



U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **FEB 26 2013**

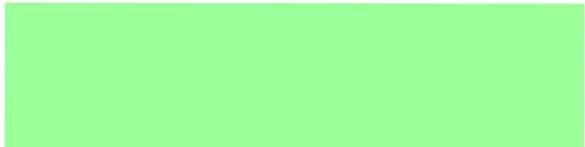
Office: CALIFORNIA SERVICE CENTER

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 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 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 seeking to employ 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, engages in the information systems and technology business. It claims to be the parent company of [REDACTED] India. The petitioner seeks to employ the beneficiary in a managerial position as a business development manager for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed abroad in a primarily managerial capacity.

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 beneficiary was employed abroad in a managerial position. Counsel submits a brief and additional evidence 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.

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.

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[.]

\* \* \*

- (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

\* \* \*

(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.

## II. The Issues on Appeal

### a. *The Beneficiary's Employment Abroad*

The first issue to be addressed is whether the petitioner established that the beneficiary was employed abroad in a primarily managerial capacity.<sup>1</sup>

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on March 30, 2012. In a letter accompanying the petition, the petitioner described the beneficiary's duties abroad as a business development manager as follows:

- Responsible for managing a team of 6 Telesales executives and the collective team targets;
- Responsible for leading and monitoring activities of Telesales Representatives to ensure effective performance;
- Understanding client's requirement and allocating resources accordingly to meet the work deadlines;
- Acting as a liaison between corporate management and telesales resources for work standards & policies;
- Providing motivation to Representatives through individual contact, goal setting, periodic meetings, and recommendation of initiative plans;
- Report creation for the entire telesales team for the management on the performance and areas of improvement;
- Responsible to make sure that telesales teams meets the effort expectations of the internal clients (sales team);

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<sup>1</sup> The petitioner only asserts that the beneficiary will be employed in a managerial capacity. The petitioner does not claim that it will employ the beneficiary in an executive capacity. Therefore, the AAO will only analyze the beneficiary's employment in a managerial capacity.

- Responsible for performance appraisals with recommendation for promotion or termination of employment as applicable;
- Ensuring that established goals and quotas for the department are reached and motivates department to meet these goals;
- Training team on products and services (through formal training and one-on-one coaching/mentoring) by focusing on the sales process to ensure maximum lead generation and high closure rates for new business;
- Responsible for assuring adherence to budgets, schedules, work plans, and performance requirements;
- Consistent exercise of independent judgment and discretion in matters of significance;
- Interviewing and recommending for hire new team members based on hiring needs; and
- Responsible for training Telesales representatives to communicate very effectively at all client levels, including CxO.

The director issued a request for evidence ("RFE"), in which she instructed the petitioner to submit, *inter alia*, a more detailed specific description of the beneficiary's prior duties abroad, identifying the percentage of time required to perform each duty, and an organizational chart of the foreign entity.

In response to the RFE, the petitioner submitted the following description of the beneficiary's job duties abroad:

- Responsible for managing a team of 6 Telesales executives and the collective team targets;
- Responsible for leading and monitoring activities of Telesales Representatives to ensure effective performance, specifically: managing metrics and performance of the team members; build and mentor a committed team for enhancing efficiency and organizational productivity; monitored the sales workflow and provide prioritization to ensure attainment of service level expectations, provide innovative solutions to meet the needs of the team and organization's customer's requirements (25%);
- Providing motivation to Representatives through individual contact, goal setting, periodic meetings, and recommendation of initiative plans, specifically: development of software business plans and analysis of the software market, analysis of future trends and requirements in the software industry, and representing the company at seminars and meetings; and gathering and understanding overall project requirements, project and/or service specifications, defining project execution approach and identifying all the project acceptance criteria in collaboration with the customer; understand the business needs and apply innovative and out-of-the-box strategies to drive the team to meet deadlines and target; mentor the team to be able to work with the clients in identifying their needs, determine the appropriate solution(s) for the client, and customize the services we offer to provide the greatest value to the client while maximizing profitable revenue; and coordination with business heads to understand and strategize approach to catalyze growth of the business (20%);
- Training team on products and services (through formal training and one-on-one coaching/mentoring) by focusing on the sales process to ensure maximum lead generation and high closure rates for new business, specifically: identify and institutionalize best practices as they relate to processes, tools, systems, and training; take initiative and guide

