

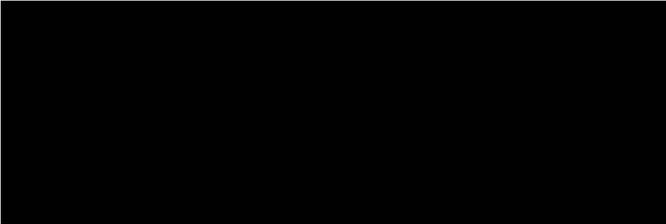
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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File: WAC 08 218 51342 Office: CALIFORNIA SERVICE CENTER Date:

JUL 28 2009

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa and the matter is now before the Administrative Appeals Office (AAO). The AAO will withdraw the director's decision and remand the petition to the director for further consideration and entry of a new decision.

The petitioner filed this nonimmigrant visa petition seeking to employ the beneficiary as an L-1B intracompany transferee with specialized knowledge pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a software development and consulting company, is an affiliate of Yomari Pvt. Ltd., located in Kathmandu, Nepal. The petitioner seeks to employ the beneficiary in the position of software engineer based at its Minneapolis, Minnesota office.

The director denied the petition on September 29, 2008. Citing to section 214(c)(2)(F) of the Act, as created by the L-1 Visa Reform Act of 2004, the director denied the petition as an impermissible arrangement to provide labor for hire at the worksite of an unaffiliated employer.

The petitioner subsequently filed an appeal. The petitioner 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 contains numerous misstatements of fact which suggest that the director has mistakenly attributed the statements of another company to the petitioner. Counsel emphasizes that the petitioner never stated that the beneficiary will work offsite at the worksite of an unaffiliated employer, and that the director's conclusion were not based on the evidence the petitioner submitted.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization. The petitioner must also demonstrate that the beneficiary seeks to enter the United States temporarily in order to continue to render services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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.

Under section 101(a)(15)(L) of the Act, an alien is eligible for classification as a nonimmigrant if the alien, among other things, will be rendering services to the petitioning employer "in a capacity that is managerial, executive, or involves specialized knowledge." Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides the statutory definition of specialized knowledge:

For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines specialized knowledge as:

[S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

Section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (the "L-1 Visa Reform Act"), in turn, provides:

An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 101(a)(15)(L) and will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent shall not be eligible for classification under section 101(a)(15)(L) if –

- (i) the alien will be controlled and supervised principally by such unaffiliated employer; or
- (ii) the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.

Section 214(c)(2)(F) of the Act is applicable to all L-1B petitions filed after June 6, 2005, including petition extensions and amendments for individuals that are currently in L-1B status. *See* Pub. L. No. 108-447, Div. I, Title IV, § 412, 118 Stat. 2809, 3352 (Dec. 8, 2004).

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker on August 6, 2008, and indicated that the beneficiary will be working as a software engineer based at its Minneapolis, Minnesota headquarters. In response to Question 13 on the Form I-129 Supplement L, the petitioner responded "No" when asked: "Will

the beneficiary be stationed primarily offsite (at the worksite of an employer other than the petitioner or its affiliate, subsidiary, or parent)?" The petition was accompanied by a ten-page letter from the petitioner in which it described the beneficiary's proposed assignment in the United States, noting that the beneficiary will be contributing to the development of the petitioner's Retail Intelligence solution, which the company hopes to introduce to the market as a licensed software application in early 2009. The petitioner also reiterated that the beneficiary's worksite will be at the company's Minneapolis, Minnesota offices.

In the request for evidence issued on August 19, 2008, the director nevertheless requested additional evidence related to the beneficiary's "L-1B Offsite Employment." In response to the RFE, the petitioner once again stated that the beneficiary's work will be completed entirely at the petitioner's own site, but nevertheless made a good faith effort to comply with all requests made in the RFE.

The director denied the petition on September 29, 2008, concluding that "the petitioner has not established that the placement of the beneficiary at the worksite of the unaffiliated employer is not merely labor for hire."

