



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAY 14 2013** Office: VERMONT 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, Vermont 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 New York corporation established in 2008, is a specialized software development company. It is a subsidiary of [REDACTED] based in [REDACTED] India. The petitioner seeks to extend the beneficiary's employment as its President for an additional two 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, counsel for the petitioner asserts that the beneficiary will be employed in a primarily managerial capacity. 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.

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 will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on September 29, 2008. On Form I-129, the petitioner indicated that it has one employee and five professional contractors. Initial documentation submitted with Form I-129 established that the beneficiary is the petitioner's sole employee in

the United States. The initial documentation, however, did not identify the five professional contractors claimed on Form I-129.

The petitioner submitted the organizational chart for the U.S. entity depicting the beneficiary at the top as President, directly overseeing three individuals: Mr. [REDACTED] Chief Executive-Technology; Mr. [REDACTED] Chief Executive-Support; and Mrs. [REDACTED] Chief Executive-Business Development. Mr. [REDACTED] is depicted as directly overseeing Mrs. [REDACTED] Manager Projects, who in turn directly oversees project leaders based in India. Mr. [REDACTED] is depicted as directly overseeing Mrs. [REDACTED] Manager Support, who in turn directly oversees support engineers based in India. Ms. [REDACTED] is depicted as directly overseeing Mr. [REDACTED] Parameswaran, Manager, and Mrs. [REDACTED] Lead Analysis, both of whom oversee business analysts based in India.

The petitioner submitted a document entitled “Summary of Growth Plan” explaining that the company has several clients in the United States. The document explained that all the “co-ordination, support and co-ordination of meetings between Indian office and Clients are managed from the NY office now.” The document further explained: “Most of the clients requested onsite support during the same time zone and availability of Executive officers in USA for further business development.”

The director issued a request for evidence (“RFE”), instructing the petitioner to submit, *inter alia*, the following: (1) an organizational chart for the U.S. company showing each employee/contract worker by name and position title, accompanied by a complete position description for the employees/contract workers with a breakdown of the estimated number of hours devoted to each of their job duties during a normal work week; (2) a schedule for the employees/contract employees by name showing the time of day that each, including the beneficiary, began and ended work every day during the full two months prior to filing the petition; (3) an explanation of the U.S. employees who report directly to the beneficiary while also serving as a manager or supervisor, clearly identifying him or her as such, and identifying their subordinates; (4) if the beneficiary manages an essential function, an explanation of the specific function(s) managed, a description of the services performed by contracted workers for the function managed, and the number of people who perform the contracted services; (5) copies of the U.S. company’s contracts for those services; (6) copies of the earnings statements or pay checks issued to each employee/contracted workers for the two months before the petition was filed; (7) copies of the company’s Federal Form 941 (Employers Quarterly Tax Return) for the most recent quarter prior to filing the petition; and (8) a complete copy of the company’s most recently filed Form W-3.

In response to the RFE, the petitioner submitted an amended organizational chart for the U.S. entity. The amended organizational chart, which bears little resemblance to the initial organizational chart, lists the beneficiary at the top as President, directly overseeing four individuals: Mr. [REDACTED], Business Development Consultant; Mrs. [REDACTED] Project Manager Foreclosure; Mr. [REDACTED] Consultant-Realty Projects; and Mr. [REDACTED]¹ Mr. [REDACTED] is depicted as directly overseeing Mr. [REDACTED] Senior Business Analyst (working from India), who in turn oversees Mrs. [REDACTED] Senior Developer (working from India). Ms. [REDACTED] is depicted as directly overseeing Mrs. [REDACTED]

¹ The evidence in the record reflects that [REDACTED] is one and the same person as [REDACTED]. The AAO will refer to [REDACTED] even if the referenced document uses the name [REDACTED]

██████████ Consultant-JAVA Project(s), who in turn directly oversees Mr. ██████████ Business Analyst (working from India).² Mr. ██████████ is depicted as directly overseeing Mr. ██████████ Senior Project Lead (working from India), who in turn oversees Mr. ██████████ Senior Developer (working from India), who oversees Ms. ██████████ Developer (working from India). Mr. ██████████ is depicted as directly overseeing Mrs. ██████████ Lead Analyst (working from India).

The organizational chart further lists several positions indirectly subordinate to the beneficiary, as follows: Mr. ██████████ Director-Customer Support; Mr. ██████████ Vice President at ██████████ Mr. ██████████ Director of Engineering at ██████████ Mr. ██████████ Development Manager at ██████████; Mr. ██████████, Corporate Strategy & Business Development at ██████████; Mr. ██████████ President at ██████████ Mr. ██████████ Outsourcing Partner; Mr. ██████████ Outsourcing Partner; Mr. ██████████, Support Engineer (working from India); Mr. ██████████ AP, Manager (working from India); Mr. ██████████ Manager (working from India); Mr. ██████████ Manager (working from India); Mr. ██████████ Manager (working from India); Ms. ██████████ Director of Marketing; Mr. ██████████ Director of Business Development; Mr. ██████████ Vice President Operations at ██████████; Mr. ██████████ Finance Controller at ██████████ Mr. ██████████, Product Manager at ██████████; Mr. ██████████ Technical Manager at ██████████ Mr. ██████████ Project Leader, Mr. ██████████ Product Manager at ██████████ Mr. ██████████, Product Manager at ██████████ and Mr. ██████████ COO at ██████████ The organizational chart did not clearly depict the nature of the beneficiary’s relationship to the above individuals.

