

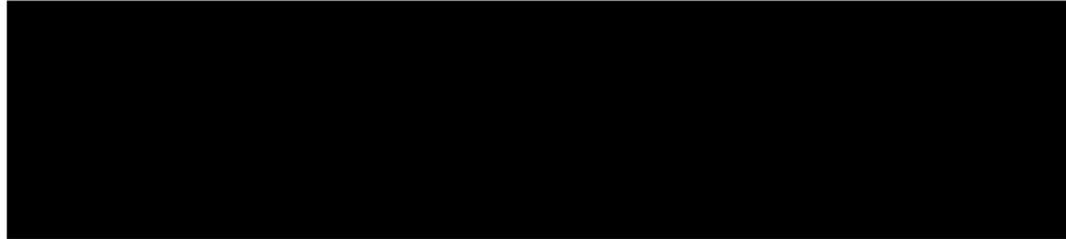
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**U.S. Department of Homeland Security**  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

**U.S. Citizenship  
and Immigration  
Services**



D7

DATE: JUL 30 2012

Office: CALIFORNIA SERVICE CENTER

FILE:



IN RE:

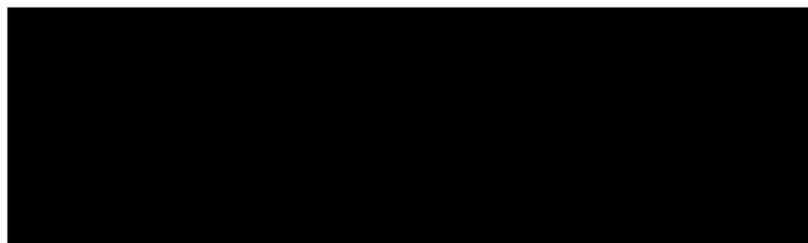
Petitioner:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will sustain the appeal and approve the petition.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary 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 was formed as a corporation under the laws of the State of Delaware in 1996, and is engaged in the provision of telecommunications network infrastructure services. It claims to be an affiliate of Telecom New Zealand International Limited, located in Wellington, New Zealand. The petitioner is seeking to employ the beneficiary as the Senior Director Strategic Accounts for an initial period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would 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. On appeal, counsel asserts that the evidence of record is sufficient to satisfy the petitioner's burden of proof and establishes that the beneficiary will be employed in the United States in a managerial capacity.

#### **I. The Law**

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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate 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.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). 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, 8 U.S.C. § 1101(a)(44)(A)(ii).

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 manages the function rather than performs the duties related to the function. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

## II. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 18, 2009. The petitioner established that it is a member of a group of affiliated U.S. and New Zealand companies that are engaged in the provision of international voice termination and related telecommunication infrastructure to support their services. The parent company of the petitioner and foreign employer, Telecom Corporation of New Zealand Limited is a New Zealand corporation publicly-traded on the New Zealand, Sydney, and London Stock Exchanges. The parent company generates revenues of \$3.73 billion and employs more than 8,632 employees.

Based in California, the petitioning company provides the United States based telecommunications network infrastructure for the parent company's international internet and data business through ownership of telecommunications equipment and the management of contract labor to maintain and manage these facilities. The petitioner also markets its international services to United States resellers of these telecommunications services. The petitioner employs approximately 24 people in the United States and achieved gross sales in excess of \$8.89 million in 2007 with assets of almost \$67 million. The petitioner has a business office in Pasadena, California and a technical center in downtown Los Angeles, California.

The petitioner indicated that the proposed position of Senior Director Strategic Accounts is "a key position which involves developing new revenue opportunities and retaining existing revenue streams by maintaining a close working relationship with major accounts."

The petitioner provided a lengthy description of the beneficiary's duties, noting that he will spend 34% of his time "[m]anag[ing] all aspects of the commercial relationship" including negotiating pricing, managing customer accounts, and acting as the single point of contact for certain services. An additional 40% of the position will involve coordinating the work of 21 "professional, sub-manager, and clerical employees." The petitioner detailed 10 other tasks that will require the remaining 26% percent of the beneficiary's time.

The director issued a request for additional evidence (RFE) on December 31, 2009. The director requested that the petitioner provide, *inter alia*: (1) a more detailed description of the beneficiary's job duties in the United States, including the percentage of time to be spent in each of the listed duties and all employees under the beneficiary's direction; (2) a detailed organizational chart for the U.S. company that clearly identifies the beneficiary's position and all employees working under his supervision by name and job title; and (3) copies of the U.S. company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for the third and fourth quarters of 2009.

