

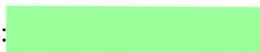
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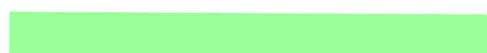
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

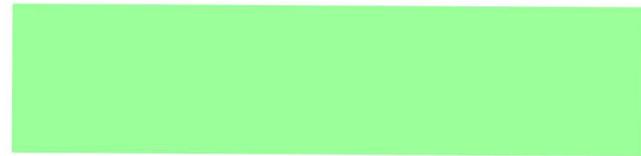


DATE: **OCT 07 2014** Office: CALIFORNIA SERVICE CENTER FILE: 

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.

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.

Thank you,


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 The director's decision will be withdrawn and the petition will be remanded to the director for further review and entry of a new decision.

The petitioner filed a Form I-129 Petition for a Nonimmigrant Worker 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 New York corporation, is an information technology service provider. The petitioner states it is the parent company of the beneficiary's foreign employer located in the Netherlands. The petitioner seeks to employ the beneficiary in the position of manager, solutions engineering for a period of three years.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary is employed in a specialized knowledge capacity abroad.

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 contends that the director failed to adequately explain the basis of the denial and overlooked substantial evidence on the record establishing that the beneficiary acts in a specialized knowledge capacity with the foreign entity.

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, Petition for a Nonimmigrant Worker (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. SPECIALIZED KNOWLEDGE CAPACITY ABROAD

The sole issue addressed by the director is whether the petitioner has established that the beneficiary has been employed in a specialized knowledge capacity with the foreign entity.

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides the statutory definition of specialized knowledge:

For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines specialized knowledge as:

[S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

The petitioner filed the Form I-129 on December 5, 2013. The petitioner stated that it is a "global, industry-leading managed services company offering complete solutions to enterprise customers for their outsourcing global information technology (IT) operations," including "management at the individual component, device and network level to analysis, design and management of complex business processes." The petitioner indicated that it specializes in automating information technology support through its proprietary [REDACTED] technology.

The petitioner stated that it is transferring the beneficiary to its San Francisco office to build and lead a team of engineers specializing in the petitioner's proprietary technology. The petitioner specified that the beneficiary is currently employed as a senior systems engineer with the foreign entity, pursuant to which he has gained knowledge and expertise in [REDACTED] technology by designing and implementing solutions for customers in the European Union. The petitioner provided an overview of the components of [REDACTED] and a description of the beneficiary's current duties in the areas of solutions engineering and platform support.

The petitioner stated that the beneficiary has worked as a professional systems administrator for over 15 years, and has worked for the foreign entity for over three years. Specifically, the petitioner indicated that the beneficiary previously worked for four different Dutch companies between 1998 and 2010 as a computer systems administrator, a computer support engineer, a Unix systems administration, a senior Linux administrator/network engineer, and as an operations manager. The petitioner noted that the

beneficiary is currently responsible for designing solutions and supporting the petitioner's proprietary platform in a Unix/Linux environment.

The director later issued a request for evidence (RFE) requesting that the petitioner submit additional evidence to establish that the beneficiary is employed in a specialized knowledge capacity abroad. The director suggested that the petitioner submit a training record; the foreign entity's organizational chart; and a letter from a representative of the foreign entity further describing the beneficiary's duties and his application of either special or advanced knowledge in the performance of such duties.

In response, the petitioner provided a letter from the foreign entity's chief executive officer (CEO) which addressed each of the director's inquiries regarding the beneficiary's claimed specialized knowledge. The CEO provided additional detail relevant to the company's [REDACTED] technology, and explained that the application is only available through the petitioner and its affiliated companies. The foreign entity provided the names of eight training courses the beneficiary completed, and an organizational chart which indicates that the beneficiary is a member of the Unix department, along with three other employees with the same job title.

In denying the petition, the director recited a portion of the beneficiary's job description and acknowledged receipt of the petitioner's response to the RFE. However, in reaching a conclusion that the beneficiary was not employed by the foreign entity in a specialized knowledge capacity, the director did not address any of the specific evidence submitted or why that evidence was insufficient to meet the petitioner's burden of proof.

On appeal, counsel asserts that the evidence of record was sufficient to establish eligibility and contends that the director failed to explain how she reached her decision based on the evidence.