The petitioner submitted a document entitled “Work Description and hour’s breakup of Executives and Non Executives Reporting to the President of [the petitioner].” In this document, the petitioner listed the following contractors as working for the petitioner and managed by the beneficiary: ██████████ Business Consultant; ██████████ Consultant-██████████ Consultant-██████████ Requirement Manager; and ██████████ Senior Analyst. Of particular significance, the petitioner described Ms. ██████████ duties in the last three months as the project manager for the “Foreclosure Project,” working with ██████████ as an outsourcing partner. The petitioner described Ms. ██████████’s duties in the last three months as “analysis of ██████████” “study of American Census,” and “Study of Mining,” and her intended duties for the remaining months of 2012 as “[c]ontinue with scope improvement of ██████████ project for USA.”

In the “Work Description and hour’s breakup of Executives and Non Executives Reporting to the President of [the petitioner],” the petitioner also listed the following individuals as both contractors/employees “working for [the petitioner] and managed by [the beneficiary]” and employees from other U.S. companies “coordinated” by the beneficiary: ██████████, Vice President at ██████████ Director of Engineer at ██████████ Development Manager at ██████████ Corporate Strategy Business Development at ██████████ President at ██████████ Outsourcing Partner at ██████████ Outsourcing Partner at ██████████ Vice President Operations at ██████████

² The evidence in the record reflects that ██████████ is one and the same person as ██████████ The AAO will refer to ██████████ even if the referenced document uses the name ██████████

The petitioner submitted a letter from [REDACTED] dated September 28, 2012, certifying that his company, [REDACTED] has contracted with the petitioner since 2009 “to render custom application development services for several of its [sic] clients, and that [the beneficiary] has personally managed several of our projects.” Mr. [REDACTED] further stated:

[The beneficiary] is also one of several key Exalt personnel currently trained on proprietary development technologies unique to one of [REDACTED]’s clients, [REDACTED], and necessary to support overflow development work with this client. In particular, his availability in the US has been necessary to [REDACTED] in order to perform on past and anticipated [REDACTED] projects.

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 denying the petition, the director acknowledged that the petitioner has a direct contractor-consultant relationship with five independent contractors, all of whom report directly to the beneficiary. The director also acknowledged that at least one of the contractors appeared to be employed in a professional capacity. However, the director concluded that because none of the contractors appeared to be primarily managing professional employees, the beneficiary does not have a managerial staff to which he provides direction, and therefore is not employed in an executive capacity. The director also concluded that the evidence does not establish how much of the beneficiary’s time is spent on non-qualifying and qualifying tasks. Hence, the petitioner concluded that the petitioner failed to establish that the beneficiary is employed in a primarily managerial capacity.

On appeal, counsel asserts that the evidence establishes that the beneficiary is employed in a managerial role pursuant to section 101(a)(44)(A) of the Act. Counsel asserts that the director failed to consider the petitioner’s contracts with other organizations which require the beneficiary to supervise professionals, as well as the beneficiary’s supervision over independent contractors. Counsel also asserts that the director failed to consider previously submitted evidence establishing that several of the independent contractors supervised other professionals.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed by the United States entity in a managerial or executive capacity.

In the instant matter, the petitioner’s claimed organizational structure is not credible or consistently documented. The petitioner’s initial organizational chart and the amended organizational chart bear little resemblance to each other, and overall, are not credible. For instance, the initial organizational chart depicts the beneficiary as overseeing Mr. [REDACTED], Mr. [REDACTED], and Mrs. [REDACTED] in the United States, but the Form I-129 and supporting documentation made clear that the beneficiary is the only actual employee in the United States. The amended organizational chart depicted the beneficiary as overseeing a completely different set of individuals, not including Mr. [REDACTED] Mr. [REDACTED] and Mrs. [REDACTED]. Both charts are completely different with respect to the employees and contractors directly supervised by the beneficiary, the number of employees and contractors in the United States, and even the position titles and managerial roles of the claimed employees.

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.* In addition, the 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).

The petitioner's claim that it utilizes five independent contractors in the United States is not entirely credible or supported by the evidence in the record. Although the petitioner claims that [REDACTED] are independent contractors directly supervised by the beneficiary, the petitioner failed to submit credible, consistent documentation to support this claim. The petitioner's initial organizational chart did not list any of the above individuals, other than Ms. [REDACTED] whom was depicted in a different position reporting to a different person when compared to the amended organizational chart.³

Critically, the petitioner failed to submit copies of the earnings statements/pay checks issued to each contractor for the two months before the petition was filed, copies of the company's Federal Form 941 (Employers Quarterly Tax Return) for the most recent quarter prior to filing the petition, and a complete copy of the company's most recently filed Form W-3. This documentation was specifically requested by the director in the RFE. The 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). Without documentation confirming payment of wages to the claimed contractors, the copies of the consulting contracts, alone, are insufficient to establish that the petitioner utilized these contractors as claimed, particularly when none of the contractors were depicted as reporting directly to the beneficiary in the petitioner's initial organizational chart.