In response, the petitioner submitted a letter from its Senior Vice President Carrier Sales & Business Development, providing a detailed overview of the proposed position and how the beneficiary will be functioning in a managerial capacity. The letter explains that the beneficiary will be managing an essential function. Specifically, the beneficiary will be "wholly responsible for managing all facets of the commercial relationship with key trading partners." The commercial relationship management function, as described in

the letter, generates \$50 million of revenue annually. This figure "represents about 23% of the \$218M USD gross total revenue of Telecom New Zealand USA Ltd."

The petitioner further explained that the beneficiary manages a staff of employees based in Wellington, New Zealand to "carry out the tasks of the essential function." The petitioner further detailed how the beneficiary's management duties rely on the supervision of this staff as follows:

[The beneficiary] has management responsibility for ensuring ongoing delivery of Voice and Data products and services in a manner commensurate with customer expectations. Due to Telecom New Zealand having a regional based structure, this responsibility is not a formal line management, rather a dotted line responsibility. There are a total of 21 staff who [the beneficiary] supervises, controls and coordinates the activities of, and the full list of these individuals is contained below in this document. These staff [*sic*] are responsible for pricing, analytical, and customer technical support functions. [The beneficiary] relies heavily upon the output from these individuals, and spends a considerable amount of time each day interfacing with these groups to ensure the continuity of the services [the petitioner] provides.

The petitioner described that 80% of the beneficiary's time is spent managing the essential function and related staff. The related duties include: overseeing internal groups responsible for product implementation, product development, pricing constructs, engineering, and service delivery; strategic and tactical planning which become a component of the overall organizational strategy; and executing a clearly defined strategy of developing trading relationships with selected companies that can benefit from the product and infrastructure capability the petitioner has developed.

The remaining 20% of the beneficiary's time is spent performing such tasks as preparing account development plans, coordinating research and data compilations on competitors, developing and negotiating joint capability serving customers' destination requirements, and attending trade shows.

The petitioner provided position descriptions, employee names, and educational requirements for the following positions tasked by the beneficiary: Manager International Pricing and Economics, two Minutes and Trading Managers, Manager, Business Management Centre Operations, 14 International Voice Specialists, and three Routing Analysts. The petitioner indicated that the positions of Manager International Pricing and Economics, Minutes and Trading Manager, and Manager Business Management Centre Operations are professional positions.

The petitioner also provided the requested organizational chart for the U.S. office at which the beneficiary will work. According to the chart, the beneficiary reports to the Senior Director Business Development - Voice. There are no positions in the United States organizational structure reporting to the beneficiary. The chart shows 20 New Zealand-based positions reporting to the beneficiary in a dotted-line capacity.

The petitioner submitted the California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for the third and fourth quarters of 2009. The record shows that the company paid 19 full-time employees during this period.

The director denied the petition on February 4, 2010, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. In denying the petition, the director determined that the duties described by the petitioner appear to be primarily non-qualifying or vaguely defined duties. The director also determined that the beneficiary will not be managing or directing a function due to the fact that "the employees with the foreign entity that are claimed to be managed by the beneficiary while rendering his or her services in the United States cannot be considered" for qualifying manager or executive capacity purposes. Furthermore, the director found that the petitioner failed to provide a detailed position description specifying what the function entails and what percentage of the beneficiary's time will be spent performing managerial duties.

On appeal, counsel asserts that the evidence establishes that the beneficiary's role is in a managerial capacity pursuant to section 101(a)(44)(A) of the Act, in that he manages an essential function of the organization and he does not spend a majority of his time on day-to-day functions.

In support of the appeal, the petitioner submits a declaration dated March 3, 2010 from [REDACTED] President. The declaration reiterates that the beneficiary manages a function and indirectly supervises a team of employees in New Zealand to carry out the function. Specifically, the beneficiary uses the "output from the above teams and collates it to take to customers as a proposal." The petitioner states it is important for one individual to serve as the company representative when presenting the proposal to "ensure continuity and delivery in agreed upon time frames." As explained by the petitioner, the beneficiary receives input from five different working groups, then proceeds as follows:

[The beneficiary] working within the above options, then has overarching responsibility to present this to the customer, and agree on a final structure. As with all complex proposals there is usually a lot of negotiating on both sides to get the desired result. [The beneficiary] has the ability to negotiate on Telecom New Zealand's behalf to deliver the desired result internally and externally.

