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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



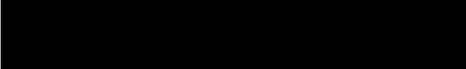
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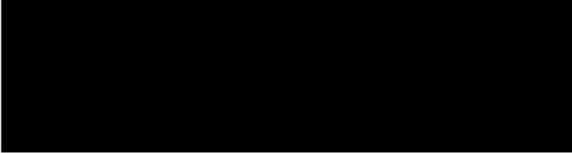


File: WAC 09 009 51375 Office: CALIFORNIA SERVICE CENTER Date: SEP 03 2009

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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will remand the petition to the director for further action and entry of a new decision.

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, a California limited liability company, intends to operate a software consulting business. It claims to have a qualifying relationship with Perfect Programming Pty. Ltd., located in Australia. The petitioner seeks to employ the beneficiary in the position of manager of consulting services in its new office in the United States for a period of three years.¹

The director denied the petition, determining that the petitioner did not establish: (1) that the petitioner had secured adequate physical premises to house the new office; or (2) that the U.S. and foreign entities have a qualifying relationship.

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 generally objects to the lengthy request for additional evidence that was issued by the director in this matter, noting that the amount of evidence requested was unduly burdensome and made it difficult for the petitioner to submit a complete response. The petitioner submits additional evidence in support of the appeal and asserts that it has satisfied all requirements for the requested visa classification.

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.

¹ Pursuant to the regulation at 8 C.F.R. § 214.2(l)(7)(i)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

- (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 first issue to be addressed is whether the petitioner established that it has secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on October 14, 2008. The petitioner stated that the petitioner's business address is [REDACTED]. The petitioner submitted a "service agreement" for this premises with a commencement date of August 1, 2008. The agreement provides for exclusive use of the office suite, receptionist services, conference room use and other services.

The director issued a lengthy RFE on October 17, 2008, in which he requested, *inter alia*, a copy of the petitioner's floor plan, photographs of the premises, and a letter from the property owner or management company confirming the petitioner's occupancy of the premises. In response, the petitioner re-submitted a copy of its lease/service agreement along with several color photographs depicting the interior and exterior of the leased premises.

The director denied the petition on November 14, 2008, concluding that the petitioner did not establish that it had secured sufficient physical premises to house the new office. The director acknowledged receipt of a lease agreement, but determined that the agreement was only valid from August 1, 2008 until August 31, 2008, and was thus no longer valid at the time the petition was filed. The director further emphasized that the lease agreement did not provide the total square footage of the office space. Finally, the director observed that the petitioner failed to provide evidence that it had entered into a new leasing arrangement or purchased property for the purpose of conducting its business.

On appeal, counsel for the petitioner asserts that the director misinterpreted the terms of the lease agreement, noting that, after August 31, 2008, the lease was to remain in effect on a month-to-month basis, requiring the petitioner to provide 60 days written notice if it seeks to terminate the agreement. The petitioner provides evidence that the company paid monthly rent for the premises between the months of August 2008 and December 2008. In addition, the petitioner provides a letter from the property manager dated November 24, 2008, confirming that the petitioner has a month-to-month lease and continues to occupy the leased premises.

Upon review, counsel's assertions are persuasive. The evidence of record is sufficient to establish that the petitioner was leasing a commercial office at the time of filing and continued to do so at the time the petition was adjudicated. Accordingly, the director's decision with respect to this issue will be withdrawn.

The second issue addressed by the director is whether the petitioner established that it has a qualifying relationship with the foreign entity. 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 petitioner claims to have a qualifying relationship with Perfect Programming Pty Ltd., an Australian company. The evidence of record shows that the U.S. limited liability company is owned and controlled in equal shares by two members, [REDACTED] and [REDACTED]. The evidence submitted, which includes the foreign entity's share certificates, corporate constitution, and other relevant documentation, is sufficient to establish that the foreign entity is also effectively owned and controlled by these two individuals.

The director denied the petition based on the petitioner's failure to submit evidence of monies transferred from the foreign entity to the U.S. entity in exchange for the stock purchase.

On appeal, counsel for the petitioner acknowledges that such evidence was requested in the RFE, but maintains that the U.S. company and foreign entity are both owned and controlled by the same two individuals and therefore possess the requisite qualifying relationship. The petitioner nevertheless provides

evidence that the foreign entity has made multiple monetary transfers to the U.S. company in order to finance the U.S. company's start-up costs.

Upon review of the totality of the evidence in the record, the AAO finds sufficient evidence of an affiliate relationship between the petitioner and the foreign entity based on common ownership and control by the same two individuals in the same proportions. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). Accordingly, the AAO will withdraw the director's decision.

Although the AAO will withdraw both grounds for denial, the record as presently constituted contains insufficient evidence that the beneficiary's employment abroad was in a primarily managerial or executive capacity as those terms are defined at sections 101(a)(44)(A) and 101(a)(44)(B) of the Act, and insufficient evidence to establish that her proposed employment in the United States involves executive or managerial authority over the new operation. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

Accordingly, the AAO will remand the petition to the director for further review and action and issuance of a new decision, pursuant to the discussion below.