Counsel's contention that the director's decision lack sufficient analysis of the petitioner's evidence is persuasive. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). Here, the director's discussion of the petitioner's evidence was limited to two or three sentences in the notice of denial and did not provide sufficient grounds for the petitioner to address any evidentiary deficiencies on appeal. Accordingly, the director's decision dated January 24, 2014 will be withdrawn and the matter will be remanded to the director for entry of a new decision.

We do not find that the record as presently constituted establishes the beneficiary's eligibility. We note that the petitioner has submitted inconsistent descriptions of the beneficiary's current duties as a senior systems engineer. At the time of filing, the petitioner provided a list of 14 specific tasks the beneficiary performs in the areas of solutions engineering and platform support for European customers. In response to the RFE, rather than assigning a percentage of time to each of the duties already described in the record, the petitioner indicated that the beneficiary allocates 45% of his time to overseeing [REDACTED] implementation in Europe and Asia, 45% of his time to serving as a technical executive for major clients, and only 10% of his time providing sales support as a Solutions Engineer, a function that was prominent in the initial position description. While the petitioner has consistently indicated that the beneficiary's role requires special or advanced knowledge of [REDACTED] it is unclear which set of duties more accurately reflects his role and responsibilities.

Further, the [REDACTED] product description document provided on the record indicates that there are other similar applications in the field, and although the petitioner states that it is the industry leader, the record as presently constituted does not contain evidence that the product is significantly different from similar products on the market. The current statutory and regulatory definitions of "specialized knowledge" do not include a requirement that the beneficiary's knowledge be proprietary. *Cf.* 8 C.F.R. § 214.2(l)(1)(ii)(D) (1988). The petitioner might satisfy the current standard by establishing that the beneficiary's purported specialized knowledge is proprietary, as long as the petitioner demonstrates that the knowledge is either "special" or "advanced." By itself, simply claiming that knowledge is proprietary will not satisfy the statutory standard.

The petitioner stated that the minimum time to obtain the special knowledge possessed by the beneficiary, including training and experience, would be one year and indicating that the beneficiary's training included [REDACTED] Overview, Best Practices for Escalating and Handling Tickets, Working with [REDACTED] Working with [REDACTED] Introducing [REDACTED] Working with [REDACTED] Company Overview, and Understanding Customer Focus at [REDACTED]. However, the record does not contain documentary evidence of the training completed or provided any additional information regarding the content and duration of these courses as evidence that they contributed to the beneficiary's claimed special or advanced knowledge. Further, it appears that the beneficiary was hired as a "senior" system engineer despite having no prior experience with the company and it is unclear at what point he became able to fully perform the stated job duties.

Finally, the petitioner has not provided evidence that compares the beneficiary with similarly employed workers within or outside the company as necessary to demonstrate that his knowledge is special or advanced. The beneficiary's knowledge must be distinguished as different from knowledge that is commonly held by other similarly placed information technology professionals in the industry or advanced in comparison to other similarly-employed workers in the organization. The petitioner indicates that the beneficiary is the senior member within his four-person Unix department at the foreign entity's office. However, it does not adequately account for the apparently wide gap in stated responsibilities for the beneficiary in comparison to other employees holding the same job title in the same department. The organizational chart shows that there are four senior engineers in the beneficiary's four-person department. The petitioner asserts that the beneficiary "oversees [REDACTED] implementations," serves as a technical executive for major clients, and provides sales support, while other similarly educated employees with the same "senior" job title are "responsible for maintaining Unix systems." This unexplained difference in responsibilities is also notable because the petitioner's initial description of the beneficiary's duties did not emphasize his role in overseeing PaaS implementations or as a technical executive.

In order to establish eligibility, the petitioner must show that the individual will be employed in a specialized knowledge capacity. 8 C.F.R. § 214.2(l)(3)(ii). The statutory definition of specialized knowledge at Section 214(c)(2)(B) of the Act is comprised of two equal but distinct subparts. First, an individual is considered to be employed in a capacity involving specialized knowledge if that person "has a special knowledge of the company product and its application in international markets." Second, an individual is considered to be serving in a capacity involving specialized knowledge if that person "has an advanced level of knowledge of processes and procedures of the company." *See also* 8 C.F.R. § 214.2(l)(1)(ii)(D). The petitioner may establish eligibility by submitting evidence that the beneficiary and the proffered position satisfy either prong of the definition.

