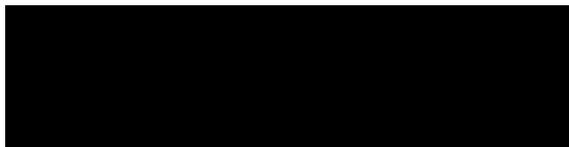


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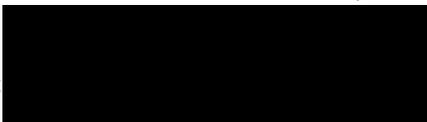
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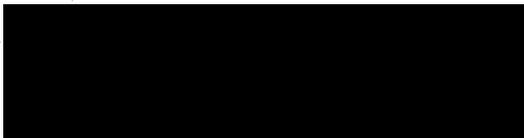
File: EAC 03 251 56524 Office: VERMONT SERVICE CENTER Date: JUL 14 2005

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)

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 State of Massachusetts that is engaged in the computer sales and service business.<sup>1</sup> The petitioner claims that it is the affiliate of Mildeep Brokerage 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's decision is in error. Counsel submits a brief in support of this assertion.

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.

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<sup>1</sup> The AAO notes that on Form I-129, the petitioner indicated that it is in the "leisure industry." However, that appears to be a description of the foreign company's business. The petitioner stated in an addendum to Form I-129 and in its response to the director's request for further evidence that it is engaged in the computer service business.

- (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 managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

At 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 the initial petition, the petitioner described the beneficiary's job duties as follows:

The Beneficiary will continue to be employed as the President of the Petitioner, and he will be responsible for hiring and firing managers; supervising subordinate employees, including at least one manager, who will supervises and oversees [sic] subordinate employees; overseeing preparation of sales and marketing reports; reviewing and analyzing sales data; establishing and implementing policies to manage and achieve marketing goals; review and financial reports [sic]; review budgets and expense reports prepared by subordinate employees; managing the company; and overseeing marketing campaigns developed by subordinate managers. In the performance of his duties, the Beneficiary will receive minimum supervision from the other members of the Board of Directors, and the Beneficiary will exercises [sic] wide discretion and latitude in the performance of his duties.

On September 18, 2003, the director requested additional evidence. Specifically, the director requested evidence establishing the duties the beneficiary performed in the past year and will perform if the petition is extended. The director also requested (1) a list identifying all employees of the U.S. entity by name and title; (2) a position description for each employee including the beneficiary; (3) a breakdown of the number of hours devoted weekly to each employee's job duties, including the beneficiary; and (4) if contractors are used, evidence documenting the number of contractors used and the duties performed.

In response, the petitioner provided the following breakdown of the beneficiary's duties:

- hiring and firing managers, supervising subordinate employees, including at least one manager, who will supervise and oversee subordinate employees (10%)
- overseeing preparation of sales and marketing reports (15%)
- reviewing and analyzing sales data (15%)
- establishing and implementing policies to manage and achieve marketing goals (15%)
- reviewing financial reports (10%)
- reviewing budgets and expense reports prepared by subordinate employees (10%)
- managing the company (15%)
- overseeing marketing campaigns developed by subordinate managers (10%)

The petitioner further states:

The Beneficiary will be responsible for reviewing and seeking additional business locations; therefore, the Beneficiary will engage in the essential function of the Petitioner's expansion of business in the United States.

In the performance of his duties, the Beneficiary will continue to receive minimum supervision, and the Beneficiary will exercise wide discretion and latitude in the performance of his duties.

The petitioner also submitted an organizational chart depicting the beneficiary as president directly supervising the cyber café manager/publications manager, who in turn supervises a computer instructor, a computer engineer, and a cashier/bookkeeper. The petitioner also provided a job description with a breakdown of duties by percentage for each of the four subordinate employees.

