



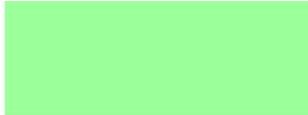
U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **AUG 14 2014** 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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

/s/ Ron Rosenberg  
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 appeal will be sustained.

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, to extend the beneficiary's status as an L-1A 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 is a software services company incorporated in Delaware. It is the parent company of [REDACTED] a research and development subsidiary located in Turkey, and maintains corporate headquarters for the group in [REDACTED] California. The beneficiary was previously granted one year in L-1A status in order to serve as the Chief Technology Officer (CTO) of the petitioner's new office. It sought to extend the beneficiary's status so that he could continue to serve as CTO for two additional years.<sup>1</sup>

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition. In denying the petition, the director emphasized that the beneficiary does not directly oversee any U.S.-based employees. The director acknowledged that the beneficiary has a team of subordinates who work for the petitioner's Turkish subsidiary, but found that "because of the time difference and distance, it would be reasonable to conclude that the beneficiary would have to be performing much of the day-to-day duties."

On appeal, counsel asserts that the director's decision was based on speculation and conjecture, without consideration of the nature of the beneficiary's actual duties as described in the record or the nature of the petitioner's business. Counsel asserts that, notwithstanding the petitioner's small staff size at the time of filing, the record establishes that the beneficiary manages the technology development function for the petitioner and its subsidiary at the highest level and is not required to perform non-managerial software developer or engineer duties.

### 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.

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<sup>1</sup> In a brief submitted on appeal, counsel for the petitioner advised the AAO of the beneficiary's appointment to a new position as the petitioner's Vice President of Customer Success as of February 2014. USCIS records reflect that the petitioner filed a new Form I-129 to advise USCIS of this change in the beneficiary's L-1A employment [REDACTED]. That petition was approved with a validity period of May 20, 2014 to April 1, 2016. The focus of this decision is the Chief Technology Officer position offered to the beneficiary at the time of filing.

The evidentiary requirements for L-1 petitions are set forth at 8 C.F.R § 214.2(l)(3). With respect to a "new office," a petitioner is allowed an initial one-year period to establish an operation that will support an executive or managerial position. After one year the "new office" visa petition may be extended by filing a new Form I-129 accompanied by the evidence outlined at 8 C.F.R. § 214.2(l)(3)(v).

Defining the term managerial capacity, section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Finally, section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), further provides:

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the [Secretary of Homeland Security] shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

## **II. Employment in a Managerial Capacity**

The sole issue to be addressed is whether the petitioner established that it will employ the beneficiary in a qualifying managerial capacity.

## A. Facts

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on October 1, 2013. The petitioner develops, sells and supports a software product called [REDACTED] which is described as a Java-based, in-memory data grid (IMDG) solution created for enterprises to build scalable applications. The petitioner's CEO and the beneficiary founded the petitioner's foreign subsidiary in Turkey, which developed the Hazelcast technology. The petitioner was founded in Silicon Valley in May 2012 to serve as the parent company and corporate headquarters for the group, while the Turkish subsidiary retains responsibility for the continued research and development of the technology. The petitioner explained that the IMDG market is primarily based in Silicon Valley, which prompted the company to locate its core management, sales and marketing departments in the United States, where more than half of its revenue is generated. At the time of filing, the petitioner had four employees including the CEO, the beneficiary, a Vice President of Marketing and a Vice President of Sales and Operations. The petitioner anticipated U.S. sales of nearly \$1 million during its first full year in operation.

The petitioner stated that the beneficiary, as CTO, is the highest level technology manager for the group and is responsible for the direction of subordinate employees engaged in the development of new technologies, as well as the overall management of existing technologies. At the time of filing, the petitioner established that the beneficiary had five direct and indirect subordinates based in Turkey, including the head of the research and development department, a software architect, two software engineers, and a software developer. In addition, the petitioner established that the U.S.-based vice president of sales and operations and the vice president of marketing also have indirect reporting responsibility to the beneficiary. The petitioner indicated that the company is experiencing rapid growth and anticipates hiring six U.S.-based sales engineers and two marketing analysts, as well as ten additional software engineers in Turkey, within the next year. The petitioner stated that all of these employees would report directly or indirectly to the beneficiary for matters relating to the company's technology.