Counsel states that the director erred in finding that the beneficiary does not manage an essential function within the company. Counsel further contends that employees of the company's affiliate can be supervised by the beneficiary as they are rendering their services to the petitioner and the beneficiary is his capacity as a manager for the petitioner.

### **III. Analysis**

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed by the United States entity in a managerial capacity. Upon review, counsel's assertions are persuasive. The petitioner has established by a preponderance of the evidence that the beneficiary will be employed in a primarily managerial capacity.

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). Contrary to the director's observations, the petitioner has provided a comprehensive description of the beneficiary's duties sufficient to establish that his duties are primarily related to the management of the petitioner's commercial relationship function, and not to producing a product, providing a service, or performing other non-managerial functions.

The AAO agrees with the petitioner's assertion that the beneficiary's overall management of the commercial relationship function, within the context of the petitioner's business organization, can be equated to managing a subdivision, function, or component of the organization. *See* section 101(a)(44)(A)(i) of the Act. Further, the beneficiary does not directly perform the routine functions carried out by the strategic accounts division. Finally, the AAO is satisfied that the beneficiary exercises discretion over the day-to-day operations of commercial relationships and strategic accounts, as required by section 101(a)(44)(A)(iv) of the Act.

In finding that the proffered position is not managerial in nature, the director refused to consider the beneficiary's subordinate staff located at the New Zealand office. The AAO notes that the statutory definition of managerial capacity refers to an assignment within an organization in which the employee manages the organization or an essential function. The term "organization" is defined at section 101(a)(28) of the Act, 8 U.S.C. § 1101(a)(28), as follows:

The term 'organization' means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects.

The statutory definition of an organization would not reasonably include a foreign corporation that is an entity separate and distinct from the petitioning organization. Here, however, the foreign corporation, Telecom Corporation of New Zealand, is not separate and distinct from the petitioner. The record contains documentary evidence that Telecom Corporation of New Zealand is the parent company of the petitioner. Both the petitioner and Telecom Corporation of New Zealand are jointly engaged in the provision of telecommunications related services. Accordingly, the United States entity and the New Zealand Company are permanently associated through ownership. Therefore, the beneficiary's managerial oversight of the team for Telecom Corporation of New Zealand on behalf of the petitioner may be considered when determining if the proffered position is in a managerial capacity.

The petitioner submitted sufficient documentary evidence to establish the existence of the employees tasked by the beneficiary in New Zealand. Accordingly, the AAO concludes that the New Zealand employees are qualified to perform the function so that the beneficiary is relieved from performing non-qualifying duties; the director's decision to deny the petition on this basis shall be withdrawn. *See Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988).

Furthermore, the AAO disagrees with the director's conclusion that the beneficiary's job duties are inherently operational and not managerial or executive in nature. The beneficiary will spend 80% of his time performing tasks related to management of the commercial relationship function including oversight of 21 employees, four of which are professional-level positions. Some of the beneficiary's listed duties are not managerial in nature including: participation in branch sales activities including account review, promotional activities, gathering competitive feedback, and attending trade shows to represent the petitioner. These duties, however, account for less than 10% of the beneficiary's time.

While the beneficiary will undoubtedly be required to apply his product expertise and perform some higher-level sales, marketing, and administrative tasks, the AAO is persuaded that the majority of the day-to-day, non-managerial tasks required to operate the business are carried out by the beneficiary's subordinates. While the branch office is not large, the record shows that the petitioner's network of offices include a large parent company and affiliate in New Zealand.

#### **IV. Conclusion**

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. Here, the petitioner has established that, at a minimum, the beneficiary primarily manages an essential function of the petitioning organization and tasks non-qualifying duties to a team of employees located at an affiliate company. Given the overall purpose and stage of development of the organization, the petitioner established a reasonable need for a Senior Director Strategic Accounts to manage the petitioner's commercial relationships for the company as a whole.

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, the petitioner has sustained that burden. Accordingly, the director's decision dated March 18, 2011 is withdrawn and the petition is approved.

**ORDER:** The appeal is sustained.