



U.S. Citizenship
and Immigration
Services

(b)(6)

[REDACTED]

APR 15 2013

DATE: OFFICE: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
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 dismiss the appeal.

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, a Delaware corporation established in 2008, is a software forms developer. It is the parent company of [REDACTED] ("the foreign entity"), located in Bucharest, Romania. The petitioner seeks to employ the beneficiary as its Quality Assurance Manager for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity in the United States.

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 submits a brief and additional evidence to supplement the record.

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.

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.

II. The Issue on Appeal

The sole issue to be addressed is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity in the United States.

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, on May 17, 2012. On Form I-129, the petitioner described the beneficiary's duties abroad, as its global Quality Assurance ("QA") Manager, to include managing the day-to-day activities of the QA team, managing the "tier 2 (escalated support) team," and overseeing and coordinating the company's legal needs. With respect to the beneficiary's proposed job duties in the United States, the petitioner asserted that the beneficiary would be performing the exact same duties as he performed abroad in Romania. In support of the petition, the petitioner submitted organizational charts for the U.S. and foreign entities, both depicting the beneficiary as directly overseeing the Romanian office, which currently employs three QA engineers and a financial accountant (contract).

The director issued a request for evidence ("RFE"), requesting, *inter alia*, a more detailed description of the beneficiary's proposed duties in the United States and copies of the U.S. and foreign entities' organizational charts.

In response to the RFE, the petitioner explained that the beneficiary will continue to perform managerial activities by overseeing the QA team and the tier 2 support team. The petitioner also explained that it is currently awaiting the beneficiary's arrival into the U.S. to oversee the hiring of two new professional positions, a senior developer and a systems administrator, that will also report directly to the beneficiary. The petitioner submitted an amended organizational chart for the U.S. entity, depicting the beneficiary as directly overseeing the Romanian office, as well as a systems administrator (to be hired) and a senior developer (to be hired).

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. In denying the petition, the director found that the beneficiary currently has no direct subordinates, and therefore the beneficiary appears to be primarily involved in performing the routine operational activities of the business. The director also found that the beneficiary does not manage or direct the management of a department, subdivision, or component of the petitioning organization, and therefore cannot be deemed a functional manager.

Counsel for the petitioner filed the instant appeal. On appeal, counsel asserts that the director erred in assuming that the beneficiary has no direct subordinates and disregarding the evidence showing that the beneficiary has four subordinates, all of whom are degreed professionals, located in Romania. Counsel also asserts that the director erred by disregarding the evidence showing that the beneficiary manages the entire Romanian operations.

Upon review of the record, the AAO concludes that the petitioner failed to meet its burden of proof in establishing that the beneficiary will be employed in a primarily managerial or executive capacity.

The AAO acknowledges counsel's assertions that the director did not consider the beneficiary's responsibilities over the foreign entity's employees and operations. 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, as defined in section 101(a)(28) of the Act, 8 U.S.C. § 1101(a)(28), 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. Here, as both the petitioner and the foreign entity are permanently associated together through ownership and joint action, the director may consider the foreign entity's employees and operations in determining if the proffered position is in a managerial capacity.

However, in the instant matter, the director did not err by ultimately disregarding the beneficiary's claimed managerial authority over the foreign entity's employees and operations. Critically, the petitioner failed to articulate how the beneficiary will continue to manage the day-to-day activities of the Romanian office and continue to supervise the daily activities of the Romanian employees, when the beneficiary will be physically located in the United States. The petitioner described the beneficiary's duties abroad and his proposed duties in the United States in exactly identical terms, without elaborating how the beneficiary can continue to perform the exact same duties from the United States. As such, the petitioner's claims regarding the beneficiary's managerial duties with respect to the foreign entity's employees and operations are not entirely credible or supported by the evidence in the record.

Moreover, the petitioner's claim that the beneficiary will manage the tier 2 support team is unsupported by any evidence in the record. None of the organizational charts- for either the U.S. or foreign entity- depict any tier 2 employees or a tier 2 support team. The petitioner provided no explanation regarding where these employees are located, the types of duties the tier 2 employees perform, and the placement of the tier 2 support team in the company's overall organizational structure.

In its response to the RFE, the petitioner explained that it is currently awaiting the beneficiary's arrival into the U.S. to oversee the hiring of two new professional positions, a senior developer and a systems administrator, that will also report directly to the beneficiary. The petitioner also submitted an amended organizational chart for the U.S. entity, depicting the beneficiary as directly overseeing the proposed systems administrator and a senior developer. However, the beneficiary's proposed oversight over these two anticipated employees cannot be considered in the instant petition, as these employees had not been hired as of the date the petition was filed, and the beneficiary's proposed supervisory duties over these proposed employees was not listed in the initial filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

In fact, the petitioner's initial U.S. organizational chart depicted the senior developer position to be hired as a lateral position to the beneficiary's, not subordinate to the beneficiary. The initial U.S. organizational chart also depicted no proposed systems administrator position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* As such, the AAO will give no weight to the amended organizational chart, and will instead rely on the initial U.S. organizational chart simply depicting the beneficiary as solely overseeing the Romanian office. For the reasons discussed above, the petitioner failed to credibly establish that the beneficiary will continue to oversee the Romanian office and the

Romanian employees while he is in the United States. The petitioner failed to establish that the director erred in finding that the beneficiary will have no direct subordinates in the United States and will not be managing a department, subdivision, function, or component of the petitioning organization.

III. Conclusion

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.