

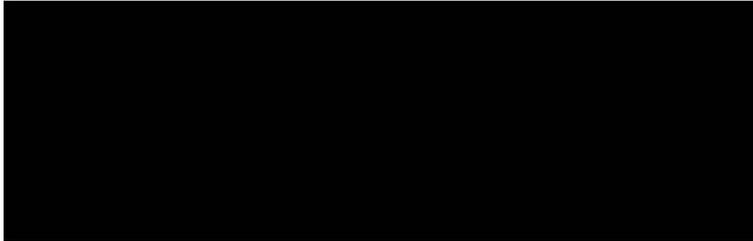
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

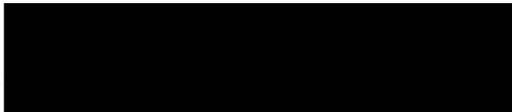


D7

File: WAC 08 231 50104 Office: CALIFORNIA SERVICE CENTER

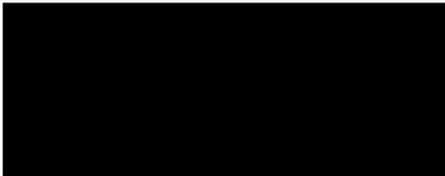
Date: **OCT 20 2009**

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.

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, as required by 8 C.F.R. § 103.5(a)(1)(i).



Perry Rhew
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 seeks to employ the beneficiary temporarily in the United States 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 South African corporation which claims to be the parent company of the U.S. entity, an Ohio limited liability company established in April 2008. Both companies are stated to be engaged in the provision of software development and consulting services. The petitioner seeks to employ the beneficiary in the position of new business development executive for its new office in the United States for a period of one year.

The director denied the petition, determining that the petitioner did not establish that the United States and foreign entities have a qualifying relationship. In denying the petition, the director determined that the petitioner failed to provide requested evidence to establish that the foreign entity paid for its ownership interest in the U.S. company.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the petitioner submitted sufficient evidence to establish that the U.S. entity is a subsidiary of the foreign entity, and that the petitioner and beneficiary otherwise meet all requirements for approval of the new office petition.

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)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The sole issue addressed by the director is whether the petitioner established that the U.S. and foreign entities have a qualifying relationship. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

- (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
 - (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and,
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

* * *

- (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
- (J) *Branch* means an operating division or office of the same organization housed in a different location.
- (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.
- (L) *Affiliate* means
 - (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
 - (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The nonimmigrant petition was filed on August 22, 2008. The petitioner stated on Form I-129 that the U.S. limited liability company is owned by three members: the foreign entity (50%), the beneficiary (25%) and [REDACTED] (25%), and is therefore a subsidiary of the foreign entity.

The petitioner submitted a copy of the U.S. entity's "Written Consent to Organize" which indicates that the foreign entity owns 50 of the U.S. entity's 100 membership units, with the beneficiary and [REDACTED] each owning 25 units. The petitioner also submitted a partial copy of the U.S. company's operating agreement, and evidence that it filed its articles of organization with the Ohio Secretary of State on April 22, 2008.

The director issued a request for additional evidence (RFE) on August 29, 2008, in which she requested, *inter alia*, additional evidence to establish that the U.S. and foreign entities have a qualifying relationship. Specifically, the director requested: (1) copies of the petitioner's stock certificates and stock ledger; (2) minutes of the meeting of the U.S. company that lists the stockholders and the number and percentage of

shares owned; and (3) evidence to show that the claimed foreign parent company has paid for its interest in the U.S. company, including copies of original wire transfers from the parent company and any other documentary detailing the monetary amounts paid for the ownership interest.

In response to the director's request, the petitioner submitted a complete copy of the U.S. company's operating agreement, and copies of its membership certificates #1-3. The membership certificates indicate that the foreign entity holds 50 voting units, the beneficiary holds 25 voting units, and [REDACTED] holds 25 voting units. The provisions of the operating agreement indicate that "members shall make the initial capital contribution of cash, property or services as approved by a unanimous vote of the members."

As "proof of stock purchase," the petitioner submitted an invoice issued to the foreign entity by a United Kingdom attorney, Optimus Law Group, on March 31, 2008 for the "preparation and filing of U.S. Business Structure." The petitioner submitted copies of recent bank statements for the U.S. company, but did not provide any specific evidence of money or other consideration paid by the foreign entity in exchange for its membership interest.

