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**U.S. Citizenship
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File: WAC 07 240 51476 Office: CALIFORNIA SERVICE CENTER Date: **JUL 08 2008**

IN RE: Petitioner: 
Beneficiary: 

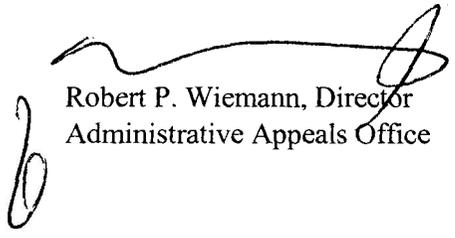
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, 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 its authorization to employ its President/Chief Executive Officer 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, an Arizona limited liability company, claims to be an affiliate of MacKenzie & Sons Technologies Ltd. located in Calgary, Canada. The petitioner states that it provides personalized computer services to business and residential clients. The beneficiary was initially granted a one-year period in L-1A status in order to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's employment for a two-year period.

The director denied the petition concluding that the petitioner did not establish that that the beneficiary would be employed 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, the petitioner submits an affidavit from the beneficiary, who seeks to clarify the nature of his duties for the United States company.

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

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed by the United States entity in a 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.

The nonimmigrant petition was filed on August 13, 2007. In a letter dated August 1, 2007, the petitioner described the beneficiary's duties as follows:

As President/CEO, he will continue to be responsible for the continued growth of the office. He has responsibility for expanding the company's presence in the U.S. through the development, management and enhancement of sales, marketing, training and customer support functions. In addition, he is responsible for supervising staff in the U.S. His responsibilities include day-to-day discretionary authority in coordinating and directing the work of his staff, as well as evaluation of their performance, and hiring and firing of personnel. [The beneficiary] has played a critical role in the company's expansion, and his continued presence is essential [to] our future growth plans.

The petitioner stated that the company has three employees including the beneficiary, a secretary/dispatcher and a computer technician. The petitioner indicated that it had contracted another person to "do marketing for commercial clients and yearly contract clients." The petitioner attached a "marketing agreement" between the company and [REDACTED], who was hired to provide 40 hours of marketing services between June 29, 2007 and July 29, 2007 for a fee of \$950.00.

On August 16, 2007, the director requested additional evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. Specifically, the director requested: (1) a more detailed description of the beneficiary's duties, the percentage of time he devotes to each of the listed duties, and job titles and position descriptions for all employees under his supervision; (2) copies of the petitioner's state quarterly wage reports for the last four quarters; (3) a list of all of the U.S. company's employees, including their names, job titles, beginning and end dates of employment and source of remuneration; (4) an organizational chart for the U.S. company; (5) a list of the specific goals and policies established and discretionary decisions exercised by the beneficiary during the previous six

months; and, (5) a specific day-to-day description of the duties the beneficiary has performed over the last six months.

In a response dated November 5, 2007, the petitioner provided the following position description for the beneficiary:

[The beneficiary's] responsibilities include: (1) development, management and enhancement of sales, marketing, and customer support functions (70%); and (2) supervision and training of U.S. staff (30%). His responsibilities include day-to-day discretionary authority in coordinating and directing the work of his staff, as well as evaluation of their performance, and hiring and firing of personnel. [The beneficiary] directly supervises [REDACTED] (Computer Technician) and [REDACTED] (Cold Call Specialist). He is currently interviewing for second Computer Technician, and anticipates hiring a third Computer technician within the next six months.

* * *

As President/CEO, [the beneficiary] directs the entire management of the U.S. company, establishes the goals and policies of the company, exercises wide latitude in discretionary decision-making and is accountable only to himself as the Managing Member of the LLC.

Over the last six months, [the beneficiary] has established a network of contracts for the purpose of increasing the Company's business, established a training program for the computer technicians, developed a quality assurance program to ensure client satisfaction. In addition, [the beneficiary] has developed a program of monthly maintenance contracts for small and medium business to ensure a constant and increased income flow. [The beneficiary] has also developed a number of new avenues for advertising the company's services.

On a daily basis, [the beneficiary] follows up with clients to ensure satisfaction with services performed by the staff and to develop new services for clients. He holds daily meetings with the computer technicians for training purposes and also to determine if there are additional services that can be performed for the clients. He also spends time in the field to keep on top of the many changes and upgrades always occurring in the field. [The beneficiary] also networks daily with present and prospective clients. In addition, he also develops new advertising avenues for the Company.