With respect to the beneficiary's foreign employment, the petitioner indicates that she has served as manager of consulting services with the foreign entity since October 2007. In a letter dated October 3, 2008, the petitioner described her duties as the following:

[The beneficiary] manages and oversees all the consulting services of the company. She is responsible for managing and negotiating rates and contracts for consulting services. [The beneficiary] manages the consulting accounts administration and billing. She deals with direct customers of [the foreign entity] as well as with other Microsoft Partner companies and ensures that all customers are satisfied with the level of consulting services that they receive. She implements new training methods and procedures to be followed by the consultants. She is responsible for representing [the foreign entity] in the marketplace and maintaining a good relationship with Microsoft Corporation and other Microsoft Dynamics AX Partner Companies to ensure future business opportunities. [The beneficiary] provided extensive training to key users of Auslog Pty Ltd., a manufacturer of parts for the Australian Mining Industry, to assist them in implementing Dynamics AX 4.0 Finance, Fixed Assets, Trade & Logistics and Production. She is also part of the team of managers and executives who are contracted by Microsoft Corporation to design end-to-end scenarios and create demo data for the Dynamics AX 2009 Projects and Service modules.

The petitioner also submitted a copy of the beneficiary's resume, in which she stated that her duties included, performing "pre-sales discovery sessions and demonstrations to prospective customers," and providing "consulting services and training to new and existing customers with respect to their financial business systems." She also states that she served as the lead consultant on a project involving the implementation of Dynamics AX4.0 Finance, Fixed Asset, Trade & Logistics and CRM modules. The beneficiary indicates that the activities involved in the project included the following:

[D]esigning the "to-be" business processes based on the client's requirements documentation; performing a gap/fit analysis; identifying and designing customization specifications; setting up and configuring test environments; training the super users and testing all of the setup and customizations with the super users.

Upon review of the initial evidence, the director requested that the petitioner submit a more detailed description of the beneficiary's position as manager of consulting, along with the percentage of time she allocated to each specific job duty. The director also requested a detailed organizational chart clearly depicting the position the beneficiary held within the foreign company, as well as information regarding the number of employees she supervised and their job duties.

In response to the director's request, the petitioner referred the director to the job description included in its letter dated October 3, 2008. The petitioner submitted an organizational chart for the foreign entity which identifies the beneficiary as director of consulting, supervising one functional consultant. The chart shows a total of seven employees working for the foreign entity.

The evidence of record does not establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. Although the petitioner indicates that the beneficiary "managed" the provision of consulting services while employed by the foreign entity, the job description she included in her own resume indicates that her duties also included directly delivering software solutions and training to the foreign entity's customers, as well as performing administrative, billing and marketing functions that do not fall within the statutory definition of managerial or executive capacity. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial operational and administrative functions. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). 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 petition will be remanded, the director should instruct the petitioner to submit additional evidence pertaining to the beneficiary's duties and the staffing structure of the foreign entity during the relevant time period in order to correct these deficiencies. If the foreign entity used the services of contracted or commissioned staff to perform any duties, the petitioner should describe in detail the duties they performed and provide evidence of fees, wages or commissions paid to payroll and contract staff during the beneficiary's tenure with the foreign entity.

With respect to the beneficiary's proposed employment in the United States, the petitioner states that she will perform essentially the same duties she performed as manager of consulting services for the foreign entity. As

discussed above, the record as presently constituted does not contain evidence that such duties are primarily managerial or executive in nature.

Furthermore, the petitioner is required to establish that the beneficiary's proposed employment in the U.S. involves executive or managerial authority over the new operation. *See* 8 C.F.R. § 214.2(l)(3)(v)(B). Although the petitioner has assigned the beneficiary the title "manager of consulting services," the petitioner's proposed organizational chart does not indicate that she would be managing or supervising consultants or any other employees. Rather, the chart indicates that the new U.S. company would be jointly managed by its owners, the chief executive officer and chief financial officer, and that the owners will supervise a general manager. The beneficiary's position will report to the general manager, and, as depicted on the chart, the position is lateral to the proposed positions of consultant, developer and senior developer. While it appears that the beneficiary would assist in recruiting the company's technical staff, there is no evidence that she would have authority to hire or fire staff, or will supervise any lower-level employees.

Therefore, the record as presently constituted does not contain evidence that the beneficiary would have the appropriate level of authority over the new operation, or that she would be performing primarily managerial or executive duties within one year of approval of the petition.

In this matter, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the petitioner and beneficiary meet the requirements for this nonimmigrant visa classification as of the date of filing the petition. The director's decision will be withdrawn and the matter remanded for further consideration and a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence deemed necessary.

ORDER: The decision of the director dated November 14, 2008 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.