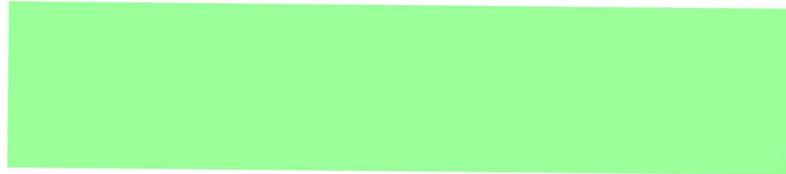


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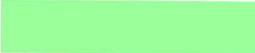


U.S. Citizenship
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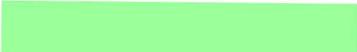


DATE: **MAY 01 2014**

Office: VERMONT SERVICE CENTER

FILE: 

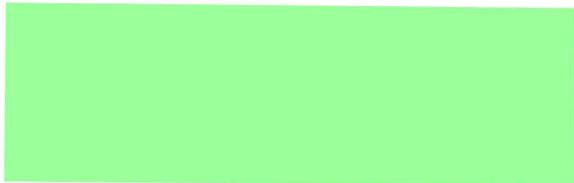
IN RE:

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:

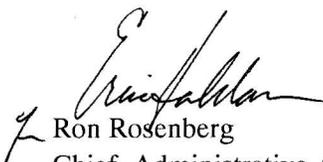


INSTRUCTIONS:

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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg

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 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 engaged in software development, is the parent company of the beneficiary's current employer located in India. The petitioner seeks to employ the beneficiary in the position of Development Manager.

The director denied the petition concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the director erred in his conclusions and that the evidence in the record establishes that it will employ the beneficiary in a managerial or executive 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.

II. MANAGERIAL OR EXECUTIVE CAPACITY IN THE UNITED STATES

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

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

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.

Finally, 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. Section 101(a)(44)(C) of the Act.

A. Facts

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker on March 13, 2013. On the Form I-129 the petitioner indicated that it is a software development company established in 2000 and headquartered in California with offices in Missouri and Oklahoma. According to the petitioner, the company currently has 100 employees and another 70 employees at its subsidiary in India.

In a letter dated March 4, 2013, the petitioner stated that the beneficiary, as Development Manager, "will be primarily responsible for managing the definition, design and development of the next version of Workforce Planning module." The petitioner indicated that the beneficiary would manage "customer deliverables in accordance with the product roadmap" and help the sustaining development manager with customer issues. The beneficiary's duties were described as follows:

- Developing and managing schedule from product development to delivery on the roadmap. (30%)
- Working with Product Management to define the roadmap for the Workforce Planning module. (20%)
- Liaising with the Product Management team, Quality Assurance and Development Team to manage the transition of deliverables throughout the software development cycle. (15%)
- Providing product expertise and support across multiple [petitioner] CPM applications. (15%)
- Managing customer support issues to ensure issues are addressed in a timely fashion. (15%)
- Managing the personal and professional development of team members. (5%)

The petitioner stated that the beneficiary "will have one Lead Engineer and one Senior Software Engineer under his direct supervision" and indicated that these employees are professionals.

The petitioner stated that the beneficiary was the primary architect for the petitioner's Corporate Performance Management (CPM) suite and had the "overall managerial responsibility of the Workforce Planning, Budgeting, and Architecture modules." Since the petitioner intends to deliver the next version of the Workforce Planning module in the United States, the petitioner seeks to transfer the beneficiary to manage the engineering team responsible for development of the module.

According to a letter from the foreign company, the beneficiary is currently employed as a development manager abroad, where he allocates 60% of his time to development management duties and 40% to architectural duties. The foreign entity stated that, upon the beneficiary's transfer to the United States, he will work closely with customers to further understand their needs and will "provide expertise" on the [petitioner's] CPM suite."

The petitioner provided its organizational chart entitled "Future Structure – US" depicting the beneficiary as directly subordinate to the "VP Engineering" and directly supervising one senior software engineer and one lead software engineer, both vacant positions.

On March 25, 2013, the director issued a request for additional evidence (RFE) to establish that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity. Among other things, the director specifically requested additional information regarding the beneficiary's proposed duties and documentation demonstrating that the beneficiary will supervise professionals.

In response to the RFE, the counsel for the petitioner reiterated that the beneficiary currently holds the development manager position in India and is to assume a similar position in the United States. Specifically, the petitioner emphasized that the beneficiary will be responsible for managing customer deliverables, managing customer support and managing development of the workforce planning module. Counsel also asserts that the beneficiary "will be managing two engineers, both of whom possess a Bachelor's Degree in an information technology field." The petitioner did not provide the subordinate employees' names or the requested educational credentials.

The petitioner also submitted a letter in response to the RFE in which it reiterated the information provided at the time of filing regarding the beneficiary's position and the company's desire to transfer him to the United States. The petitioner referred generally to the beneficiary's team and his responsibility to the software engineers on his team, but the petitioner did not include the engineers' names, duty descriptions, pay stubs, or credentials.

