minimal supervision. In addition, he is involved in reviewing the professional employees whom he supervises for purposes of advancement, recognition, salary adjustment, and bonuses. Accordingly, as a project leader at one of our more important and high profile clients, the beneficiary functions at a senior level within the company's overall management hierarchy.

The director denied the petition on August 2, 2004, concluding that the petitioner had not established that the beneficiary would be employed in a managerial capacity. The director stated that the evidence initially submitted did not establish that the beneficiary would be engaged in primarily managerial duties. The director provided the following "comments" with respect to the additional information provided in response to the request for evidence: (1) the beneficiary seems to be in the "next-to-lowest onsite employee rank"; (2) the petitioner's statement that 27 of its 95 onsite employees are managers or executives "strikes us as a remarkably high ratio of managerial to non[-]managerial employees"; (3) the petitioner's indication that the beneficiary supervises off-shore employees reflects a recent trend in the information technology field and the director is "uncertain what to make of this recent development"; and (4) the petitioner's initially-submitted evidence "would have led a reader to conclude that [the beneficiary's] subordinates were located in the United States." The director concluded that while the beneficiary may have some influence on the activities of some offshore employees, the record did not establish that he is engaged in primarily managerial duties in the United States.

On appeal, counsel asserts that the director's decision appears to be based on "intangible and subjective criteria rather than specific reasons as required by regulation." Specifically, counsel claims that each "comment" is "either without foundation in fact or law, or it is irrelevant to the determination of the beneficiary's eligibility." Counsel notes that the beneficiary currently supervises a team of two on-site professionals and seven off-shore professionals, including a senior associate, and notes that it was inappropriate for the director to consider "how many people are above the beneficiary in terms of authority." Counsel emphasizes that the most significant factor is that "the beneficiary's duties involve the day-to-day management and direct supervision of other professionals."

Counsel further contends that the director's "difficulty in coming to terms with 21<sup>st</sup> century business models based on globalization" does not justify the denial of the petition, noting that neither the statute nor regulations require an L-1A to manage employees located at the same location as the beneficiary. Finally, counsel rejects the implication that the petitioner initially intended to misrepresent the physical location of the employees working under the beneficiary's supervision, again noting that the location of the managed employees is irrelevant. Counsel again argues that the director failed to provide any specific reason for the denial, and instead presented a "collection of subjective and unverifiable assumptions and ideas."

In support of the appeal, counsel submits a current list of on-site and off-shore employees working under the beneficiary's supervision, and a summary of the supervisory duties the beneficiary performs with respect to the off-shore employees. These duties include facilitating communication between the client and the offshore team; ensuring that client requirements are understood; conducting daily teleconferences to check the progress of work and resolve issues; reviewing the team's work product following delivery, normally twice per week;

monitoring milestones and ensuring timely deliverables; training the offshore team; meeting client managers to provide solutions for their software problems; project/team management; and providing performance reviews of each associate.

Upon review, the petitioner has not established that the beneficiary will be employed in a primarily managerial capacity. However, the AAO concurs with counsel that the majority of the director's decision was based on unsupported assumptions and speculation rather than an application of the relevant statute and regulations to the facts of the case. The director should not hold a petitioner to his undefined and unsupported view of what constitutes a proper ratio of managerial to non-managerial personnel within an organization, or generalize about trends in the information technology industry. The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. For this reason, the director's "comments" will be withdrawn.

When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). Upon review of the director's decision, the AAO agrees that the reasons given for the denial are inappropriate, with no specific reference as to how the evidence failed to satisfy the petitioner's burden of proof. As the AAO's review is conducted on a *de novo* basis, the AAO will herein address the petitioner's evidence and eligibility. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.*

Further, 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). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

Here, the petitioner's initial iteration of the beneficiary's duties largely paraphrases the statutory definition of managerial capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner indicated that the beneficiary "manages the JPMC T&SS Investor Services LOB project," "supervises and controls the work of other professionals," "has the authority to recommend that those individuals be retained or fired," and "exercises discretion over the day-to-day activities" of the project team. 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); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Although the petitioner has stated that the beneficiary's duties will be "primarily" or "exclusively" managerial in nature, the record contains no comprehensive description of the beneficiary's duties that would allow the AAO to determine what he does on a day-to-day basis or what proportion of his time is actually devoted to qualifying managerial duties. After paraphrasing the statutory definition of "managerial capacity" as discussed above, the petitioner went on to state that the beneficiary is "primarily responsible for managing the onsite and offshore activities" performed by other employees and "managing communications" with the client, including such responsibility as "managing his team" and "managing the project." Essentially, the petitioner has stated that the beneficiary qualifies as a manager for L-1A purposes because he "manages" professionals and a project. Again, the petitioner cannot satisfy its burden of proof by making conclusory assertions regarding the beneficiary's employment capacity. 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. at 1108. The AAO will not speculate as to the actual managerial job duties to be performed by the beneficiary in the absence of the detailed job description required by regulation. See 8 C.F.R. § 214.2(l)(3)(ii).