The petitioner's claim that Ponnamal Subramoney Iyer directly supervises [REDACTED] is not credible. In the initial organizational chart, the petitioner depicted Ms. [REDACTED] as directly overseeing project leaders based in India. However, the evidence in the record, including Ms. [REDACTED]'s resume, indicates that Ms. [REDACTED] works and resides in the United States. Furthermore, in the "Work Description and hour's breakup of Executives and Non Executives Reporting to the President of [the petitioner]," the petitioner described Mrs. [REDACTED]'s job duties as the project manager for the "Foreclosure Project," working with [REDACTED] as an outsourcing partner. In contrast, the petitioner described Mrs. [REDACTED]'s duties as working on the [REDACTED] as well as a "Study of Mining." The petitioner failed to explain how Mrs. [REDACTED] could plausibly serve as Mrs. [REDACTED]'s direct supervisor when the two individuals are working on two different projects.

In the "Work Description and hour's breakup of Executives and Non Executives Reporting to the President of [the petitioner]," the petitioner listed the executives of several of the petitioner's major clients as being managed and coordinated by the beneficiary. Similarly, in the amended organizational chart, the petitioner depicted the said executives as indirectly subordinate to the beneficiary. However, this depiction is not

³ In the initial organizational chart, Ms. [REDACTED] was depicted as the "Manager Projects" working directly under Mr. [REDACTED]. In contrast, the petitioner's amended organizational chart depicted Ms. [REDACTED] as the "Project Manager-Foreclosure" working directly under the beneficiary.

credible or supported by any evidence in the record. The nature of the consulting agreements between the petitioner and client companies, such as [REDACTED] USA, and [REDACTED], is that the petitioner is the service provider for the client companies. For instance, the consulting agreement between the petitioner (“consultant”) and [REDACTED] (the “Company”) states: “Relationship of the Parties . . . Consultant shall accept any directions issued by the Company pertaining to the goals to be attained and the results to be achieved.” Ultimately, it is the petitioner that must answer to the executives of the client companies; there is no evidence to corroborate the petitioner’s claims that these executives are managed by and subordinate the beneficiary. Again, 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. *Matter of Ho*, 19 I&N Dec. at 591-92.

In addition, the evidence in the record suggests that the beneficiary performs non-qualifying duties in the United States. The letter from [REDACTED] states that the beneficiary is one of several key personnel “currently trained on proprietary development technologies unique to one of [REDACTED]’s clients, [REDACTED] and necessary to support overflow development work with this client.” Mr. [REDACTED] further states that the beneficiary’s availability in the United States “has been necessary to [REDACTED] in order to perform on past and anticipated [REDACTED] projects.” In addition, the petitioner’s “Summary of Growth Plan” states that the company’s United States clients “requested onsite support during the same time zone and availability of Executive officers in USA for further business development.” Considering that the beneficiary is the petitioner’s only employee in the United States and the petitioner’s failure to document its purported use of independent contractors in the United States, it is reasonable to conclude that the beneficiary will engage in technical development and support duties in the United States. These technical duties constitute producing a product or providing the services of the petitioner. 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).

The petitioner has submitted documentation establishing that it has several active, major projects in the United States. While the evidence indicates that the standard technical tasks are assigned to the company’s offshore developers, the petitioner seems to have a reasonable need for some employees or documented contractors in the United States to handle the other non-qualifying tasks, such as administrative duties, receiving payments, and invoicing, that would accompany handling this volume of work. Considering that the beneficiary is the petitioner’s only employee in the United States and the petitioner’s failure to submit any documentation establishing the utilization of independent contractors in the United States, it is reasonable to conclude that the beneficiary will also engage in these non-qualifying tasks in the United States.

The petitioner failed to establish what percentage of the beneficiary’s time is spent on qualifying versus non-qualifying duties. In the RFE, the director specifically advised the petitioner to submit evidence establishing that the beneficiary is significantly relieved of performing non-qualifying duties. The director specifically advised the petitioner to submit evidence establishing the breakdown of the estimated number of hours each employee devotes to each of his or her job duties. In response to the RFE, the petitioner provided the requested breakdown of time for its claimed contractors, but provided no such breakdown for the beneficiary. Again, the 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).

The petitioner's failure to quantify the time the beneficiary spends on each of his duties is critical because the record indicates that the beneficiary's duties will encompass both qualifying and non-qualifying duties. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. For this reason, the AAO cannot determine whether the beneficiary is primarily performing qualifying or non-qualifying duties.

Overall, based upon the fact that the beneficiary is the only employee in the United States, the petitioner's failure to establish its utilization of independent contractors, and the several discrepancies in the record regarding the petitioner's organizational structure and staffing, the record prohibits a determination that the petitioner will employ the beneficiary in a primarily managerial or executive capacity. For the foregoing reasons, the petitioner failed to meet its burden of establishing that the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

In visa petition proceedings, the burden of proving eligibility for the benefit sought rests with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.