- team to persistently try to close additional business opportunities; practice self-discipline to work independently and manage all phases of the business development cycles to successfully close deals while meeting and exceeding set corporate goals; and train and provide inputs [sic] to the team on how to open new vertical markets and/or territory (20%);
- Responsible for training Telesales representatives to communicate very effectively at all client levels, including CxO;
  - Understanding client's requirements and allocating resources accordingly to meet the work deadlines, specifically: mentor the team to learn to take ownership of the sales cycle and pursue with a consultative approach, focusing on the customer's business goals and needs. Must be able to close the opportunities and be an agent of change (5%);
  - Acting as a liaison between corporate management and telesales resources for work standards & policies (5%);
  - Interviewing and recommending for hire new team members based on hiring needs (5%);
  - Report creation for the entire telesales team for the management on the performance and areas of improvement (5%);
  - Responsible to make sure that telesales teams meets the effort expectations of the internal and external clients (5%);
  - Responsible for performance appraisals with recommendation for promotion or termination of employment as applicable (5%);
  - Ensuring that established goals and quotas for the department are reached and motivates department to meet these goals (5%);
  - Responsible for assuring adherence to budgets, schedules, work plans, and performance requirements (5%); and
  - Consistent exercise of independent judgment and discretion in matters of significance;

The director denied the petition, concluding that the beneficiary's foreign job duties, including "leading and monitoring activities of sales representatives," "motivation to representatives through individual contact," "training telesales representatives" and "adherence to budgets, schedules, work plans, and performance requirements" were not consistent with someone in a managerial or executive position. The director found that the job duties were more indicative of an employee who was performing the necessary tasks to provide a service or to produce a product. The director concluded that the beneficiary's position abroad was to primarily assist in the performance of day-to-day, non-supervisory duties.

On appeal, counsel for the petitioner asserts that four of the beneficiary's job duties, specifically "leading and monitoring activities of sales representatives," "motivation to representatives through individual contact," "training telesales representatives" and "adherence to budgets, schedules, work plans, and performance requirements," are managerial in nature. Counsel submits print-outs from the O\*NET Online Library for the occupations of Sales Manager, IT Project Manager, and CIS Managers to illustrate that these four duties are managerial duties shared by three similar managerial occupations.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary was employed abroad in a managerial executive 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(1)(3)(ii). The petitioner's description of the job

duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

In the instant matter, the petitioner has repeatedly described the beneficiary's foreign job duties in very broad, vague, and repetitive terms. For example, the petitioner described the beneficiary's duties as including "managing a team of 6 Telesales executives and the collective team targets," "leading and monitoring activities of Telesales Representatives to ensure effective performance," "[p]roviding motivation to Representatives through individual contact, goal setting, periodic meetings, and recommendation of initiative plans," and "[e]nsuring that established goals and quotas for the department are reached and motivates department to meet these goals. These job duties merely rephrase the beneficiary's overall duty to manage the telesales executives through various broad methods (i.e., leading, monitoring, motivating, and ensuring quotas were met). Other than to broadly assert that the beneficiary managed the telesales executives, the petitioner provided no detail or insight into what actual duties the beneficiary performed on a day-to-day basis. The AAO cannot accept such an ambiguous job description and speculate as to the actual managerial duties the beneficiary performed.

Another example of the petitioner's use of broad and vague language to describe the beneficiary's job duties is the beneficiary's job duty of "[c]onsistent exercise of independent judgment and discretion in matters of significance." This job duty provides no insight into the beneficiary's actual, day-to-day activities. Instead, it merely reiterates the definition of "managerial capacity" under Section 101(a)(44)(A)(iv) of the Act.

