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



U.S. Citizenship
and Immigration
Services

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DATE: **MAY 16 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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

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 dismiss the appeal.

The petitioner filed this nonimmigrant petition 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, a California corporation, is a provider of [REDACTED] and consulting services. It states that it is the parent company of [REDACTED]. It seeks to employ the beneficiary in the position of Business Development Manager for a period of period of two years.

The director denied the petition after concluding that the petitioner would not employ the beneficiary in the United States in a primarily managerial or executive capacity. In denying the petition, the director observed that all of the beneficiary's subordinate employees are located outside the United States and concluded that he would not be relieved from performing non-qualifying duties associated with his assigned business development activities.

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, the petitioner indicates that the beneficiary's subordinate team in India does in fact provide support to its U.S. parent company's operations and will continue to do so. Counsel emphasizes that the beneficiary currently manages the U.S. business development support function from India and will continue to do so in the United States with the assistance of his India-based team. Counsel submits a brief in support of the appeal.

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 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.

II. Discussion

The issue to be addressed is whether the petitioner established that it will employ the beneficiary in the United States in a primarily managerial capacity. The petitioner does not claim that the beneficiary will be employed in an 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.

A. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on April 21, 2010. In a letter dated April 19, 2010, the petitioner explained that it intends to transfer the beneficiary from his current position of [REDACTED] based in India, to the position of [REDACTED] based at the U.S. parent company's [REDACTED] headquarters. The petitioner provided identical position

descriptions for both positions in its initial letter. The petitioner provided the following overview of the proffered [REDACTED] position, and added the percentage of time spent on each duty in response to a subsequent request for evidence the director issued on April 27, 2010:

- Manage US Support Practice (which includes US Sales, Lead Generation, Resource Management, Recruiting Support & IT Support) on a day-to-day basis. (Time spent: 20%)
- Ensure that the group maintains a healthy pipeline of qualified leads and prospects. (Time spent: 15%)
- Monitor productivity and ensure that the team achieves weekly/monthly goals. (Time spent: 5%)
- Supervise the team in accordance with company policies and procedures. (Time spent: 5%)
- Provide coaching for existing associates and train new ones. (Time spent: 5%)
- Conduct employee interviews and hire/fire staff as necessary. (Time spent: nominal)
- Manage performance & salary reviews. (Once a year activity)
- Resolve interpersonal issues within his team and escalate if required. (Time spent: nominal)
- Schedule and lead team meetings and activities. (Time spent: 5%)
- Increase pipeline through demand generation and target campaigns to the [REDACTED] base and/or net new accounts. (Time spent: 30%)
- Report to Senior Management on Sales Metrics, opportunities and threats and interact with senior management to develop strategies to enhance Sales Revenue and meet or exceed \$2 million target. (Time spent: 15%)

The petitioner indicated that the beneficiary will continue to be responsible for "generating leads/sales and key offshore account management" and will have responsibility for \$2 million in revenues.

As noted above, the director issued a request for additional evidence in which she instructed the petitioner to submit: (1) a more detailed description of the beneficiary's duties, including the specific tasks he will perform and the percentage of time he will allocate to each task; (2) an organizational chart for the U.S. company which clearly identifies the names and job titles of all workers the beneficiary will supervise; (3) the job titles, detailed job duties, educational level, and immigration status for all employees the beneficiary will supervise; and (4) the U.S. company's state quarterly wage report for the first quarter of 2010.

In a response dated May 7, 2010, the petitioner restated the job description provided in its previous letter and added the percentages noted above. The petitioner noted that the remaining 5% of the beneficiary's time would be allocated to "the HR Technical Recruiting and Sourcing side," and that his role in that regard would be limited to "supervising the India team." The petitioner submitted an organizational chart which reflects that the beneficiary will manage the "offshore sales" and "offshore recruiting" teams. The petitioner did not indicate that the beneficiary would supervise any employees located in the United States.

