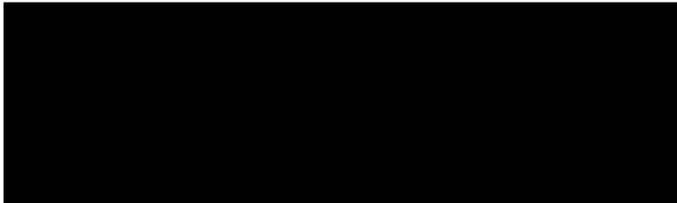


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U.S. Citizenship
and Immigration
Services



D7

File: EAC 08 059 51312 Office: VERMONT 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, 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 visa petition seeking to employ the beneficiary in the position of vice president-delivery 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 Commonwealth of Virginia and is allegedly in the "e-learning technologies" business.¹

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 asserted that the director erred and that the beneficiary will be primarily employed in an executive capacity in the United States. Also, on November 17, 2008, almost seven months after filing the appeal, counsel attempted to submit additional evidence to the AAO pertaining to the beneficiary's proposed duties 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.

¹It is noted that, according to the corporate records of the Commonwealth of Virginia, the petitioner's corporate status was automatically terminated on July 2, 2007. Therefore, since the petitioner has not taken steps under Virginia law to seek reinstatement, the company can no longer be considered a legal entity in the United States. Therefore, if the appeal were not being dismissed for the reasons set forth herein, this would call into question the petitioner's continued eligibility for the benefit sought.

- (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.

Although the petitioner claims that the beneficiary will be employed in an "executive" capacity in the United

States, the AAO will consider both the managerial classification and the executive 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).

The petitioner claims in the Form I-129 to employ 3 workers and describes its business in a letter dated December 17, 2007 as the provision of "end-to-end 'Learning Solutions'" to customers. The petitioner claims to transform "unstructured raw content" into "effective learning solutions by leveraging the expertise of a team of Instructional Design specialists." The instructional strategy is then "brought to fruition by a highly creative multimedia team of Graphic Artists, Content Writers, Animators, and Programmers."

The petitioner also describes the beneficiary's proposed job duties in the United States as "vice president, delivery" in the December 17, 2007 letter. The petitioner indicates that the beneficiary will perform the same duties in the United States as he currently provides in India, which are described as follows:

[H]e is responsible for the areas of operations and strategic planning for business unit. On the operational side, [the beneficiary] has helped [the foreign employer] put a structure to the growth and has successfully delivered value added services such as blended learning and instructor led training. He educates and trains the delivery managers on the industry best practices with an objective of overall industry knowledge enhancement. He is responsible for improving delivery practices by sharing industry best practices and working with teams to develop key corporate accounts. He leads a team of learning development professionals providing services to fortune 100 companies. [The beneficiary] acts as a chief mentor and developed a mentoring framework to train the business and the delivery teams.

The petitioner further describes the beneficiary's proposed duties as follows:

[The beneficiary's] primary responsibility would be to fuel growth of business from existing clients for [the petitioner]. He will be responsible to build an on-site delivery team comprising of Project/Delivery Managers. He will direct and oversee the providing of systems and processes that would allow [the petitioner] to be the preferred partner for fortune 100 companies.

Specifically, [the beneficiary] will be charged with overall unit operations and management of projects from both, financial as well as leading the team of project managers/delivery managers, running his unit (more than one vertical) as a profit center across all projects/deliveries. He is responsible for increasing revenues from existing customers, reducing costs, and/or optimizing profitability for the [petitioner] and at a microlevel, for relationships more than one vertical....

Beneficiary will report directly to [the global delivery head]. With only general oversight and direction from [the global delivery head], [the beneficiary] will have autonomy to create and direct productivity, develop new value added solutions to existing clients, support global delivery, oversee and lead setting up dedicated teams, develop new systems and define efficient processes. He will also establish and manage cost effective outsourcing options.

The petitioner submitted an organizational chart for the United States operation. The chart shows the beneficiary reporting directly to the global delivery head. Although the chart indicates that the beneficiary will supervise 3 "project managers," it appears that these positions are vacant. Therefore, it does not appear that the beneficiary would supervise any subordinate workers upon petition approval.

On January 2, 2008, the director requested additional evidence. The director requested, *inter alia*, job descriptions for the beneficiary's proposed subordinates in the United States.

In response, the petitioner submitted a description of the proposed "project manager" positions. These proposed positions are generally described as working directly with clients in providing the petitioner's services.

On March 26, 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.

On appeal, counsel asserts that the beneficiary will primarily perform executive duties in the United States. In support, counsel submits a brief and cites legacy Immigration and Naturalization Service (INS) Operating Instructions and U.S. Citizenship and Immigration Services (USCIS) internal memoranda. Also, on November 17, 2008, almost seven months after filing the appeal, counsel attempted to submit additional evidence to the AAO pertaining to the beneficiary's proposed duties 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 issue, it is noted that future hiring plans may not be considered in determining whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. 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, the proposed hiring of 3 "project managers" may not be considered by the AAO in determining whether the beneficiary will more likely than not primarily perform qualifying managerial or executive duties in the United States.