On October 3, 2003, the director denied the petition. The director determined that the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity by the U.S. entity. The director noted that, even though the organizational chart depicts the beneficiary as supervising another manager, the evidence suggests that both the beneficiary as well as that manager would be required to perform some of the non-qualifying day-to-day operational tasks of the company. The director further noted that the petitioner has not established that the company utilizes independent contractors, or that the business is complex, such that the beneficiary might qualify as a "functional manager." The director found that the petitioner has not demonstrated that the beneficiary will function at a senior level within the organization's hierarchy other than in position title, or that the beneficiary will be involved in the supervision and control of other supervisory, professional, or managerial employees who will relieve him from performing the services of the corporation.

On appeal, counsel for the petitioner restates in their entirety the job descriptions of the petitioner's employees as provided in response to the director's request for further evidence. Counsel claims that the beneficiary's position will be solely executive or managerial and does not include doing day-to-day work of the business. Counsel further asserts that the beneficiary will primarily supervise and control other managerial or professional employees. Counsel also asserts that the beneficiary will be primarily responsible for managing

the marketing function of the petitioner and that the beneficiary also directs the major function or component of the petitioner's efforts to expand in the United States.

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. Here, the petitioner did not specify whether the beneficiary would be primarily employed in a managerial or executive capacity. In fact, the job description provided by the petitioner combines some elements of the statutory definitions for both "managerial capacity" and "executive capacity," and counsel claims on appeal that the beneficiary's position "will be solely executive *or* managerial." A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Counsel asserts that the beneficiary will primarily supervise and control other managerial or professional employees. 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, 8 U.S.C. § 1101(a)(44)(A)(ii). The record in this matter does not establish that the beneficiary's subordinate staff is composed of supervisory, professional, or managerial employees. Upon reviewing the job descriptions for the beneficiary's subordinates, the AAO cannot conclude that any of these employees truly function in a managerial or supervisory capacity. Of the four subordinate employees, only one has a managerial title - the cyber café manager/publications manager. Despite his title, however, 90% of that employee's job appears to be performing sales, marketing and customer service tasks. Based on their job descriptions, the remaining three employees - the computer engineer, the computer instructor, and the bookkeeper/cashier - clearly have no managerial or supervisory role. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act, 8 U.S.C. § 1101(a)(44)(A)(iv). Moreover, the petitioner has not provided the level of education required to perform the duties of the beneficiary's subordinate employees. Thus, the petitioner has not established that these positions require an advanced degree, such that these subordinate employees could be classified as professionals. Accordingly, the AAO must conclude that the record is insufficient to show that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Counsel's assertion that the beneficiary qualifies as a "functional manager" also is not supported by the record. The term "functional 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, *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.

Here, counsel claims that the beneficiary is primarily responsible for managing the marketing function of the U.S. entity. The beneficiary's job description indicates that his managerial duties in this respect include tasks such as "overseeing preparation of sales and marketing reports;" "reviewing and analyzing sales data;" "establishing and implementing policies to manage and achieve marketing goals;" "reviewing financial reports;" "reviewing budgets and expense reports prepared by subordinate employees;" and "overseeing marketing campaigns developed by subordinate managers." The AAO notes that although the beneficiary's job description refers to multiple "employees" and "managers" involved in these tasks, a review of the job description of all of the petitioner's employees show that only the cyber café/publications manager performs any marketing or sales task. Even then, that individual's job description does not show that he prepares the marketing reports, financial reports, or the budget and expense reports that the beneficiary purportedly reviews. Given that no other employee is engaged in the marketing function other than the beneficiary and the cyber café/publications manager, it is reasonable to conclude that any of the tasks related to that function which is not performed by the cyber café/publications manager must be performed by the beneficiary himself. 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. *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. 1988)).

Counsel also claims that the beneficiary "will engage in the essential function of the petitioner's expansion of business in the United States." However, in the description of the beneficiary's job duties, there appears to be no time allocated to tasks associated with this function, such as "seeking additional business locations," as counsel indicated. Thus, counsel's assertion is not persuasive. 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). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Finally, in support of his claim that the beneficiary is a "functional manager," counsel further refers to an unpublished 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 even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the Irish Dairy Board matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). 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.

