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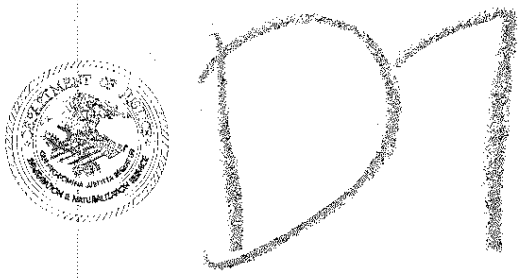

U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 01 273 53682 Office: VERMONT SERVICE CENTER Date: FEB 11 2003

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER: [redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Myra L. Rosenberg
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office ("AAO")on appeal. The appeal will be dismissed.

The petitioner is a computer consulting and software development business that seeks to continue the employment of the beneficiary in the United States as its vice president. The director determined that the petitioner had not established that the beneficiary had been or would be employed in the United States in a managerial or executive capacity.

On appeal, counsel states that the director erred by ignoring relevant statutory and regulatory provisions which directly apply to the instant petition. Counsel further states that the director also erred by requiring the supervision of tiers of professional and managerial staff in order to qualify for a managerial or executive position. Counsel indicates that the AAO has found in numerous cases that supervision of tiers of professional and managerial staff is not required if the "functional manager" functions at a senior level of the organizational hierarchy.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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.

8 C.F.R. 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary has been or will be employed in the United States a primarily managerial or executive 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.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

> The term "executive capacity" means 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
>
> iii. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter dated September 6, 2001, the petitioner's president describes the beneficiary's job duties as follows:

> Due to Beneficiary's extensive experience and world wild contacts in the computer industry, Beneficiary will continue to utilize his skills and network to develop business with the US affiliates of Borlas' international corporate clients. He will continue to have sole responsibility and authority for negotiating and binding IBC to long term contracts and partnerships to renew and obtain additional product distributorship and to provide customized products and services to existing and prospective corporate clients. He will continue to develop and fine tune business strategies, marketing and sales plans, business objectives and budget. He will continue to direct and oversee the marketing/sales campaign to target new clients as well as existing clients. He will continue to hire, train, supervise and manage activities of sales/marketing and account personnel and technical professionals. He will continue to direct and coordinate the account/administrative and sale/marketing departments to implement programs initiated by him and the corporation. He will continue to oversee the work of professional consultants including senior systems analysts and project leaders for the consulting projects. He will continue to act in effect as the Chief Executive Officer of IBC. He will continue to work closely with the president of IBC for strategic planning, budgeting, salary structure including coordination with U & X Group, Inc. among others, to

insure current and future appreciation of technical standards of the computer industry and to ensure proper application thereof.

The director determined that the petitioner had failed to establish that the beneficiary was managing a subordinate staff of professional, managerial or supervisory personnel who relieved him from performing non-qualifying duties.

The petitioner employs seven persons including its president, the beneficiary as vice president, an account executive, a sales manager, a sales representative, an accountant and a receptionist. The record indicates that the beneficiary supervises the account executive and the sales manager. The sales manager, in turn, supervises the sales representative.

The petitioner's description of the beneficiary's job duties is insufficient to warrant a finding that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The beneficiary's duties as outlined are general and do not provide comprehensive data about the beneficiary's daily activities. It appears, at most, the beneficiary has been and will be performing operational rather than managerial or executive duties. The petitioner has provided insufficient evidence to establish that the beneficiary will be managing or directing the management of a function, department, subdivision or component of the company. In this case, the beneficiary is second in command of a seven person office.

Based upon the record, even with the beneficiary supervising two persons, the petitioner has not provided sufficient evidence to demonstrate that the beneficiary has been or will be managing a subordinate staff of professional, managerial or supervisory personnel who relieve him from performing non-qualifying duties. It appears that the beneficiary is the individual performing the necessary tasks for the ongoing operation of the company, rather than primarily directing or managing those functions through the work of others.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.