Furthermore, counsel's attempt to supplement the record almost seven months after the filing of the instant appeal was inappropriate, and the evidence submitted will not be considered by the AAO. The regulations require appellants to file "the complete appeal including any supporting brief" within 30 days after service of the decision. 8 C.F.R. § 103.3(a)(2). Although the Form I-290B and the regulations permit a brief or additional evidence to be filed directly with the AAO within 30 days of the filing of appeal, the petitioner in this matter indicated in the Form I-290B that its brief and additional evidence was attached to the appeal. *See* 8 C.F.R. § 103.3(a)(2)(vii). According, not only did the petitioner attempt to supplement the record almost

seven months after filing the instant appeal, the petitioner had already indicated that its brief and additional evidence were attached to the Form I-290B. Therefore, the AAO will not consider these additional materials for any purpose. Regardless, as the petitioner was put on notice in the Request for Evidence of deficiencies in the record pertaining to the beneficiary's proposed duties in the United States, the petitioner may not submit new evidence on appeal addressing these deficiencies. *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.

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary's "primary responsibility would be to fuel growth of business from existing clients." He will also build an "on-site delivery team" and will "direct and oversee" the provision of services. Finally, he will be "charged with overall unit operations and management of projects" by "increasing revenues from existing customers, reducing costs, and/or optimizing profitability." However, the petitioner does not explain what, exactly, the beneficiary will do to "fuel growth of business" or how he will "direct and oversee" client projects without first hiring a subordinate staff of project managers, who are described in the record as principally coordinating the provision of these services. The fact that a petitioner has given a beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that a 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). 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).

Consequently, the record is not persuasive in establishing that the beneficiary will primarily perform qualifying duties. The petitioner has not established that the beneficiary's "primary responsibility," i.e., fueling business growth from existing clients, is a bona fide managerial or executive duty. To the contrary, this duty appears to be a sales, marketing, or customer relations tasks which, without evidence to the contrary, will not rise to the level of being a qualifying managerial or executive duty. As the record does not establish that the beneficiary will be relieved of the need to perform the non-qualifying tasks inherent to this ascribed duty, it has not been established that the beneficiary will primarily perform managerial or executive duties in the United States. Furthermore, the record does not establish that the beneficiary will be relieved of the need to perform the non-qualifying tasks inherent to his duties, chiefly the provision of services to customers. Although the petitioner is described as directing and overseeing client projects, the petitioner has not yet employed any of the subordinate "project managers" who are described as coordinating the provision of these services. Accordingly, it appears more likely than not that the beneficiary will perform these non-qualifying administrative and operational tasks until the "project managers" are hired. Therefore, it appears that the beneficiary will "primarily" perform the tasks necessary to the provision of a service or the production of a product. 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 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 noted above, as the "project managers" have not yet been hired, the beneficiary will not supervise any employees in the United States. Furthermore, although counsel does not specifically argue 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 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 will manage 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 vague job description fails to document that the beneficiary's duties will be primarily managerial or executive. Also, as explained above, it appears more likely than not that the beneficiary will primarily perform non-qualifying administrative or operational tasks. 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 or executive, if any, 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). Accordingly, 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. As explained above, it appears instead that the beneficiary will primarily 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.

It is important to note that, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).²

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.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary was employed abroad in a position that was primarily managerial or executive in nature. 8 C.F.R. § 214.2(l)(3)(iv).

The petitioner described the beneficiary's job duties abroad in the December 17, 2007 letter. As these duties were described as being identical to the beneficiary's proposed duties in the United States, this job description was already reproduced verbatim in this decision, *supra*. The petitioner also submitted an organizational chart for the foreign employer. This chart shows the beneficiary supervising a "team" consisting of "skill head programming," "skill head arts," "skill head QA," "skill head cont tech," "PMs," and "BMs."

Upon review, the record is not persuasive in establishing that the beneficiary was employed abroad in a primarily managerial or executive capacity. The beneficiary's vague job description fails to describe the beneficiary as primarily performing managerial or executive duties abroad. Once again, the fact that a petitioner has given a beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that a beneficiary actually performed managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary's duties were 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, *aff'd*, 905 F.2d 41. Once again, 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.

²Finally, it is noted that counsel's reliance on legacy INS Operating Instructions and USCIS memoranda is inappropriate. Unlike the Act, the regulations, and precedent decisions, agency policy memoranda and Operating Instructions do not have the force of law and do not vest petitioners with any substantive legal rights. Instead, Operating Instructions and policy memoranda are simply internal directives. *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1024 (9th Cir.1985); *see also Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004). Regardless, as the petitioner has failed to establish that the beneficiary will more likely than not primarily perform qualifying duties in the United States, the petitioner is not eligible for the benefit sought. This is paramount to the analysis, and neither the Operating Instructions nor internal memoranda could reasonably be construed to relieve the petitioner of the need to establish its eligibility under the Act and the regulations.

Furthermore, the petitioner failed to describe the duties of the beneficiary's claimed subordinate employees. Absent job descriptions for the subordinate workers, it cannot be concluded that the beneficiary was relieved of the need to perform non-qualifying tasks by a subordinate staff or that he supervised and controlled the work of other supervisory, managerial, or professional workers. 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. If initial evidence does not demonstrate eligibility for the benefit sought, USCIS may deny the petition. 8 C.F.R. § 103.2(b)(8)(ii).

Accordingly, the petitioner has not established that the beneficiary was employed abroad in a primarily managerial or executive capacity, and 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.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.