Once the petitioner articulates the nature of the claimed specialized knowledge, it is the weight and type of evidence which establishes whether or not the beneficiary actually possesses specialized knowledge. In visa petition proceedings, the burden is on the petitioner to establish eligibility. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). In evaluating the evidence, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Id.*

The record as presently constituted contains insufficient evidence to establish that the beneficiary has been employed abroad in a capacity requiring specialized knowledge. However, neither the request for evidence nor the notice of decision provided the petitioner adequate notice of the evidentiary deficiencies in the record. Accordingly, we will remand the petitioner to the director for further action and entry of a new decision.

III. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The petitioner indicates that the beneficiary will be employed in the United States in a managerial capacity in the position of Manager, Solutions Engineering in its San Francisco office. Upon review, the evidence of record is insufficient to establish that the beneficiary will be employed in a managerial 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.

The petitioner stated on the Form I-129 that the beneficiary "will build, train and lead a team to develop and apply custom solutions to client systems using [REDACTED] . . . To do this, he will first hire and then oversee the

work of a team of professional solutions engineers in ensuring that customers receive the support required to take full advantage of [REDACTED] technology."

In its letter in support of the petition, the petitioner stated that the beneficiary's proposed duties in the United States are the same as those he performs for the foreign entity "except that now he will be building and managing a team of other professionals to execute these same functions." The petitioner listed 14 duties and stated that "the solutions engineering and platform support job descriptions of [the beneficiary's] current position as Senior Systems Engineer and his proposed position as Manager, Solutions Engineering in San Francisco overlap significantly."

In response to the director's request for additional information regarding the beneficiary's proposed role and duties, the petitioner stated that the beneficiary will be building a solutions engineering team, and explained that "solutions engineering supports sales by showing prospective clients the technical benefits of [REDACTED] in their businesses and by overseeing the implementation of [REDACTED] in the IT infrastructures of new clients." The petitioner indicate that because there is no solutions engineering department in San Francisco at present, the beneficiary's managerial duties will change over time as personnel are added. The petitioner indicated that during his first year on the job, the beneficiary will allocate 20% of his time to planning the department; 25% of his time to hiring "professional Unix systems engineers," with a total of two to three to be hired during his planned three-year tenure; 40% of his time to staff training; 5% of his time to overseeing personnel; and 10% of his time to overseeing projects. The petitioner stated that the office is otherwise fully staffed with logistical and clerical support and thus the beneficiary will be relieved from performing any non-managerial tasks.

The petitioner indicated that the beneficiary will be employed in a managerial capacity as he will manage the solutions engineering department, supervise and control the work of professional engineers, have the authority to hire and fire employees in consultation with the human resources department, and make decisions on the daily operations of solutions engineering activities under his authority.

Based on the petitioner's descriptions of the beneficiary's duties and the anticipated hiring plans for the San Francisco-based solutions engineering position, the record does not establish that the beneficiary would be employed in a managerial capacity.

The petitioner indicated at the time of filing that there would be "significant overlap" between the beneficiary's current duties as a senior systems engineer and his proposed managerial role. In response to the RFE, the petitioner submitted information to further clarify the beneficiary's duties, but did not indicate when it expected to be fully staffed other than stating that the beneficiary would likely hire two to three engineers within three years. Assuming that the petitioner expects to offer its clients and its sales team solutions engineering support upon the beneficiary's arrival in the United States, it is unclear who would be responsible for performing these engineering duties, if not the beneficiary, while the department remains unstaffed or understaffed.

Further, the petitioner has not established that the beneficiary's training responsibilities, which the petitioner indicates would require 40% of his time, would qualify as managerial in nature, as such duties appear to involve knowledge technical knowledge transfer.

While it appears that the solutions engineering team may be staffed and trained within three years, and that the beneficiary would have authority over the teams' recruitment, hiring and eventual work product, the petitioner did not establish that his duties would be primarily managerial in nature in the short-term, or even state that he would immediately hire any professional staff to perform the non-managerial engineering tasks that are the responsibility of his new department. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Therefore, the record as presently constituted does not establish that the petitioner would employ the beneficiary in a managerial capacity.

IV. CONCLUSION

Based on the foregoing discussion, although the director's decision will be withdrawn, the evidence of record as presently constituted does not establish the beneficiary's eligibility for the benefit sought. Accordingly, we will remand this matter to the director for further action and entry of a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing discussion and entry of a new decision which, if adverse, shall be certified to the Administrative Appeals Office for review.