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Washington, DC 20529



U.S. Citizenship  
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File: WAC-02-238-50112 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:

[Redacted]

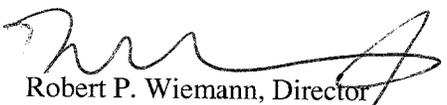
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California 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 branch office of ~~Sellcraft Softech Private~~ Limited located in Pune, India. The petitioner is engaged in software development, consulting, and project management. 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 evidence of record shows that the beneficiary will be employed in a primarily managerial or executive capacity. Specifically, counsel alleges that the director's decision was erroneously based on the fact that the beneficiary is the sole employee of the petitioner, and that the director disregarded submitted evidence that shows that wages were paid to the beneficiary. In support of these assertions, the petitioner submits a brief, additional evidence, and previously submitted documents. While counsel indicated on Form I-290B he would be submitting a brief and/or additional evidence within 30 days of filing the appeal, as of the date of this decision, the AAO has received no further documentation or correspondence from counsel or the petitioner, and the record will be considered complete.

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 primary 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.

With the initial petition filed on July 19, 2002, the petitioner provided a support letter describing the beneficiary's duties as follows:

[The beneficiary] will continue as President with overall responsibilities like managing, supervising all U.S. operations, including marketing, finance, administration, etc. [The] Beneficiary will be responsible for the overall performance including promoting sales, hiring and firing personnel, ensuring the financial well being, and generally looking after operational matters through other employees and by using external specialists/agencies on [an] as-needed basis.

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[The] Beneficiary has contributed to the growth of the company and she has actively contributed to the success of the company during 2001 . . . . [The] Petitioner therefore requires the continuing services of [the] Beneficiary as she will be responsible for the growth of our company, and to manage the technology alliances in the areas of bespoke development, professional services, and launching of [the] company's products.

On August 28, 2002, the director requested additional evidence. Specifically, the director requested: (1) an organizational chart for the petitioner, including a list of employees under the beneficiary's supervision showing their job titles, duties, education, and compensation; (2) the petitioner's most recent California Form DE-6; (3) the petitioner's Form 1120, U.S. Corporation Income Tax Return; (4) an accounting of the percentage of time the beneficiary spends on various duties identified in the petition; and (5) evidence to show whether the beneficiary performs certain duties by herself, or through the assistance of other employees.

In a response dated November 14, 2002, the petitioner submitted: (1) an organizational chart for the petitioner; (2) a copy of the petitioner's Form 1120F, U.S. Income Tax Return of a Foreign Corporation; (3) Forms DE-6 for the first, second, and third quarters of 2002; (4) Forms 941, Employer's Quarterly Federal Tax Return, for the first, second, and third quarters of 2002; and (5) a letter further describing the beneficiary's duties. In the letter, counsel for the petitioner discussed the beneficiary's duties as follows:

Planning and Developing Policies. The marketing inputs and customer feedback obtained will be taken into consideration before the policies are fully developed and implemented. Some amount of planning effort will be done by the parent company, considering that the Petitioner's office is a branch office. The remaining effort will be spent by [the] Beneficiary currently and later by a marketing executive. Beneficiary is expected to spend 20% of the time on this activity.

Directing Legal Affairs. Beneficiary is not expected to spend much amount of time on this matter but will needless to say, spend as much time as required and when needed. The Law Offices of Hemant R. Habbu takes care of all the legal matters and also advises on company issues. Please note that the same office currently focuses on Corporate and Business Immigration Law and therefore looks after all legal affairs that are needed at present. In addition, Senior Accountant [REDACTED] CPA handles accounting responsibilities. Finally the payroll and all related filing and payment of taxes are outsourced to an outside agency.

Planning, Supervising and Marketing. Beneficiary herself did the planning and actual marketing last year. At the same time, [a] considerable amount of research and identification of the target customers was carried out by the parent company and by Beneficiary. After identification of the target clientele and the business segment, Beneficiary herself took charge of direct marketing. The challenges and the circumstances demanded that a senior person like Beneficiary herself become fully responsible for carrying out these duties and not delegate these responsibilities to a junior person. . . . Beneficiary is expected to continue to spend approximately 15% of her time UNTIL Beneficiary finds the right candidate to take on these responsibilities and when Petitioner is in a position to hire such as person.

Supervising Financial Matters. Beneficiary projects spending just 10% of her time for such a duty as the company has outsourced all these duties to professionals both here and in India. The accountant appointed by the company prepares the financial accounts and statements. The expenses accounting and billing services are carried by parent company on a daily basis.

The firm in charge of payroll services has been hired for payroll and other statutory payroll related filing of returns. With improvement in the economy however a full time person will have to be employed so that Beneficiary will be then in a position to devote the balance of the time for business development.