In light of the foregoing, the AAO agrees with the director's determination that the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the record contains insufficient evidence to establish that the foreign entity employed the beneficiary in a primarily managerial or executive capacity. On the attachment to the Form I-129, the petitioner states that prior to coming to the United States, the beneficiary was employed as the managing director of the foreign entity. The petitioner described the beneficiary's job duties as follows:

The Beneficiary was responsible for supervising subordinate employees who prepare marketing and sales strategy; reviewing and analyzing data relating to market conditions; and sales reports; [sic] establishing and implementing policies to manage and achieve marketing goals; reviewing and approving budgets prepared by controller and chartered accountants and directing management of the company.

The Beneficiary received minimum supervision in the performance of his duties, and he supervised at least four (4) subordinate managers and employees.

The petitioner submitted no other evidence to substantiate the above assertion. First, the AAO notes that nowhere in the record did the petitioner specify the dates of the beneficiary's employment with the foreign company. Furthermore, the description of the beneficiary's duties that the petitioner has provided is vague and nonspecific and fails to demonstrate what the beneficiary did on a day-to-day basis when he worked for the foreign company. Moreover, although the petitioner asserted that the beneficiary managed a subordinate staff, the record contains no information relating to the beneficiary's subordinate staff at the foreign company, such that the AAO could determine whether that staff was composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. 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. In light of the foregoing, the AAO finds the evidence of record does not establish that the foreign entity employed the beneficiary in a primarily managerial or executive capacity for the time period required under the regulation at 8 C.F.R. § 214.2(l)(3)(iii).

In addition, the petitioner has not provided sufficient evidence that the United States and foreign entities are still qualifying organizations, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between U.S. and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

The petitioner indicated in the letter accompanying the Form I-129 that the foreign entity owns 51% of the U.S. entity. The petitioner submitted a copy of the Articles of Incorporation of the U.S. entity, which indicates that 200,000 common shares are authorized, and copies of share certificates number 1 and 2 of the U.S. entity, indicating that the foreign entity owns 510 shares, and an individual named Tushar Pandit owns 490 shares, respectively. No other evidence of share ownership was provided. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 364-365. Without full disclosure of all relevant documents, the elements of ownership and control cannot be determined in this instance.

Moreover, the AAO notes that the copy of the front of the share certificate for the 510 shares lists the foreign entity as the shareholder, whereas the copy of the back of that certificate indicates that the shares were issued to the beneficiary. In addition, the petitioner provides a copy of a check made payable to the petitioner in the amount of \$21,300.00, from the beneficiary's personal bank account.<sup>2</sup> As evidence of \$20,000.000 being paid to the petitioner by Tushar Pandit, the other shareholder, was also submitted, it appears that these are in fact payments for the shares in the U.S. entity. Given that there is conflicting information on the stock certificate as to whether the 510 shares were issued to the foreign entity or the beneficiary, and payment for those shares appears to have come from the beneficiary in his individual capacity rather than from the foreign entity, there remains serious doubt regarding the petitioner's claim that it is owned in part by the foreign entity. The petitioner has not accounted for these inconsistencies in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Id.*

In light of the above described deficiencies in the record, the AAO finds that the evidence is insufficient to establish that the United States and foreign entities are still qualifying organizations, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A).

Furthermore, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status, pursuant to the regulation at 8 C.F.R. §

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<sup>2</sup> The AAO notes that the check bears the beneficiary's signature and has the same account number as another check in the record, payable to National Corporate Research, Ltd., with the beneficiary's name clearly printed as the account holder.

214.2(l)(14)(ii)(B). Under the regulations, the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. The initial petition was approved in October 2002. The petitioner submitted a number of invoices and bank statements to establish that it has been conducting business on a regular basis. However, the earliest bank statement only went back as far as December 24, 2002, and the earliest invoice documenting a business transaction carried out by the petitioner dates back to April 24, 2003. Furthermore, the AAO notes that the invoices submitted by the petitioner evidence the petitioner's *purchase* of goods and services by the petitioner, rather than the *provision* of goods and services by the petitioner as contemplated by the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H). As such, the petitioner has not provided sufficient evidence that it has been "doing business," as defined by the regulations, for the entire year prior to filing the petition for extension. For this additional reason the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). For these additional reasons, the appeal must be dismissed.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.