Finally, some of the beneficiary's stated job duties, as described by the petitioner, suggest that while he serves at a senior or lead level within his small project team, he is still required to perform duties that do not fall under the traditional definition of managerial capacity. For example, the petitioner stated that the beneficiary's duties include "interacting with the client to gather the requirements," yet the petitioner did not address how this duty, which is characteristic of a systems analyst position, qualifies as managerial in nature. The beneficiary is also responsible for "establishing good communication between offshore and onsite teams" and "providing onsite coordination," but these responsibilities, without further explanation as to what actual duties are involved, do not necessarily indicate the level of authority associated with managerial capacity as defined at section 101(a)(44)(A) of the Act.

In addition, the AAO notes the petitioner provided a description of its "integrated on-site/offshore model" indicating that its offshore teams handle development and "non-critical support and maintenance issues," while the project teams based at a client site are responsible for performing "detailed analysis of a client's needs, design and system testing, as well as time-critical maintenance and support activities." At the time of filing, the beneficiary's on-site "team" consisted of one "team member" and the beneficiary himself. There is no evidence in the record to demonstrate that one "team member" would relieve the beneficiary from performing most or all of the on-site analysis, design, testing, maintenance and support duties required by the project, such that he would primarily supervise these activities and those performed by the overseas team. The beneficiary's performance of non-qualifying duties is further supported by a review of the beneficiary's resume, which confirms his involvement in "design, development, testing and code movement," working with clients to gather requirements, reviewing work being delivered to clients, conducting quality inspections, and "design[ing], develop[ing] and implement[ing] solutions *with the help of* offshore developers." (Emphasis

added). Again, these duties suggest that the beneficiary is directly involved in the day-to-day non-managerial duties associated with his assigned project.

The AAO does not doubt that the beneficiary exercises some supervisory authority over professional employees; however, the record does not support a finding that supervising professionals is his primary responsibility or that the majority of his responsibilities as a whole are managerial. Whether the beneficiary is a managerial employee turns on whether the petitioner has sustained its burden of proving that his duties are “primarily” managerial. *See* sections 101(a)(44)(A) and (B) of the Act. 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). Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial duties associated with delivering services to the petitioner’s client. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

In sum, the petitioner and counsel’s assertions that the beneficiary’s duties are “exclusively” or “primarily” managerial are simply insufficient to establish the beneficiary’s eligibility for an amendment of his L-1 visa classification from that of an L-1B specialized knowledge employee to that of an L-1A manager. The petitioner’s vague description of the beneficiary’s duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary’s duties represents a credible perspective of the beneficiary’s role within the organizational hierarchy. The record does not demonstrate that the beneficiary, in his role as a systems analyst, would be relieved from performing non-qualifying duties associated with the petitioner’s project activities at the client’s site, and it cannot be determined how much of his time would actually be allocated to managerial versus non-managerial duties. 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 AAO acknowledges counsel’s assertion on appeal that the beneficiary’s project team has grown to include an additional on-site team member and a total of seven offshore employees. 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).

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record as presently constituted does not establish that the beneficiary’s qualifying year of employment abroad was in a position that was managerial, executive or involved specialized knowledge. *See* 8 C.F.R. § 214.2(l)(3)(iv). The petitioner claimed that the beneficiary is

eligible for this classification based upon his managerial experience with the foreign entity, and stated that this experience was gained on an overseas client project between March 2002 and September 2002. However, the petitioner stated on Form I-129 that the beneficiary was in the United States in L-1B status from February 16, 2002 until August 30, 2002, and the beneficiary's passport confirms his admission to the United States in L-1 status on February 16, 2002. Thus, petitioner has not provided a description of the beneficiary's duties with the foreign entity. According to the beneficiary's resume, his last overseas project, to which he was assigned from February 2000 to February 2002, required him to perform "analysis, coding, unit testing and high priority bug fixing" for a client's system. There is no evidence that this role involved any managerial duties. 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. at 165. Furthermore, although the beneficiary was previously granted an L-1B visa under the petitioner's blanket L petition, there is no evidence that his prior year of employment with the foreign entity involved specialized knowledge, nor has the petitioner articulated a claim that the beneficiary was previously employed in a capacity involving specialized knowledge. Accordingly, the AAO cannot determine that the beneficiary was employed in a qualifying capacity with the foreign entity prior to his transfer to the United States. For this additional reason, the petition cannot 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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.