The petitioner's letter in support of the petition included a five-page explanation of the beneficiary's duties as CTO, as well as brief descriptions of duties and educational credentials for the petitioner's vice presidents and the foreign entity's research and development team. Briefly, the petitioner indicated that the beneficiary will: direct, plan and coordinate customer products and oversee development activities; manage key client relationships; oversee implementation of projects; evaluate performance of subordinates and make personnel decisions; manage and direct the strategic development of the company's products; manage all technical operations of organization; develop and implement all technology policies and strategies related to intellectual property; lead strategic technological planning; oversee service level agreements; and represent the petitioner's group to potential investors as a member of the senior management team. The petitioner stated that the beneficiary allocates all of his time to managing the technology development function and supervising professional employees who perform the non-managerial duties associated with that function.

The director subsequently issued a request for evidence and, later, a notice of intent to deny (NOID). In the NOID, the director observed that all of the beneficiary's immediate subordinates are located outside of the United States and therefore the petitioner had not shown how the beneficiary would be relieved from performing the non-managerial day-to-day duties of the business.

In response, the petitioner supplemented the record with additional details regarding the beneficiary's duties, additional evidence demonstrating his supervision of the overseas staff, and additional explanation of the nature of the technology development function the beneficiary manages. The petitioner requested that the director consider the contributions made by the foreign subsidiary's employees and the needs of the organization as a whole. The petitioner explained that the U.S. parent and its overseas subsidiary "have been working together as a global organization, and are intricately connected to each other throughout the process of development of the product, as well as the marketing and sales of the [REDACTED] product, and securing customers and providing the customer its products and solutions."

The petitioner stated that the beneficiary functions as the manager of technology operations, an essential function of the company, and does not perform the duties of a sales engineer, developer, software engineer or perform sales and marketing duties, all of which are performed by other employees in the United States and abroad. The petitioner explained that the CTO role requires the beneficiary to oversee all technology staff and to indirectly oversee sales and marketing staff for the entire organization from the U.S. headquarters. Finally, the petitioner stressed that the beneficiary reports only to the CEO and is the "key strategic manager ensuring that the technology functions are implemented across all departments in a uniform manner."

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity under the extended petition. In denying the petition, the director observed that the beneficiary does not have any direct subordinates in the United States. The director noted that the petitioner has a number of positions for sales engineers and marketing analysts in the United States which have not yet been filled, and thus "it would be reasonable to conclude that the responsibility of performing many of the tasks associated with these positions would fall upon the beneficiary."

The director acknowledged the petitioner's claim that the beneficiary oversees a team of professionals, but noted that these employees are located overseas.<sup>2</sup> The director found that "[b]ecause of the time difference and distance it would be reasonable to conclude that the beneficiary would have to be performing much of the day-to-day duties." The director concluded that based on the organizational structure described, the beneficiary is required to primarily assist with the day-to-day non-supervisory duties of the business, and the performance of such tasks precludes the beneficiary from being considered a manager or executive. The director further determined that the petitioner did not submit sufficient documentation establishing that the beneficiary manages an essential function.

On appeal, counsel asserts that although the director's decision appears to be based almost entirely on the size of the U.S. company and number of employees in the United States, it did not take into account the reasonable needs of the organization as a whole or the overall purpose and stage of development of the petitioning company. Counsel emphasizes that cross-border and cross-functional management are increasingly common in the software industry, and that the petitioner provided a sufficiently detailed

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<sup>2</sup>The director also stated that the petitioner did not provide any details about any of these positions. The record reflects that the petitioner did in fact provide duty descriptions for all positions that report directly or indirectly to the CTO position.

explanation of why it has made the decision to initially operate with its senior managers based in the United States and its research and development staff based overseas.

Counsel also contends that the director failed to consider that the two companies work together as one global organization serving the same customer base, and therefore unfairly dismissed the work performed by the technical staff located at the Turkish subsidiary when determining whether the beneficiary would be relieved from performing non-managerial duties. Further, counsel asserts that the director's conclusion that the beneficiary would be performing the duties of a sales engineer or software engineer because of "time differences and distance" separating him from his subordinates is not supported by the weight of the evidence in the record, but instead is based on "speculation and conjecture." Counsel maintains that the beneficiary's primary duties are to manage the company's technical operations function across the organization and to establish short- and long-term technology strategies at the highest level.

