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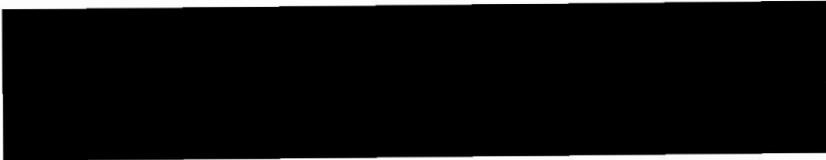
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File: EAC 08 071 52021 Office: VERMONT SERVICE CENTER Date: **AUG 27 2008**

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

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

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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

  
Robert P. Wiemann, Chief  
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 employ the beneficiary as its software test manager 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 New Jersey that is engaged in information technology. The petitioner claims that it is the subsidiary of MindTree Consulting, Ltd., located in Bangalore, India. The petitioner seeks to employ the beneficiary in the United States for a period of three years.

The director denied the petition concluding that the petitioner did not establish that: (1) the beneficiary had been employed abroad in a primarily managerial or executive capacity; or (2) the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director noted that the beneficiary appeared to be a team leader on various projects, but did not appear to have traditional managerial authority, such as the authority to hire and fire employees or manage a specific subdivision of the companies.

Counsel for 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 restates the beneficiary's duties and asserts that these duties meet the statutory definition of "managerial capacity." Counsel provides additional details regarding the nature of the projects which the beneficiary manages in an attempt to clarify the nature of the beneficiary's responsibilities.

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(I)(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 (I)(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.

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.

The first issue in the present matter is whether the beneficiary was employed abroad by the foreign entity in a primarily managerial or executive capacity. Specifically, the regulations require that a qualifying

organization must have employed the beneficiary in a qualifying managerial or executive capacity for one continuous year within three years preceding the beneficiary's application for admission into the United States.

In this matter, it is noted that the Form I-129, Petition for a Nonimmigrant Worker, was filed on January 10, 2008. Therefore, for purposes of this analysis, the petitioner is required to demonstrate that the beneficiary was employed in a qualifying managerial or executive capacity for at least one continuous year during the period from January 10, 2005 through January 10, 2008.

In a letter from the petitioner dated January 7, 2008, the petitioner claimed that the beneficiary joined the foreign entity as a software test manager on July 7, 2003. With regard to the beneficiary's position and duties, the petitioner stated as follows:

[The beneficiary] leads medium to large Software Quality Control and Software Quality Assurance projects. As a Software Test Manager, his responsibilities include the following:

- Lead teams of test coordinator and test analysts, responsible for performing testing activities supporting deployment of new systems, system and environment enhancements and upgrades, and defect resolution.
- Manage overall testing schedules to meet project timelines by prioritizing testing efforts and obtaining and assigning resources.
- Oversee and assess test artifacts for completeness, accuracy, and timeliness.
- Actively mentor and develop all team members.
- Direct the planning, scheduling, and execution of project-level testing activities.
- Establish testing strategies, processes and standards.
- Persuade staff to become a cohesive team with regards to strategies, processes and standards.
- Collaborate with project management, production support, and software development teams to construct and maintain a schedule of changes to the software enterprise. Ensure changes meet quality and compliance standards, and approve their release into the production environment. Initiate data-driven continuous quality improvement in testing strategies[.]
- Aggressively advocate and publicize the benefit of software and infrastructure testing activities to business users and information technology teams.
- Collect and manage meaningful metrics that show a roadmap of process improvement and reduction of expenses.

The petitioner also submitted a letter dated December 10, 2007 from [REDACTED], Senior Associate – People Function at the foreign entity, who outlined the various duties the beneficiary performed since his employment commenced in July 2003. In relevant part, Mr. [REDACTED] stated the following:<sup>1</sup>

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<sup>1</sup> For purposes of this analysis, only the duties performed during the relevant period (from January 10, 2005 to January 10, 2008) will be examined herein.

**Jan 2004 to Dec 2005:** Worked as Team Lead on projects for IT Services on web based enterprise applications developed using Microsoft.NET, ORACLE, and XML. He played the role of Test Manager in the projects and was involved in Test planning, team set up, requirements analysis, Test case design, defect reporting and tracking. He was also involved in training the team on client specific tools, functional and regression testing. Defects were raised and maintained through Clear Quest tool.

**Jan 2006 – Present:** Working as Test Manager on projects for IT Services on web based enterprise applications developed using Microsoft.NET, ORACLE, and XML. He played the role of Test Manager in the projects and was involved in Analyzing and Understanding the requirements. He is also responsible for Test Planning, Status Reporting, training the team on new domains, task allocation to the team, planning and tracking the task execution, defects analysis, client coordination, Mentoring the team and owns overall test activities.

On January 18, 2008, the director requested additional evidence. Specifically, the director requested additional evidence to establish that the beneficiary had been employed in a managerial or executive capacity abroad, including but not limited to a comprehensive overview of the beneficiary's duties, position descriptions and job titles for all of beneficiary's subordinates, and the amount of time the beneficiary allocated to managerial/executive functions in comparison to the time allocated to non-qualifying functions.