The foreign entity's organizational chart indicates that the beneficiary oversees a technical resource manager who supervises four employees responsible for recruiting, as well as four offshore sales employees. In a separate attachment, the petitioner briefly described the roles of the team members. The petitioner indicated that the technical resource manager "coordinates all the open requirements with the recruiting team and manages the recruiting team on a day-to-day basis," while the other four employees "assist the U.S. Recruiting Team and the Technical Practices with searching and identifying right candidates for the open positions."

With respect to the offshore sales team, the petitioner identified two employees as "assistant managers" responsible for "generating leads and growing/managing some key accounts for the company." The remaining two employees are "senior associates" who are "responsible for generating leads via cold calls."

The petitioner emphasized that the beneficiary "is being transferred to be close to the action and take personal and more direct responsibility for the Business Development Function." The petitioner restated that the beneficiary has experience "in the broad facets of marketing such as marketing collaterals, websites, analyst relations, customer profiling, competitor intelligence, proposal preparation and presentations," and once again noted that his role "includes generating leads/sales and key offshore account management."

The AAO notes that, while the petitioner initially indicated that the foreign and U.S. positions are identical, the petitioner provided a different description and breakdown of the beneficiary's foreign duties in response to the RFE. Overall, the petitioner stated that the beneficiary currently allocates 80 percent of his time to business development, including managing US sales, lead generation, and current client communications. The petitioner indicated that the beneficiary currently spends 20 percent of his time managing U.S. resource management and recruiting support.

The director denied the petition on May 14, 2010, concluding that the petitioner failed to establish that it would employ the beneficiary in the United States in a primarily managerial or executive capacity. In denying the petition, the director noted that "all evidence suggests that the beneficiary will manage employees working abroad at the India location," and that having the beneficiary come to the United States to render his services to the foreign entity is contrary to the definition of "intracompany transferee" at 8 C.F.R. § 214.2(l)(1)(ii)(A). The director determined that the beneficiary would not be employed in a primarily managerial capacity because the petitioner failed to establish that he would supervise and control a subordinate staff of professional, managerial or supervisory personnel who provide relief from the performance of non-qualifying duties.

On appeal, counsel asserts that the director erred in concluding that the beneficiary is coming to the United States in order to render services to the foreign company. Counsel explains:

[The beneficiary] (with the support of his team), is providing Business Development services to the US based parent company. . . . Upon transfer, he will become an employee of [the U.S. company] and continue to render the same Business Development services to the US employer . . . albeit from the US, in proximity to clients rather than remotely from India, as is usual and customary in this business.

Counsel emphasizes that the beneficiary currently provides, and will continue to provide, services to the U.S. company. Counsel asserts that the beneficiary manages the essential "business development function" for the organization, functions at a senior level with respect to this function, and exercises discretion over the function's day-to-day operations.

B. Discussion

Upon review, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial capacity.

While the AAO agrees with the director's ultimate determination, the petitioner is not required to establish that the beneficiary will manage a U.S.-based subordinate staff in order to qualify as a manager under section 101(a)(15)(L) of the Act. The petitioner's claim that the beneficiary will continue to supervise and monitor the offshore sales recruiting teams is reasonable given the nature and structure of the petitioner's organization. The record establishes that the petitioner's Indian subsidiary provides offshore support for its U.S. parent [REDACTED] implementation projects in North America, and that the beneficiary and his team, while based in India, are responsible for providing support to the U.S. parent company. Under the circumstances, the AAO will take the foreign employees under consideration in determining whether the beneficiary will be employed in the United States in a qualifying managerial capacity.