In denying the petition, the director noted that the beneficiary will perform as a software engineer "for a project at a Minnesota location of a worldwide provider of banking and financial services." The director noted that the project "involves the consolidation and modification of the client's pre-existing Customer Relationship Management (CRM) system." Neither of these statements is accurate. The petitioner has not stated that the beneficiary will work at a client site, his proposed assignment does not involve modification of a client's CRM system, and the petitioning company does not provide services in the CRM field.

The decision contains numerous other errors. The decision at page 3 includes a quoted paragraph attributed to the petitioner, yet, upon careful review of the record, the AAO finds that the petitioner made no such statements. The director also states that the petitioner "is a branch of the parent company located in India," when in fact the petitioner has no parent company and has one affiliate located in Nepal. While the decision contains a few references to actual statements made by the petitioner, a review of the totality of the decision reflects that the director did not take into account the facts and arguments set forth by the petitioner in the initial petition and in response to the RFE.

On appeal, counsel addresses the director's factual errors and the resulting erroneous conclusion that the beneficiary will be placed at the worksite of an unaffiliated employer. Counsel asserts that the denial is based on an incorrect and incomplete reading of the petition. Counsel emphasizes that the beneficiary's assignment is not related to any specific client contract for IT services, but rather he will be involved in the development of the petitioner's own Retail Intelligence software solution, which is "conceptualized, designed, developed, published, sold and maintained by the petitioner."

Upon review, the director's decision dated September 29, 2008 will be withdrawn, and the matter will be remanded to the director for further consideration and entry of a new decision. The decision was based solely on the incorrect finding that the beneficiary would be providing client services at the worksite of an unaffiliated employer. Furthermore, the director did not take into account the majority of the petitioner's actual claims with respect to the beneficiary's specialized knowledge and the application of such knowledge in the U.S. assignment.

On remand, the director is instructed to review and weigh the evidence submitted in support of the initial petition and in response to the RFE in order to determine whether the petitioner has established that the beneficiary possesses specialized knowledge and whether he has been and will be employed in a position requiring specialized knowledge. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time.

Specifically, additional evidence may be required to establish that the petitioner has an ongoing internal development project requiring the beneficiary's services in a specialized knowledge capacity. Although the petitioner has indicated that the beneficiary's services are essential to the timely completion of its Retail Intelligence product, to be launched in 2009, the evidence of record indicates that "Yomari Retail Intelligence" was listed among the petitioner's solutions on its public web site as of September 2008 when the petitioner responded to the RFE. The petitioner should be instructed to clarify the launch date for the solution and indicate whether it has already been licensed to U.S. clients. If development and launch of the product was in fact already completed prior to the adjudication of the petition, this would raise questions regarding the accuracy and completeness of the beneficiary's proposed job description.

In addition, it has not been established that the knowledge required to develop the Retail Intelligence product is indeed specialized. The petitioner notes that the product encompasses "a unique combination of computer languages, databases, tools and applications," and that it would require 12 to 18 months to train a new hire to become a productive member" of the Retail Intelligence team. The AAO notes that the product is built entirely on Oracle and other third-party retail data warehouse technologies. The petitioner acknowledges that other workers employed with unrelated companies have advanced knowledge of the same computer languages and databases but claims that "no U.S. worker possesses [the beneficiary's] knowledge of how we have used these computer languages and databases to develop our own unique proprietary software application." The petitioner has not, however, explained how the knowledge possessed by the beneficiary is so complex that it would require a full year or longer to train a similarly experienced software engineer who already possesses advanced knowledge of the same underlying retail data warehousing technologies. The beneficiary himself was hired in October 2006 immediately after completing his bachelor's degree and assigned to implement customized solutions for clients after a three-month trainee/probationary period. Further, the petitioner states in its 2007 annual report that "[t]here are many other small boutique software companies that offer similar, though not exact, software packages as the ones that we intend to offer." The record as presently constituted does not establish that the beneficiary's experience with the Retail Intelligence product alone constitutes specialized knowledge.

However, in light of the critical errors and misstatements of fact present in the director's decision dated September 20, 2008, the director's decision will be withdrawn and the petition will be remanded for further review and entry of a new decision. As always 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.

ORDER: The decision of the director is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.