The petitioner provided an organizational chart for the U.S. company which depicts two employees under the beneficiary's supervision. The petitioner indicated that the "cold call specialist" is responsible for "marketing the Company's services by cold calling potential clients. The petitioner further indicated that it employs one contract computer technician who responds directly to clients and determines whether telephone assistance or on-site services are needed. The petitioner stated that the cold call specialist receives a monthly salary of

\$948, while the technician is paid by commission based upon services and products provided. The petitioner did not provide the date of hire for either employee.

The petitioner did not provide the requested quarterly wage reports, noting that all of its employees are contract employees. In lieu of the wage reports, the petitioner submitted bank statements for its employee payroll bank account for the months of March 2007 through August 2007, some of which bear handwritten notations indicating which employees received specific check payments.

The director denied the petition on November 21, 2007, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. Upon review of the evidence, the director concluded that the beneficiary would be performing "all of the day-to-day operations of the business." The director noted that the petitioner's description of the beneficiary's duties was vague and merely paraphrased the statutory definitions of definitions of managerial and executive capacity. The director further found that the petitioner had failed to establish that the beneficiary would be supervising a subordinate staff of managerial, professional, or supervisory personnel who would relieve him from performing non-qualifying duties, or that he would manage an essential function of the organization.

On appeal, the petitioner clarifies that it "utilizes contract technical personnel to perform the actual computer services provided to clients," and states that it continues to employ one contract technician and one cold call specialist. The beneficiary provides the following information regarding his job duties:

I spend approximately 70% of my time in overall management of the Company. I am solely responsible for and utilize full discretion and authority in developing the Company's overall marketing and growth strategy, including identifying and cultivating new client sources, and developing strong and mutually beneficiary relationships with personal and telephone contact with current and potential clients. Those contacts also provide the Company with first-hand information on the types of issues facing the Company's clients. My responsibilities also include setting up internal company procedures, such as accounting.

* * *

In addition to my duties in overall development of the Company, I spend approximately 30% of my time in the hiring, supervision, evaluation and termination of contract personnel. Because the best way to evaluate a computer technician's ability to service clients is to observe him in the field with clients, I occasionally accompany the technician on field calls. In addition, I oversee the establishment of training programs and materials for contract personnel. I also have independent discretionary authority to hire and terminate all personnel.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. 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(1)(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 definitions of executive and managerial capacity have two separate components. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Here, while the beneficiary evidently exercises discretion over the day-to-day operations of the petitioning company as its president and chief executive officer, the petitioner's description of the beneficiary's job duties, considered in light of the totality of the evidence submitted, fails to establish that he would perform primarily managerial or executive duties under the extended petition. The fact that the 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 (Feb. 26, 1987).

Although the petitioner has provided a breakdown of how the beneficiary's time will be divided among his various responsibilities, the job description provided is too ambiguous to convey any understanding of what tasks the beneficiary will perform on a day-to-day basis. For example, the petitioner indicated that the beneficiary would devote 70% of his time to "development, management and enhancement of sales, marketing, and customer support functions." This general statement was not responsive to the director's request for a detailed description of the beneficiary's duties and the percentage of time he devotes to each specific duty, and it is insufficient to establish that the beneficiary primarily performs managerial duties associated with the "sales, marketing and customer support functions." The petitioner indicated that the beneficiary devotes the remaining 30 percent of his time to "supervision and training of U.S. staff;" however, as discussed further below, the petitioner has not submitted adequate evidence of its staffing levels, and the evidence of record does not establish that supervision of subordinate managerial, professional or supervisory subordinate personnel requires a significant proportion of the beneficiary's time. Overall, the petitioner's response to the directors' request for a detailed position description provided little insight into the nature of the beneficiary's daily duties. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will 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).

The petitioner also provided a description of the beneficiary's "day-to-day" duties which suggests that he is directly involved in the petitioner's sales, marketing, and customer service activities, rather than managing such activities through subordinate personnel. The petitioner indicated that the beneficiary "established a network of contacts," "develops new advertising avenues," "follows up with clients to ensure satisfaction," "networks daily with present and prospective clients," and "spends time in the field to keep on top of the many changes and upgrades always occurring the field." On appeal, the petitioner confirms that the beneficiary continues to have "substantial personal and telephone contact with current and potential clients."