On May 24, 2013, the director denied the petition concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. The director found that the petitioner did not establish that the beneficiary would be managing professionals, supervisory or managerial employees or that the beneficiary would be sufficiently relieved from performing non-qualifying duties.

On appeal, counsel for the petitioner states that the petitioner filed this petition on March 13, 2013 and filed two I-129 petitions requesting L-1B classification for two software engineers "on or about that same time." Counsel asserts that these workers currently work under the beneficiary's supervision in India and will be responsible for performing the day-to-day duties of defining, designing and developing software for the Workforce Planning module upon their transfer to the United States. Counsel also asserts that other company departments would assist in day to day operations to relieve the beneficiary from performing non-qualifying tasks.

On appeal, the petitioner asserts that the director "erroneously assumes that [the petitioner] is a small software development company with limited staffing needs and, as such, [the beneficiary] will be performing the day to day design and development activities." The petitioner emphasizes that the company employs a total of 170 people of which 70 are in India and 100 in the United States. The petitioner further states that its software engineering team has approximately 70 professional employees with a "majority of the development team (65 people)" working for the company in India.

B. Analysis

Upon review, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). Published case law clearly supports the pivotal role of a clearly defined job description, as the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner initially described the beneficiary's duties by allocating a percentage of the beneficiary's time into six general areas of responsibility. The petitioner indicated that the beneficiary would allocate 30% of his time to developing and managing a schedule, 20% to working with another department to develop a roadmap, 15% to liaising with other teams to manage transition of deliverables, 15% to providing product expertise, 15% to managing customer support issues, and 5% to managing team member development. Most of these duties are too vague and overly-broad to be classified as managerial in nature. The petitioner did not explain how the beneficiary will manage customer support, in what way he will participate in the transition of deliverables, how he will manage schedules or develop roadmaps, or what specific tasks any of these functions will entail. 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 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). While it appears that the beneficiary will have authority over the development and delivery of a software product module, the petitioner has not established that his actual day-to-day duties will be primarily managerial in nature.

Although the director advised the petitioner that the position description provided at the time of filing was insufficient to establish that the beneficiary would be employed in a qualifying managerial or executive capacity, and requested additional specific information regarding the beneficiary's anticipated tasks and the amount of time he would allocate to managerial duties, the petitioner's response to the RFE did not include any additional information regarding the proposed position or its associated tasks. 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).

On appeal, the petitioner adds that the beneficiary will work closely with customers while the Workforce Planning module is in development; however, the petitioner failed to explain how much time the beneficiary will spend on this non-qualifying task or where it would fit within the general responsibilities already outlined in the petition. The petitioner also states that the beneficiary will continue to perform the same duties in the United States that he currently employs abroad. The petitioner indicates that the beneficiary allocated 40% of his time abroad to architectural duties, yet the petitioner did not include architectural duties in the beneficiary's duty description for the petitioner. This assertion represents a departure from the petitioner's initial description of the beneficiary's duties and creates an unresolved inconsistency regarding the beneficiary's actual duties upon transfer to the U.S. petitioner. 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. at 582.

Beyond the required description of the job duties, United States Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary. Factors considered include the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

In this matter, the beneficiary is to transfer to the United States and be responsible for management of the software development phase and launch of the company's next generation Work Planning Module. The petitioner's "future" organizational chart depicted two software engineer positions that would report directly to the beneficiary. Presumably these engineers would develop the software and perform other duties under the beneficiary's supervision. However, the petitioner did not provide the engineers' duty description or their names. Despite the director's RFE, counsel for the petitioner merely stated that the unidentified engineers have bachelor's degrees in the information technology field but provided no supporting documentation. Again, 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).

On appeal, the petitioner states that the proposed subordinate engineers are current members of the beneficiary's team abroad who have been approved to work in the United States in L-1B status. The petitioner provides Form I-797 approval notices for two individuals.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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." See section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. §

214.2(l)(1)(ii)(B)(2). In addition, if a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. See 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Though requested by the director, the petitioner did not provide job descriptions or educational credentials to establish the professional qualifications of the beneficiary's subordinate employees. Thus, the petitioner has not established that these employees possess or require bachelor's degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees supervises subordinate staff members or manages a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. The petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act. Further, the petitioner's vague description of the beneficiary's duties does not indicate how much of his time will actually be allocated to the supervision of his subordinates or specify which duties will be delegated to them. Therefore, even if the petitioner established that the beneficiary's subordinates are professionals, the petitioner has not established that his duties will primarily relate to supervising professional subordinates.

In the present matter, the petitioner failed to submit the requested detailed description of the beneficiary's job duties, failed to resolve inconsistencies regarding the beneficiary's performance of non-qualifying duties, and failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. Absent a clear and credible breakdown of the time spent by the beneficiary performing specific tasks, we cannot determine what proportion of his duties would be managerial, nor can we conclude whether the beneficiary would be primarily performing managerial duties. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). 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. The petitioner has not met this burden.

For these reasons, the petitioner has not established that it will employ the beneficiary in a managerial or executive capacity. Accordingly the appeal will be dismissed.

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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.