The letter further indicated that the petitioner utilizes the services of another company for contract labor. The letter provides that:

[T]he Petitioner engaged the services of another consultant who was the employee of another corporation, to carry out a software assignment. Petitioner paid that other corporation whatever charges were payable for such work. However, Beneficiary supervised the employee for the quality of work, determined the objectives of the project and the general means of achieving those objectives.

On June 25, 2003, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director summarized the beneficiary's proposed duties, and noted that the beneficiary is the petitioner's sole employee.

On appeal, counsel for the petitioner asserts that the evidence of record shows that the beneficiary will be employed in a primarily managerial or executive capacity. Specifically, counsel alleges that the director's decision was erroneously based on the fact that the beneficiary is the sole employee of the petitioner. Counsel states that the director disregarded an unpublished AAO decision involving an employee of the Irish Dairy Board, and asserts that this decision confirms that "a person may be a manager or executive even if he or she is the sole employee of the company where outside independent contractors are used." Counsel asserts that, as the "[p]etitioner employed [an] outside independent contractor . . . [the] Petitioner has clearly satisfied the condition of being a manager or executive." Counsel further states that the director disregarded submitted evidence that shows that wages were paid to the beneficiary. In support of these assertions, the petitioner submits a brief, previously submitted documents, and additional evidence, including: (1) an agreement with a subcontractor, establishing an arrangement where the petitioner can submit work orders to use the subcontractor for labor; (2) a work order in which the petitioner contracted for the services of a Consultant Programmer/Analyst from its subcontractor; and (3) copies of time sheets reflecting the hours that the subcontracted Consultant Programmer/Analyst worked for the petitioner.

Upon review, 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. § 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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In the instant case, the petitioner asserts that the beneficiary is primarily engaged in both managerial duties and executive duties. Therefore, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act.

The beneficiary's job description submitted by the petitioner is vague, providing little insight into the true nature of the tasks the beneficiary will perform. For example, the petitioner indicates that "[the] beneficiary will be responsible for the overall performance including promoting sales, hiring and firing personnel, ensuring the financial well being, and generally looking after operational matters . . ." The petitioner further states that the beneficiary "will be responsible for the growth of our company, and to manage the technology alliances in the areas of bespoke development, professional services, and launching of [the] company's products." These general statements provide no specific information regarding the actual tasks the beneficiary will perform on a daily basis. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.* The provided job description does not allow the AAO to determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature.

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 administrative or operational duties. The beneficiary's job description includes non-managerial and non-executive duties, such as conducting marketing and performing administrative tasks. In response to the director's request for evidence, the petitioner provided the percentage of the beneficiary's time that will be devoted to certain activities. However, the petitioner has only accounted for 45 percent of the beneficiary's time, some of which is devoted to non-managerial direct marketing tasks. Thus, the petitioner has not established that the majority of the beneficiary's time will be spent on managerial or executive tasks, such that she will be employed in a *primarily* managerial or executive capacity as required by 8 C.F.R. § 214.2(I)(3)(ii). *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991); *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Counsel further refers to an unpublished AAO decision involving an employee of the Irish Dairy Board. In the unpublished decision, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification as a function manager even though he was the sole employee, in part due to the fact that the beneficiary managed professional outside contractors. Counsel alleges that, as "the petitioner employed [an] outside independent contractor . . . [the] Petitioner has clearly satisfied the condition of being a manager or executive." 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). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the

beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Thus, whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial. 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). In the present matter, the petitioner has established that it has employed an outside contractor as a Consultant Programmer/Analyst. However, as discussed above, the petitioner has not established that the beneficiary will be primarily engaged in managerial or executive duties, and thus the petitioner has not established that the beneficiary qualifies as a function manager.

Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Thus, the director is not bound to follow the reasoning in *Matter of Irish Dairy Board*, and counsel's assertion that the director disregarded an unpublished AAO decision is not persuasive.

Although the director apparently based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. 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, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. The petitioner operates largely as a marketer of the foreign entity's information technology products and services. Thus, the petitioner requires employees to perform daily non-managerial and non-executive tasks such as contacting potential clients, answering questions regarding the petitioner's services, and conducting routine office functions such as paying bills, managing a checking account, and answering telephones. As the beneficiary is the petitioner's sole employee, it is apparent that she performs all of these tasks. Accordingly, the reasonable needs of the petitioner require the beneficiary to perform substantial non-qualifying duties. As discussed above, the petitioner has not fully accounted for how the beneficiary apportions her time, and the petitioner has failed to establish that she will be employed in a primarily managerial or executive capacity as defined by sections 101(a)(44)(A) and (B) of the Act.

The record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional 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). Furthermore, 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. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3). For this reason, the appeal will be dismissed.

In visa proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.