

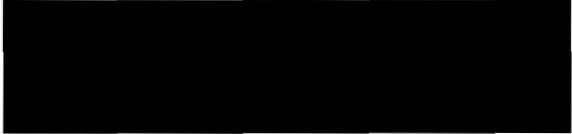


U.S. Citizenship
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PUBLIC

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File: WAC 08 114 51478 Office: CALIFORNIA SERVICE CENTER Date: MAR 04 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)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
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 visa petition seeking to employ the beneficiary in the position of senior project 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 under the laws of the State of Washington and is allegedly a "technology, marketing, and strategy consulting company."

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 to the petitioner asserts that the director erred and that the beneficiary's duties will be primarily those of a manager supervising professional employees. In support, counsel submits additional evidence, including a job description for the beneficiary's proposed subordinates in the United States.

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

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner claims that the beneficiary will primarily perform managerial duties under section 101(a)(44)(A) of the Act. Although the petitioner does not claim that the beneficiary will primarily perform executive duties under section 101(a)(44)(B) of the Act, the AAO will nevertheless also consider that classification. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

Counsel claims in his "legal brief" that the beneficiary "will be filling one of the open Project Manager

positions" in the United States. The petitioner describes the beneficiary's proposed duties in a "powerpoint summary" appended to the initial petition as follows:

- Schedules and attends all meetings with the client
- Captures requirements, action items, deadlines
- Writes the Statement of Work (SOW) for the project
- Creates the project plan (including milestones)
- Holds internal and external kick-off meetings
- Communicates regularly with the client (weekly status reports, sync calls)
- Coordinates the creation of content between the development team and subject matter experts
- Ensures that other roles meet milestones
- Closes out the project internally and externally
- Ensures that the purchase order (PO) is submitted

Counsel also claims that each "team member" to be managed by the beneficiary will be "a professional who possesses at least a U.S. bachelor's degree or its equivalent."

On March 18, 2008, the director requested additional evidence. The director requested, *inter alia*, an organizational chart for the United States operation, including a list of all employees to be under the beneficiary's supervision; descriptions of the job duties and educational levels of all subordinate employees; and a more detailed description of the beneficiary's proposed duties in the United States.

In response, the petitioner further described the beneficiary's proposed duties in the United States in a letter dated May 20, 2008. The petitioner indicates that the beneficiary's "responsibilities will be the same" as his duties in India and describes these duties, which are also outlined in an attached "individual profile summary," as follows:

- Work to ensure high levels of employee engagement and motivation. Ensuring right fit of job and team member. Responding to concerns of teams by sensitively resolving the issue or escalating the same to the management.
- Developing the team members as professional with appropriate skilling [sic], direction and supervision. Providing proper guidance about company policies, best practices and use of standards and processes.
- Work with clients (external/internal) to identify their needs for our services and transform the same into presentable, effective, relevant and workable deliverable descriptions and execution approach. Identify scope exclusions and project risks.
- Assess project execution needs including skills, human resources, equipment, infrastructure and stakeholders' schedules.
- Gather requirements and establish solution needs. Manage project specification – act as primary project architect.
- Establish project teams, arranges and co-ordinates availability of required infrastructure etc., establishes communication plans.
- Plan project execution by coordinating a deliverable breakdown, resource assignment

- and work schedules.
- Monitor project execution by keeping track of deliverable statuses, actual effort, context changes etc. Ensure effective and efficient execution by supervising the activities involving deliverable definition, design, development, validation, submission and sign-off. Manage schedule, effort and cost variances.
- Maintain communication with all project stakeholders and remain abreast with the relevant information about project progress and deliverable statuses. Continuously validate project priorities against relevant project contexts. Ensure that all relevant information is available to the team, client and other stakeholders.

The petitioner also notes that the beneficiary will devote approximately 80% of his time to "project management" and 20% of his time to "administrative functions," which includes assisting with informal training and making presentations.

Furthermore, counsel claims in an undated "legal brief" that the beneficiary will supervise "two professionals, and possibly a third professional (whose L1 petition is pending)." Counsel describes the two workers who are already employed by the petitioner as having earned university degrees. Counsel submitted an organizational chart portraying the beneficiary as supervising these two individuals, who are also described as "project managers." However, although counsel submits copies of the two claimed subordinates' resumes, the record is devoid of evidence pertaining to the specific duties to be performed by these two workers.

On June 24, 2008, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity. The director specifically notes that the petitioner failed to establish that the positions to be supervised by the beneficiary require those employees to have earned at least a bachelor's degree. Therefore, it has not been established that the beneficiary will supervise professional employees.

On appeal, counsel asserts that the beneficiary's duties are primarily those of a manager. Counsel argues that the beneficiary will supervise professional employees. In support, counsel submits additional evidence, including a job description for the beneficiary's proposed subordinates 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.*

As a threshold matter, it is noted that counsel's attempt on appeal to supplement the record with evidence pertaining to the job duties of the beneficiary's claimed subordinates was inappropriate and will not be considered by the AAO. In her Request for Evidence, the director specifically requested that the petitioner describe the duties of the beneficiary's claimed subordinate workers in the United States. Therefore, as the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated, counsel may not submit this evidence for the first time on

appeal. The AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Furthermore, the petitioner's plan to employ additional workers in the future, e.g., other beneficiaries of pending non-immigrant visa petitions, may not be used to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. 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). Accordingly, only the beneficiary's claimed supervision of the two workers currently employed by the petitioner may be considered in determining whether the beneficiary will primarily perform qualifying duties in the United States.