### B. Analysis

Upon review, the petitioner's assertions are persuasive. The petitioner submitted sufficient evidence to establish that the beneficiary will be employed in a primarily managerial capacity.

When examining the executive or managerial capacity of the beneficiary, USCIS looks first to the petitioner's description of the 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 to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.*

The statutory definition of managerial capacity under section 101(a)(44)(A)(ii) of the Act allows for both "personnel managers" and "function managers." Personnel managers must primarily supervise and control the work of other supervisory, professional, or managerial employees, whereas function managers must primarily manage an essential function within the organization. While the term "essential function" is not further defined by statute or regulation, a petitioner who claims that the beneficiary qualifies as a function manager must identify the essential function and describe in detail the duties to be performed in managing that function. 8 C.F.R. § 214.2(l)(3)(ii).

Furthermore, the petitioner must demonstrate that the beneficiary will manage the function rather than perform the duties related to the function. Whether the beneficiary will be a function manager turns on whether his or her duties will be "primarily" managerial. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). While an L-1A function manager may use his or her business expertise to perform some operational or administrative tasks, he or she primarily must manage an essential function; someone else must primarily perform the day-to-day, non-managerial tasks associated with that function.

To determine whether a beneficiary would primarily manage an essential function, USCIS must consider the totality of the record and weigh all relevant factors, including: the nature and scope of the petitioner's business; the petitioner's organizational structure and a beneficiary's position within it; the scope of a beneficiary's authority and its impact on the petitioner's operations; the work performed by other staff within the petitioner's organization, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business. When staffing levels are considered in determining

whether an individual will act as a "function manager," an officer must also take into account the reasonable needs of the organization as a whole, which may include closely-related foreign components.

Here, the petitioner has established that the beneficiary's responsibilities have been and will be primarily managerial duties associated with technology development and strategy for the petitioner's international organization. Based on the petitioner's description of the beneficiary's duties, the beneficiary oversees all aspects of the company's technology function. The beneficiary is charged with managing the implementation of technology-related projects, strategies and policies, ensuring that the company's technology vision is conveyed by sales and marketing departments, overseeing the team responsible for product research and development, contributing to high-level planning for the future product developments, and ensuring that the group's technology will support further market expansion. The record further establishes that the beneficiary has been given significant discretion in decision-making, and that he is a member of the senior management team, reporting only to the CEO.

Although the director based her decision almost entirely on the size of the U.S. company and the number of staff, the director did not take into consideration the reasonable needs of the organization as a whole. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

Upon review, the evidence establishes that the U.S. petitioner works closely with its Turkish subsidiary's research and development department, which employs professional technical staff dedicated to supporting the growth of the company's customer base and continuous development of its technology. Thus, the fact that the U.S. company has only four employees should not lead to a conclusion that the petitioner would require the beneficiary, as CTO, to perform day-to-day duties associated with development, engineering, sales or marketing of the petitioner's products. The petitioner has submitted evidence demonstrating that the foreign technical staff is able to carry out their duties under the beneficiary's oversight despite the distance and time difference between the two offices. Further, the petitioner has hired a vice president for marketing and a vice president for sales. Therefore, although the petitioner has not fully staffed its U.S. sales and marketing departments, the record does not support the director's suggestion that the beneficiary would be performing sales and marketing duties.

Given the overall purpose of the organization, the petitioner has established a reasonable need for a senior-level employee to manage the essential function of overseeing technology strategy and development for its international organization, even in an office composed of only three other employees. The petitioner has established by a preponderance of the evidence that the beneficiary's duties are primarily managerial in nature, while the day-to-day non-managerial tasks associated with the function he manages are performed by other staff within the petitioner's organization. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Accordingly, the appeal will be sustained.

### III. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

Here, that burden has been met. Accordingly, the director's decision dated December 31, 2013 is withdrawn and the petition will be approved.

**ORDER:** The appeal is sustained.