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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D7

[Redacted]

DATE: **JUL 26 2012** Office: CALIFORNIA SERVICE CENTER FILE: [Redacted]

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)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. 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 classify the beneficiary as a 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, a Delaware corporation, states that it operates a payment and online financial management solutions firm. It claims to be an affiliate of [REDACTED] located in North Sydney, Australia. The petitioner is seeking initial employment for the beneficiary in L-1A status for a period of three years as its Director for [REDACTED]

The director denied the petition, concluding that the petitioner failed to 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 evidence of record establishes that the beneficiary will be employed in a position that is managerial in nature. Counsel submits a brief and additional evidence in support of the appeal.

I. The Law

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.

II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial capacity. The petitioner does not claim that the beneficiary will be employed 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 petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on May 13, 2010. The petitioner indicated that it operates a payment and online financial management solutions firm with eight employees and a gross annual income of \$1.5 million.

In a letter dated May 7, 2010 the petitioner provided a position description for the "Director for Software Development and Integration." The petitioner described the position as having responsibility for "design and development of the online payment solutions" for the United States market. The petitioner stated that the beneficiary's specific duties would include the following:

- Develop tailored application components and customized implementation;
- Manage product development cycle from design through quality assurance and follow-on technical support;
- Act as liaison with [REDACTED] technical team(s) to manage implementation and delivery of network solutions in the U.S.;
- Conduct promotional and technical seminars for customers and partners in the U.S.;

- Manage, hire, and train relevant technical staff and contractors;
- Supervise and manage [REDACTED] and US customer support organizations;
- Responsible for internal processes, various applications and components used within the Account Management Services department

The petitioner stated that the beneficiary will be responsible for hiring and training new employees as well as integrating and supporting personnel development and support resources. Furthermore, the beneficiary will be responsible for "internal functions such as support, administration, integration, and provisioning."

The director issued a request for additional evidence ("RFE") on May 26, 2010 in which he instructed the petitioner to submit, *inter alia*, the following: (1) a more detailed description of the beneficiary's duties and whom the beneficiary directs including job titles and duties; and (2) an organizational chart for the United States business listing all employees under the beneficiary's supervision.

In a response dated June 16, 2010 the petitioner stated the beneficiary is a functional manager responsible for "managing the design and development of online payment solutions" for both the United States and overseas markets. The duties "encompass the essential function of designing and developing online payment solutions." Specifically, the beneficiary manages the rollout and implementation of the beneficiary's [REDACTED] Payment Network as well as overseeing project management for the integration of [REDACTED] financial solutions. The petitioner provided the same list of job duties as provided with the initial petition, however, the description in response to the RFE indicated that the beneficiary would now be managing a number of the duties.

The petitioner also provided job categories that the beneficiary allocates his time to on a weekly basis. Those categories were as follows: setting the general direction and policies for [REDACTED] network (10%); overseeing and ensuring [REDACTED] rules compliance by network participants (10%); ensuring integration with financial institutions, merchants, billers, and payment gateways (10%); allocation of resources, setting project schedules, and rollouts (40%); management and auditing of [REDACTED] Processing Services (5%); auditing infrastructure used to provide SVP services (5%); and new solutions development (20%).

The petitioner did not provide any information on subordinates or other employees directed by the beneficiary as requested. The petitioner provided the requested organizational chart reflecting that no employees reported to the beneficiary. The petitioner explained that the beneficiary operates "at a senior level within [REDACTED] [REDACTED]" reporting directly to the CEO.

The director denied the petition on July 9, 2010 concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director determined that the record is unclear as to whether the beneficiary would primarily be performing the duties or directing others to perform those duties. The director found that the petitioner indicated that the beneficiary would be responsible for hiring, managing, and training new employees; however, the petitioner "did not provide any evidence that it currently has any employees or contractors to perform the non-qualifying tasks."

On appeal, counsel asserts that the detailed job description submitted for the beneficiary supports a finding that he would be primarily managing the software development and integration function. Counsel states that

the beneficiary operates at a high level within the organization reporting directly to the CEO. Furthermore, counsel contends that the beneficiary will spend 60% of his time on project management. As a project manager, counsel claims that "the day-to-day tasks associated with software development will be carried out by technical teams." Finally, counsel states that the beneficiary's hiring authority is "an example of [the beneficiary's] discretionary authority" and is therefore "relevant to the adjudication of this petition."

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial capacity.

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 in either an executive or a managerial capacity. *Id.*

The definitions of executive and managerial capacity each 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 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 fact that a beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

In its response to the director's request for evidence, the petitioner expanded the beneficiary's duties, adding items such as: overseeing and ensuring [REDACTED] rules compliance; setting the general direction and policies for [REDACTED] networks; and management and auditing of [REDACTED]. The petitioner also elevated the beneficiary's responsibility regarding some of the duties initially submitted including managing internal processes and managing the [REDACTED] technical team. In sum, the initial description appeared to have the beneficiary doing more of the work, while the second iteration of the job has the beneficiary managing more of the work done in the petitioner's operation.

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). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this appeal will be based on the job description submitted with the initial petition.

Even though the petitioner claims that the beneficiary directs and manages software development and integration, it does not claim to have anyone on its staff to actually perform the software development and integration duties. Thus, either the beneficiary himself is performing the software development and integration or he does not actually manage the software development and integration function as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the beneficiary is performing the software development and integration function, the AAO notes that 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

It has been noted in the record that there are no employees in the United States reporting directly to the beneficiary. There is no mention in the record of any other technical or development staff to support the beneficiary in his management of the software development and integration function. On appeal, counsel for the petitioner states that, as described in the petition, "the day-to-day tasks associated with software development will be carried out by technical teams." To the extent that the technical teams exist, there is no documentation of what employees compose the teams or where they are located. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3). Therefore, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

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. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, 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. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)). The petitioner has not provided evidence that the beneficiary manages an essential function.

The record established that the beneficiary will be the only United States employee available to perform the services of the software development and integration function. 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'r 1988). The actual duties themselves 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).

Although requested by the director in the request for evidence, the petitioner did not provide information regarding "exactly whom the beneficiary directs including their job title and duties." Any 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). While counsel asserts that the day-to-day tasks of software development are "carried out by technical teams," the record is devoid of any evidence of the technical teams. The organizational chart submitted for the United States entity does not include such a team. To the extent that they are located at an overseas organization, the petitioner failed to provide any evidence documenting their existence and availability to perform duties as directed by the beneficiary.

Furthermore, the petitioner stated that the beneficiary is responsible for managing, hiring, and training "relevant technical staff and contractors." The AAO agrees with counsel's assertion that such duty is indicative of the beneficiary's managerial authority. The petitioner failed, however, to provide any documentation that would support an assertion that the beneficiary allocates a significant amount of time on a day-to-day basis to the hiring, managing, and training of employees. Specifically, the petitioner did not describe any new hiring initiatives or indicate what staff members currently employed by the petitioner were managed, hired, or trained by the beneficiary. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To

establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. The petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive 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'r 1998).

The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. The petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial or executive duties. Regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.