In response, the petitioner submitted a letter dated January 23, 2008, in which it stated that during his employment abroad, the beneficiary managed software testing teams of 4 to 42 software quality assurance professionals involved in projects for the petitioner's international clients. It also included the following updated description of duties for the beneficiary:

The role of the software test manager or test lead is to effectively lead the testing team. To fulfill this role, the lead must understand the discipline of testing and how to effectively implement a testing process while fulfilling the traditional leadership roles of a manager. The manager must manage and implement or maintain an effective testing process. That involves creating a test infrastructure that supports robust communication and a cost-effective testing framework.

What the test manager is responsible for:

- Defining and implementing the role testing plays within the organization.
- Defining the scope of testing within the context of each release/delivery.
- Deploying and managing the appropriate testing framework to meet the testing mandate.
- Implementing and evolving appropriate measurements and metrics.
  - To be applied against the product under test.
  - To be applied against the testing team.
- Planning, deploying and managing the testing effort for any given engagement/release.

- Managing and growing testing assets required for meeting the testing mandate:
    - Team members
    - Testing tools
    - Testing processes
- Retaining skilled testing personnel.

As a Software Test Manager with [the foreign entity] in India, [the beneficiary] led various testing projects, which consisted of teams ranging in size of anywhere from 4 to 42 testing professionals. As discussed above, he was responsible for planning, deploying, and managing the testing efforts for these engagements. On these assignments, he was responsible for the management of the team, testing processes, and testing tools.

No additional evidence, such as payroll records or specific details regarding the foreign entity's other employees and the beneficiary's subordinates, was submitted.

On February 6, 2008 the director denied the petition. The director noted that despite the petitioner's contentions that the beneficiary functioned in a qualifying position, the information submitted with regard to the beneficiary's position abroad indicated that he merely performed various lead positions on teams and managed testing on products and systems. The director found that nothing in the record indicated that he functioned at a senior level within the organizational hierarchy of the foreign entity, and further concluded that the petitioner did not demonstrate that the beneficiary exercised traditional managerial authority over the hiring, firing, and personnel actions associated with a managerial position.

On appeal, the petitioner re-emphasizes the importance of the beneficiary's duties, and claims that all of the employees managed by the beneficiary are professionals. The petitioner supplements the record with a chart outlining the names of the beneficiary's claimed subordinates, their position titles, degrees held, skills, and years of experience.

Upon review, the AAO concurs with the director's findings.

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 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 prove 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).

In this matter, the petitioner provided a lengthy description of duties for the beneficiary, both with the petition and in response to the request for evidence. However, the description of duties fails to specifically state the exact nature of the beneficiary's duties. In fact, a review of the details provided by the petitioner suggests that the beneficiary has been primarily engaged in the manifestation of the foreign entity's products and services, as opposed to maintaining managerial or supervisory authority over subordinate employees. For

example, duties such as “implementing and evolving appropriate measurements and metrics,” “establish testing strategies, processes and standards, and “collaborate with project management, production support, and software development teams to construct and maintain a schedule of changes to the software enterprise” are tasks that clearly require the beneficiary’s direct participation or involvement. Based on this, it appears that the beneficiary plays an intricate and active role in the implementation of the foreign entity’s software testing projects, and does not delegate his responsibilities to others. 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).

Upon review of the request for evidence, it is evident that the director specifically requested to differentiate between the amount of time the beneficiary devoted to managerial or executive duties and non-qualifying duties. Moreover, the director requested the petitioner to a statement clarifying what type of managerial and/or executive skills were required to perform these duties. Finally, the director asked the petitioner to clarify the degree of discretionary authority the beneficiary had over day-to-day operations in the foreign entity.

The petitioner’s response failed to adequately address the director’s queries. For this additional reason, the AAO is unable to conclude that the beneficiary was employed abroad in a qualifying capacity. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Despite the director’s request for additional information, the petitioner failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because many of the beneficiary's daily tasks, such as those listed above, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

On appeal, it is noted that for the first time, the petitioner claims that the beneficiary is in fact performing managerial duties by virtue of his supervision of professional employees. In support of this contention, the petitioner submits a list which identifies all the beneficiary’s claimed subordinate employees by name. The document further provides the educational qualifications of each subordinate, as well as their position titles, experience, and primary skills. This evidence, however, will not be considered.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). It is noted that the request for evidence specifically asked the petitioner to submit an overview of the beneficiary's subordinates, including their job titles, job duties, and a statement identifying all subordinate managers. However, the petitioner failed to submit such evidence in its January 23, 2008 response. If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

The record is not persuasive in establishing that the beneficiary was employed abroad in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

The second issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

In the letter of support dated January 7, 2008, the director described the beneficiary's proposed duties in the United States as follows:

[The beneficiary] will lead Software Quality Control & Software Quality Assurance efforts for CIT<sup>2</sup> development and maintenance projects. As a Software Test Manager with [the petitioner] in the United States, [the beneficiary] will be placed on [the petitioner's payroll], and he will report directly to [the petitioner's] management. He will report directly to [the petitioner's] Senior Vice President & Chief Technology Officer, IT Services business, Mr. [REDACTED]. The following is a detailed description of [the beneficiary's] proposed duties and responsibilities:

- Test strategy development, i.e. defining test/automation strategy and plan, test tool evaluation and selection, and developing skills and relevant roles, particularly around automation
  - Test process management and measurement, i.e. guiding quality policies, processes and standards, and defining quality goals and test measurements, analyze and define test coverage
  - Test project management i.e. test planning and effort estimation, task, and project scheduling, project tracking and reporting, financial analysis and ROI, metric tracking and presentation
  - Management of team of testers/engineers including goal-setting/managing both project & performance of cohesive team
- Management of general team issues, such as individual performance reviews, resources assignments, mentoring, etc.

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<sup>2</sup> The petitioner's client.

On January 18, 2008, the director requested additional evidence. Similar to the request pertaining to his position abroad, the director also requested additional evidence to establish that the beneficiary will be employed in a managerial or executive capacity in the United States. Specifically, the director asked the petitioner to differentiate between the amounts of time the beneficiary would devote to managerial or executive duties and non-qualifying duties, as well as a statement clarifying what type of managerial and/or executive skills were required to perform these duties. The director also asked the petitioner to clarify the degree of discretionary authority the beneficiary would exercise over day-to-day operations, and requested confirmation of the number of subordinate employees the beneficiary would manage, along with their job titles and job descriptions.

In response, the petitioner submitted a letter dated January 23, 2008. The petitioner did not address the beneficiary's proposed subordinates or their titles or positions in the United States. Instead, it reiterated the same overview of the beneficiary's proposed duties which the director had found to be insufficient. Specifically, the petitioner provided the identical description of the beneficiary's proposed position in the United States as it did in its letter dated January 7, 2008. No additional evidence, such as payroll records or specific details regarding the petitioner's other employees and the beneficiary's subordinates, was submitted.

On February 6, 2008 the director denied the petition. Again, the director noted that despite the petitioner's contentions that the beneficiary functioned in a qualifying position, the information submitted with regard to the beneficiary's proposed position in the United States indicated that he would be performing virtually identical duties to those he had performed abroad, such as various lead positions on teams and managing testing on products and systems. The director found that nothing in the record indicated that he would function at a senior level within the organizational hierarchy of the petitioner, and that the record was devoid of evidence of his authority to hire and fire personnel.

On appeal, the petitioner again claims that the beneficiary has satisfied the regulatory requirements. The petitioner claims that the beneficiary will plan, organize, supervise, direct, and coordinate professional personnel. As a result, the petitioner asserts that the beneficiary is thus supervising the required personnel, and concludes by requesting reconsideration of the denial.

Again, the AAO concurs with the director's findings.

For reasons similar to those discussed above, the petitioner has failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. As previously discussed, the AAO must review the petitioner's description of the job duties, pursuant to 8 C.F.R. § 214.2(l)(3)(ii), to determine whether the beneficiary primarily performs managerial or executive responsibilities and does not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533.

In this matter, the petitioner provided a brief description of the beneficiary's proposed duties, which was repeated again in response to the request for evidence. This description, like the description of his duties abroad, again suggests that the beneficiary will be primarily engaged in the manifestation of the petitioner's IT products and services, as opposed to maintaining managerial or supervisory authority over subordinate employees. For example, duties such as "test planning and effort estimation, task, and project scheduling,

project tracking and reporting, financial analysis and ROI, metric tracking and presentation,” “guiding quality policies, processes and standards, and defining quality goals and test measurements, analyze and define test coverage, and “defining test/automation strategy and plan, test tool evaluation and selection, and developing skills and relevant roles, particularly around automation” demonstrate that the beneficiary will be directly involved in the testing for the petitioner’s technology products and services. Again, 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. at 604.

Upon review of the request for evidence, it is evident that the director specifically requested that the petitioner differentiate between the amount of time the beneficiary devoted to managerial or executive duties and non-qualifying duties. Moreover, the director requested the petitioner to provide statements clarifying what type of managerial and/or executive skills were required to perform these duties, as well as the degree of discretionary authority the beneficiary had over day-to-day operations in the foreign entity. Finally, the petitioner was asked to submit information regarding the proposed subordinates of the beneficiary in the United States.

The petitioner’s response failed to adequately address the director’s queries. The petitioner merely resubmitted the previously-submitted description of duties, and provided no additional information to address the director’s queries. Moreover, no additional documentation or new evidence was submitted on appeal to address these issues. 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).

For this additional reason, the AAO is unable to conclude that the beneficiary will be employed in the United States in a qualifying capacity. For this additional reason, the appeal will be dismissed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.