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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). 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. *Id.* Conclusory assertions regarding the beneficiary's employment capacity are not sufficient; merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.*

In response to the director's RFE to provide a more detailed, specific description of the beneficiary's job duties abroad, the petitioner responded by essentially resubmitting the same list of job duties, with a few minor additions. The few additional details the petitioner submitted in response to the RFE provided no further insight into the beneficiary's actual duties. For example, under the duty of "[r]esponsible for leading and monitoring activities of Telesales Representatives to ensure effective performance," the petitioner provided the following additional details: "managing metrics and performance of the team members," "build and mentor a committed team for enhancing efficiency and organizational productivity," "monitored the sales workflow and provide prioritization to ensure attainment of service level expectations," and "provide innovative solutions to meet the needs of the team and organization's customer's requirements." Again, these vague additional duties merely rephrase the beneficiary's overall duty to manage the telesales representatives. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; the actual duties themselves will reveal the true nature of the employment. *Id.*

In response to the RFE, the petitioner provided the following elaboration regarding the beneficiary's duty of providing motivation to representatives through individual contact, goal setting, periodic meetings, and recommendation of initiative plans: "development of software business plans and analysis of the software market," "analysis of future trends and requirements in the software industry, and representing the company at seminars and meetings," "gathering and understanding overall project requirements, project and/or service specifications, defining project execution approach and identifying all the project acceptance criteria in collaboration with the customer," and "coordination with business heads to understand and strategize approach to catalyze growth of the business." The petitioner failed to explain how the duties of analyzing industry trends and requirements, representing the company at seminars and meetings, understanding project requirements, and coordination with business heads, are directly relevant to the beneficiary's duty of "providing motivation" to her subordinate telesales representatives.

Similarly, the petitioner elaborated on the beneficiary's job duty of understanding client requirements and allocating resources accordingly by stating that the beneficiary "mentor[s] the team to learn to take ownership of the sales cycle and pursue with a consultative approach, focusing on the customer's business goals and needs." Again, the petitioner failed to explain how the job duty of mentoring the telesales team is directly related to the beneficiary's duty of understanding client requirements and allocating resources accordingly. The petitioner failed to provide any meaningful elaboration of the beneficiary's job duties in response to the RFE.

The AAO acknowledges counsel's assertions that "leading and monitoring activities of sales representatives," "motivation to representatives through individual contact," "training telesales representatives" and "adherence to budgets, schedules, work plans, and performance requirements," are managerial in nature. However, while these broadly described duties could generally fall under the definition of managerial capacity, the lack of specificity raises serious questions as to the beneficiary's actual responsibilities. Overall, the vague job descriptions provided for the beneficiary prohibit the determination that the beneficiary was employed abroad in a managerial capacity. Accordingly, the appeal will be dismissed.

*b. The Beneficiary's Employment in the United States*

Beyond the decision of the director, the record also fails to establish that the beneficiary will be employed in the United States in a primarily managerial capacity. The petitioner's description of the beneficiary's proposed job duties in the United States was substantially similar to and contained the same vague and broad language found in the petitioner's description of the beneficiary's job duties abroad.

For example, the petitioner described the beneficiary's proposed duties in the United States as a business development manager as including the following:

- Leads and monitors activities of Telesales Representatives to ensure effective performance;
- Provides motivation to Representatives through individual contact, goal setting, periodic meetings, and recommendation of incentive plans;
- Provides direction to employees according to established policies and management guidance;
- Administers Company policies that directly affect subordinate employees;
- Ensures that established goals and quotas for the department are reached and motivates department to meet these goals;

- Trains staff on products and services (through formal training and one-on-one coaching/mentoring) by focusing on the sales process to ensure maximum lead generation and high closure rates for new business;
- Assures adherence to budgets, schedules, work plans, and performance requirements;
- Ensures 100% compliance to policies;
- Consistent exercise of independent judgment and discretion in matters of significance; and
- Train Telesales representatives to communicate very effectively at all client levels, including CxO.