Furthermore, although the petitioner indicates that the beneficiary merely occasionally accompanies computer technicians on field calls, other evidence in the record suggests that the beneficiary is directly involved in providing the services of the company. The petitioner provided copies of several work orders as evidence of its business activities during the first year of operations which identify the beneficiary as "service technician." As discussed further below, the petitioner has also failed to establish that it employs sufficient lower-level staff to relieve the beneficiary from performing non-qualifying duties. Overall, the petitioner's description of the beneficiary's daily duties indicates that he would primarily perform sales, marketing and customer service duties that do not fall under the statutory definitions of managerial or executive capacity. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

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. Here, the petitioner fails to meaningfully 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 administrative or 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 duties, as discussed 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 manager or executive. *See e.g., IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). While the beneficiary exercises discretion over the day-to-day affairs of the business as president and owner, the fact that the beneficiary owns and manages the business is insufficient to establish that the beneficiary is employed in a managerial or executive capacity. Again, the actual duties themselves reveal the true nature of the employment. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

At the time of filing, the petitioner was a one-year-old company engaged in providing computer-related services to business and residential clients. In August 2007, the petitioner claimed to employ the beneficiary, a secretary-dispatcher, and a computer technician, as well as a contracted marketing specialist, and it claimed to be in the process of hiring a second technician. In response to the request for evidence in November 2007,

the petitioner claimed to employ the beneficiary, a computer technician, and a "cold call specialist." It provided no explanation regarding the "secretary-dispatcher" position or the second computer technician who had yet to be hired. At the same time, the petitioner claimed to have a substantial increase in business. Upon review of the evidence, it appears that the contracted marketing person and the "cold call specialist" are the same person, and that this individual was hired by the company in June 2007 to perform 40 hours of marketing work over a one-month period, according to the terms of the marketing agreement submitted with the initial petition. The petitioner failed to provide evidence that this employee was in fact working for the company as of August 2007. Similarly, the petitioner has failed to provide documentary evidence of payments to the computer technician, other than handwritten notations on its bank statements. Although the petitioner claims to have paid this individual nearly \$10,000 in 2006, it did not provide evidence in the form of an IRS Form 1099 or copies of any paychecks issued to this employee. Although the director requested quarterly wage reports that were unavailable, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(D) do specifically require the petitioner to submit evidence of wages paid to employees during the first year of operations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, even if the petitioner had established that it employs the beneficiary and a computer technician, it is noted that the petitioner reasonably requires employees to market its services, advertise the petitioner's business, respond to customer inquiries and perform other customer service functions, perform the company's technical services for all types of clients, maintain the company's day-to-day finances, and perform routine clerical and administrative tasks associated with operating any small business. Although the petitioner states that the beneficiary "manages" the day-to-day operations, the record does not clearly demonstrate that a single computer technician would perform most or all of the non-managerial and non-executive tasks associated with operating the petitioner's business. Based on the petitioner's claims, it does not appear that one contracted computer technician would even relieve the beneficiary from providing the petitioner's technical services to clients.

Upon review, it is clear that the director considered the reasonable needs of the company and concluded that the petitioner was incapable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act. Contrary to the petitioner's assertions, the record does not establish that the beneficiary was relieved from primarily performing non-managerial duties associated with the company's sales, marketing, advertising, customer service, financial, and administrative functions.

Collectively, the lack of a subordinate staff brings into question how much of the beneficiary's time can actually be devoted to the claimed managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, 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 AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties. As discussed above, the petitioner has not established this essential element of eligibility.

In this case, while the beneficiary evidently exercises discretion over the business as the owner of the business and sole full-time employee, the petitioner has not established that his primary duties are the high-level duties contemplated by the statutory definition of executive capacity. Nor does the record establish that the beneficiary will primarily manage a subordinate staff of managerial, supervisory or professional employees, or an essential function of the organization, such that he would be employed in a primarily managerial capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A).

Although the petitioner indicates that it intends to hire additional staff in the near future, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, the appeal will 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.

ORDER: The appeal is dismissed.