When examining whether the beneficiary will be employed in a primarily managerial or executive capacity, the AAO will look first to the petitioner's description of the proposed 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 that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.* The AAO will then consider this information in light of the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The petitioner has provided a vague description of the beneficiary's proposed duties that provides little insight into what he will actually do on a day-to-day basis in the role of business development manager. For example, the petitioner indicates that the beneficiary will allocate 20 percent of his time to "manage US Support Practice . . . on a day-to-day basis." The petitioner failed to delineate any specific tasks associated with this general responsibility. 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). Similarly, the petitioner did not explain how the beneficiary would "ensure that the group maintains a healthy pipeline of qualified leads and prospects," a responsibility which will require an additional 15 percent of his time" and appears to be distinct from his responsibilities for monitoring productivity, supervising the team, or providing coaching to team members. USCIS will not accept an ambiguous position description and speculate regarding the proposed duties.

Further, the petitioner indicated that the beneficiary will allocate a full 30 percent of his time to "increase pipeline through demand generation and targeting campaigns to the [REDACTED] install base and/or net new accounts." Again, the petitioner failed to explain or clarify what specific duties the beneficiary would perform to achieve this increase. Without further explanation, and given the petitioner's reference to the beneficiary's responsibility for "generating leads/sales" and the beneficiary's experience "in the broad facets of marketing such as marketing collaterals, websites, analyst relations, customer profiling, competitor intelligence, proposal preparations and presentations," it would be reasonable to conclude that the beneficiary is directly responsible for performing non-managerial marketing duties. Overall, these duties which account for 65 percent of the beneficiary's time, have not been adequately defined.

The director reviewed the list of eleven duties provided at the time of filing and specifically requested that the petitioner submit a more detailed description of the beneficiary's proposed position. The director clearly advised the petitioner that the description should "be specific." In responding to the request for evidence, the petitioner opted to re-submit the same list of duties that the director had already reviewed and found to be insufficient. 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).

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 administrative or operational duties. The petitioner's description of the beneficiary's job duties does not adequately demonstrate 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).

The provided percentages are of little assistance as the petitioner has not adequately defined the beneficiary's actual duties. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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 petitioner has consistently claimed that the beneficiary qualifies as a function manager.

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 detailed position description which explains the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates 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. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. For the reasons discussed above, the petitioner did not submit a detailed description of the beneficiary's duties sufficient to establish that those duties would be primarily managerial in nature.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, the AAO recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. It is the petitioner's obligation to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary. The petitioner indicates that the beneficiary will spend more than 95 percent of his time focused on business development and less than five percent of his time on technical recruiting and sourcing.

Although the director requested a detailed description of the duties performed by the beneficiary's subordinates, the petitioner only stated that the offshore sales employees are responsible for generating leads through cold calls and for growing accounts. Based on this limited information, the AAO cannot conclude that the four-member overseas sales team based in India would relieve the beneficiary from non-managerial duties associated with the business development function, which, according to the petitioner, includes "marketing and marketing support." Further, the petitioner states that the beneficiary "is being transferred to be close to the action and to take personal and more direct responsibility for the Business Development Function." The petitioner failed to explain what this personal and direct responsibility would entail. Finally, the petitioner's organizational chart indicates that the U.S. office has a vice president of sales who supervises his own sales team. It is not clear how the beneficiary and the Indian team fit into this structure, and or whether the beneficiary operates at a senior level with respect to the U.S. sales or business development function.

The AAO acknowledges the petitioner's claim that the beneficiary will continue to perform the same duties in the United States that he currently performs in India. However, the petitioner provided different descriptions of the two positions in response to the RFE that undermine the claim that the positions are identical or essentially identical. For example, the petitioner indicates that the beneficiary allocates approximately 60 percent of his time in India to supervising the offshore sales and offshore recruiting teams, as opposed to approximately 20 to 25 percent of his time on these duties in the United States. The position description for the proffered U.S. position does not adequately explain how the remainder of the beneficiary's time would be spent to account for this significant difference in time spent on supervisory duties.

Overall, the petitioner's claim that the beneficiary will manage an essential function is undermined by its failure to provide the required detailed description of the beneficiary's duties, the duties performed by his team, and the structure of the company's sales and business development function overall. The petitioner has not established that the beneficiary will be employed in a primarily managerial capacity. Accordingly, the appeal will be dismissed.

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.