The director denied the petition on November 13, 2008, concluding that the petitioner failed to establish that the U.S. and foreign entities have a qualifying relationship. In denying the petition, the director found that the petitioner had failed to provide evidence that the foreign entity actually paid for its ownership interest in the U.S. entity. The director further emphasized that, since the U.S. company is a start-up company, such evidence would include documentation to establish that the claimed parent company actually formed the subsidiary and funded the start-up expenditures.

On appeal, counsel for the petitioner asserts that the foreign entity owns a 50 percent interest in the U.S. company and as such, has established a qualifying parent-subsidary relationship, with the requisite common ownership and control.

The petitioner re-submits copies of the U.S. company's membership certificates and organizational documents, and also provides the minutes of two meetings held by the directors of the foreign entity. The minutes from the first meeting, held on January 24, 2008, indicates that the directors discussed their negotiations with a U.S. client, [REDACTED] and the client's "strong preference in only dealing with companies with an office in the US." The foreign entity decided at that point to investigate the setup of a U.S. company. The foreign entity's director's held a second meeting on March 27, 2008, at which time the company's directors agreed to move forward with the establishment of the U.S. company. It was agreed that the company would be owned by the foreign entity (50%), the beneficiary, and [REDACTED] and that "all shareholders will need to fund their portion."

Upon review, the evidence submitted on appeal is not sufficient to overcome the director's determination.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of

possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, membership certificates alone are not sufficient evidence to determine whether a member maintains ownership and control of a limited liability company. The corporate membership register, articles of organization, operating agreement, and the minutes of relevant membership meetings must also be examined to determine the total number of membership units issued, the exact number issued to each member, and the subsequent percentage ownership and its effect on control of the company. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper membership certificates into the means by which ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for the issued membership units.

Furthermore, as noted by the director, in the case of a new office, additional evidence would also include documentation to establish that the claimed parent company actually formed the subsidiary and funded the start-up expenditures. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C)(2) requires the petitioner to provide evidence of the size of the U.S. investment in the new office.

Although requested by the director, the petitioner did not provide any evidence of funds transferred to the United States entity for purchase of its membership interest or for its start-up expenses. Notwithstanding the fact that this was the primary reason for denial of the petition, the petitioner has not supplemented the record on appeal with evidence that the foreign entity has funded the U.S. company or paid for its 50 percent interest in the company. The U.S. company's operating agreement and foreign entity's corporate documents explicitly state that the members of the U.S. company would be responsible for paying some form of consideration in exchange for their ownership interest. 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).

As the petitioner has not addressed the specific grounds for denial of the petition or submitted additional evidence to overcome the director's findings, the appeal will be dismissed.

Beyond the decision of the director, the record as presently constituted does not establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity, or that the United States entity will support an executive or managerial position within one year. 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.

In a letter dated July 18, 2008, counsel for the petitioner stated that the beneficiary has been employed by the foreign entity since January 2007 and currently serves in the position of new business development executive, responsible for "developing new client business and applications; managing existing clientele; and providing general business analysis functions." The petitioner submitted an organizational chart for the foreign entity which depicts the beneficiary as "Executive New Business Development," reporting to the company's three directors. The foreign entity's chart shows a total of 14 employees working in the Microsoft Development Team, Oracle Financials, DBA and Oracle Development Team, but it does not appear that any of the technical personnel report directly to the beneficiary.

The petitioner submitted a copy of the beneficiary's curriculum vitae, in which he describes his experience with the foreign employer. The beneficiary indicates that, while employed by the foreign entity, he has been providing services to Wesbank as a Senior Developer/Analyst for the bank's in-house systems, serving as a member of the bank's enterprise architecture board, and designing and developing an in-house product to interface with new external systems. The beneficiary further stated that he "thought up project concept to fill

gap in existing client's software deployment methodology," "designed and build application from scratch," and is "currently conducting sales process of application with aforementioned client." Finally, the beneficiary stated that his duties with the foreign entity include: developing new client business, client management, delivery management on client sites, team management, and application development. The foreign entity's invoices indicated that the company has billed Wesbank for the beneficiary's services on a monthly basis.

In the RFE issued on August 29, 2008, the director instructed the petitioner to submit a more detailed description of the beneficiary's duties abroad, including the percentage of time he devotes to specific duties on a weekly basis. The director also requested that the petitioner clearly identify the number of employees the beneficiary supervises, their job titles and duties, and educational qualifications.