In this matter, the record fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a job description which fails to describe the beneficiary as primarily performing qualifying duties. For example, the petitioner states that the beneficiary will devote 80% of his time to "project management" and that he will work directly with clients to identify service needs, assess project execution needs, gather requirements, act as the primary project architect, plan and schedule project execution, and maintain communications with all stakeholders. However, absent evidence to the contrary, it appears that these duties are non-qualifying operational tasks necessary to the provision of the petitioner's services. The petitioner also claims that the beneficiary will devote 20% of his time to performing administrative tasks. However, similarly, it has not been established that these administrative tasks, e.g., assisting with informal training and making presentations, will be qualifying managerial or executive duties. Finally, the petitioner claims that the beneficiary will supervise two other project managers in the performance of his duties. However, as the petitioner failed to sufficiently describe the duties of these two subordinate employees or explain how, exactly these workers will relieve the beneficiary of the need to perform the non-qualifying tasks ascribed to him, if at all. 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). It also cannot be discerned whether these subordinates are professionals due to the petitioner's failure to submit the necessary job descriptions. *See infra*. 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 (Reg. Comm. 1972).

Accordingly, it appears that the beneficiary will "primarily" perform non-qualifying administrative, operational, and first-line supervisory tasks in his position as "senior project manager." 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). The fact that the petitioner has given the beneficiary a managerial or executive title does not establish that the beneficiary will actually perform managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y.

1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As asserted in the record, the beneficiary will directly supervise two "project managers." However, as these two workers are not described in the organizational chart as having supervisory responsibilities over other employees, it does not appear as if the project managers are supervisory or managerial employees.

Furthermore, the record is also not persuasive in establishing that the project managers are "professional" employees. In evaluating whether the beneficiary will manage professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

In this matter, the petitioner has not established that a bachelor's degree is actually necessary to perform the duties of either subordinate "project manager" position. As noted above, the petitioner failed to specifically describe the duties of these positions, even though this evidence was specifically requested by the director in the Request for Evidence.¹ Once again, 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). Accordingly, the record is not persuasive in establishing that these are "professional" positions, and, thus, it appears that the beneficiary will be a first-line supervisor of two non-professional employees. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.²

¹It is noted that, even if the AAO considered the job descriptions submitted on appeal for the beneficiary's claimed subordinate workers, these job descriptions would fail to establish that either of these positions is a "professional" position or that either position will relieve the beneficiary of the need to primarily perform non-qualifying duties. These descriptions indicate that the subordinate "project managers" will work directly with clients, gather requirements, maintain communications with stakeholders, provide knowledge leadership, engage in training, and make presentations. However, nothing in these descriptions establishes that a bachelor's degree or higher is necessary to perform these tasks. Accordingly, even if the descriptions submitted on appeal were considered, the petitioner has failed to establish eligibility for the benefit sought.

²Furthermore, although the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record would not support this position if taken. The term "function manager" applies

Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The job description provided for the beneficiary fails to establish that the beneficiary will primarily perform qualifying duties. To the contrary, it appears that the beneficiary will be primarily employed as a first-line supervisor of two employees and will perform the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.³

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. 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 in managing the essential function, 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 will manage the function rather than perform the tasks related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's job description fails to document how the beneficiary's duties will be primarily managerial. As explained above, the record fails to establish that the beneficiary will primarily perform qualifying managerial duties as a first-line supervisor of two non-professional employees. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will primarily perform 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).

³Counsel cites the Foreign Affairs Manual (FAM) as authority. It must be noted that the FAM is not binding upon USCIS. *See Avena v. INS*, 989 F. Supp. 1 (D.D.C. 1997); *Matter of Bosuego*, 17 I&N 125 (BIA 1979).

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity.

The petitioner indicates in its May 20, 2008 letter that the beneficiary's "responsibilities will be the same" as his duties in India. Accordingly, as this job description was reproduced above and also appears in the record, it will not be repeated here.

The petitioner also submitted an organizational chart for the foreign employer. This chart, and attached employee list, indicates that the beneficiary supervised approximately six subordinate workers. None of the subordinate workers is described as having supervisory or managerial responsibilities over other workers. Furthermore, the petitioner describes these six subordinate workers as performing a variety of computer related tasks. However, the record is devoid of evidence establishing that a bachelor's or higher degree, or its equivalent, is necessary to perform the duties ascribed to any of the positions.

Upon review, it has not been established that the beneficiary primarily performed managerial or executive duties abroad. To the contrary, and similar to the proposed United States position, it appears that the beneficiary primarily performed administrative, operational, and first-line supervisory tasks abroad. 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; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Also, to the extent the beneficiary supervised subordinate workers, it appears that this was a non-qualifying, first-line supervisory task. Once again, a managerial or executive employee generally must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. Section 101(a)(44) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Similar to the beneficiary's proposed subordinates in the United States, the record is not persuasive in establishing that any of the beneficiary's subordinates abroad was a managerial, supervisory, or professional worker.

Accordingly, as the petitioner failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity, the petition may not be approved for this additional reason.

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 at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

The FAM provides guidance to employees of the Department of State in carrying out their official duties, such as the adjudication of visa applications abroad. The FAM is not relevant to this proceeding.