When instructed by the director to provide a more detailed specific description of the beneficiary's job duties in the United States, the petitioner responded by essentially resubmitting the same list of job duties, with a few minor additions. Again, the additional duties provided were equally vague and unenlightening as the initial duties the petitioner sought to explain. For example, the petitioner elaborated on the beneficiary's duty to lead and monitor telesales representatives with the following additional duties: "managing metrics and performance of the team members," "build and mentor a committed team for enhancing efficiency and organizational productivity," and "monitor the sales workflow and provide prioritization to ensure attainment of service level expectations, provide innovative solutions to meet the needs of the team and organization's customer's requirements." These additional duties provided no further insight into the beneficiary's actual duties. Overall, the vague job descriptions provided for the beneficiary prohibit the determination that the beneficiary will be employed in the United States in a managerial capacity. Accordingly, the appeal will be dismissed.

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 actual duties themselves will reveal the true nature of the employment. 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. *Id.*

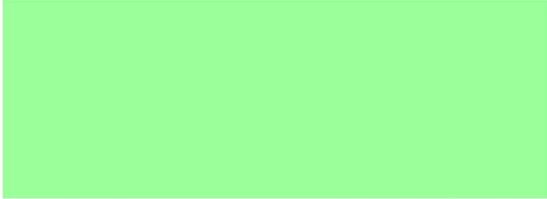
*c. Qualifying Relationship*

Beyond the decision of the director, the petitioner submitted insufficient evidence to establish that the petitioner has a qualifying relationship with the beneficiary's overseas employer. 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).

On Form I-129, the petitioner claimed to be the parent company of [REDACTED] ("the foreign entity"). Specifically, the petitioner claimed that that the foreign entity was "95% Partners of [the petitioner] (Parent Company)."

In support of the qualifying relationship, the petitioner submitted a detailed list of the owners of the foreign entity, as follows:

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The petitioner submitted the foreign entity's stock certificates, which corroborate the owners and percentages of ownership listed above.

The petitioner listed the owners of [redacted] as follows: [redacted] 87,000 shares; [redacted] 4,900 shares; [redacted] 100 shares; and [redacted] 5,000 shares ([redacted] % 95%). The petitioner listed the owners of [redacted] as follows: [redacted] 5,000 shares; [redacted] 5,000 shares; [redacted] 87,000 shares; and [redacted] 271 shares ([redacted] % 95%).

Finally, the petitioner submitted its stock certificates and stock ledger, which establish the U.S. entity's ownership structure as follows:

- [redacted] shares [20%];
- [redacted] 000 shares [20%];
- [redacted], 500,000 shares [30%]; and
- [redacted] 000 shares [30%].

Based upon the above-depicted ownership structures, the record fails to establish that the U.S. and foreign entities have a qualifying relationship. The record fails to establish that the petitioner is the parent company of the foreign entity and that it owns 95% of the foreign entity, as claimed on Form I-129. According to the foreign entity's stock certificates, the foreign entity's direct owners (shareholders) are [redacted]. The petitioner failed to establish that it has any direct or indirect ownership interest in the foreign entity, and therefore, that the foreign entity is its "subsidiary" as defined in 8 C.F.R. § 214.2(l)(1)(ii)(K).

The record indicates that the U.S. and foreign entities share two common shareholders. Specifically, [redacted] owns 20% of the U.S. entity, 1% of the foreign entity, plus another 95% of the 46% interest in the foreign entity held by [redacted]. [redacted] owns 20% of the U.S. entity, 4% in the foreign entity, plus another 95% of the 46% interest in the foreign entity held by [redacted]. However, despite the fact that the U.S. and foreign entities have two common shareholders, the petitioner and the foreign entity do not qualify as "affiliates" as defined in 8 C.F.R. § 214.2(l)(1)(ii)(L). No one shareholder has a majority ownership interest in both the U.S. and foreign entities, and the U.S. and foreign entities are not "controlled by the same group of individuals, *each individual owning and controlling approximately the same share or proportion of each entity* (emphasis added)."

The AAO maintains plenary power to review each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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). 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 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. 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.