In response to the director's request for a more detailed description of the beneficiary's duties, the petitioner stated that the beneficiary is responsible for: (1) the development of new business areas; (2) the development of new products; (3) client relationship management; and (4) delivery management. The petitioner emphasized that the foreign entity is a "roles based company" in which "all employees have line and functional managers, thus reporting lines will change from project to project." The petitioner stated that the beneficiary currently supervises an Oracle Applications Developer, and a contractor.

When examining the petitioner's claim that the beneficiary has been employed in a primarily executive or managerial capacity, the AAO will look first to the petitioner's description of the beneficiary's 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 that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.*

The petitioner's initial description of the beneficiary's duties, in which it stated that the beneficiary is responsible for "developing new client business and applications; managing existing clientele; and providing general business analysis functions," fell significantly short of demonstrating that he performs primarily managerial or executive duties. In response to the director's explicit request for a detailed description of the beneficiary's duties and the percentage of time the beneficiary allocates to specific duties, the petitioner provided an equally vague list of four duties. The petitioner declined to explain what managerial or executive duties the beneficiary performs in relation to new business development, product development, client relationships and project delivery. 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). 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. at 1108.

Furthermore, a review of the beneficiary's curriculum vitae reveals that he directly provides software consulting services to the foreign entity's clients, and also performs application development and sales functions. While it appears that he may lead other consultants within the scope of client projects, the petitioner has not indicated that the beneficiary has the authority to hire and fire employees or that he has any staff permanently under his supervision. 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 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 several of the beneficiary's daily tasks, such as designing and analyzing systems for clients or selling products and services, 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. *See e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Based on the foregoing discussion, the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. For this additional reason, the petition cannot be approved.

With respect to the beneficiary's proposed U.S. employment, the AAO emphasizes that in order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner must also establish that the proposed employment involves executive or managerial authority over the new operation. 8 C.F.R. § 214.2(l)(3)(v)(B).

In a letter dated July 18, 2008, counsel for the petitioner described the beneficiary's proposed duties as the following:

[The beneficiary] will develop the new American office's business and development strategies and activities, including the execution of an advertising and marketing campaign; targeting both South African and multi-national companies for new leads; recruiting and training all support staff; application development, business analysis; client management; and general day-to-day recruitment activities. . . . Essentially, [the beneficiary] will have total management control of the company's business development activities in the U.S. [The beneficiary] will oversee expansion efforts and the development of new business and contracts with key customers in the United States.

The evidence of record indicates that the petitioner anticipates that almost all of the U.S. company's anticipated first year revenues of \$217,000 will derive from its existing contract with a U.S. company, [REDACTED] which was signed on April 10, 2008. The petitioner's business plan for the U.S. company includes a proposed organizational chart for the U.S. company, which indicates that only one employee, an Oracle developer, would be hired in the United States, while other technical functions would be performed by the South African company. The business plan does not clearly indicate when or how many employees or contractors would be hired during the first year of operations.

Moreover, the April 2008 agreement with _____ is supplemented by a document labeled "Annexure A: Scope of Engagements." The contract annex indicates that the beneficiary and another South African employee would serve as consultants under the agreement, specifically providing services as Oracle Consultants responsible for documenting and modeling 37 processes, and delivering a business flow diagram, form process flow diagram and logical data definition for each process, using Oracle Repository and Oracle Designer. The scope of work indicates that the beneficiary would be assigned to a one-year engagement, while the other employee would be assigned to the client for three months. The agreement indicates that "after completion of the Initial Scope, Client will establish other priorities for [the beneficiary's] services for the remainder of his engagement, which may include work on processes on the attached list beyond the 37 priority items, or other work." The work is to be performed at the clients' premises. The beneficiary and the second consultant are expected to perform the agreed upon work during regular work hours for fees of \$650 to \$750 per work day.

The terms of this agreement cast doubt on the petitioner's claim that the primary purpose of the beneficiary's transfer to the United States is to open a new office, recruit staff, and manage new business development activities. Rather, it appears that he will be a full-time Oracle consultant based at a client's worksite for a period of one year. While the AAO does not discount the possibility that the beneficiary will perform some sales or marketing duties in an attempt to expand the U.S. company's opportunities, the evidence of record suggests that he will be primarily providing the services of the U.S. company and will not be hiring a support staff who would relieve him from performing operational, administration and other non-managerial functions within one year. The petitioner has not clearly outlined the intended organizational structure of the new office.

Therefore, the record as presently constituted does not establish that the beneficiary will have managerial or executive authority over the new office, or that the new office would support the beneficiary in a primarily managerial or executive position within one year. For this additional reason, the petition cannot be approved.

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). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 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.

ORDER: The appeal is dismissed.