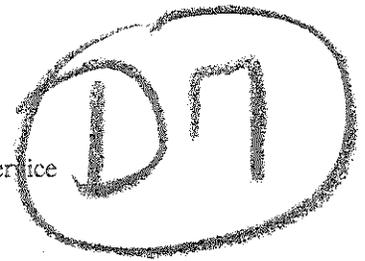




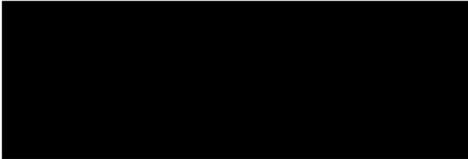
PUBLIC COPY

U.S. Department of Justice
Immigration and Naturalization Service



Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



File: WAC-01-218-53767 Office: California Service Center Date: **JAN 15 2003**

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)

IN BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a company involved in the design, development and marketing of computer hardware and computer software. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its vice president of development. The director determined that the petitioner had not established that the beneficiary had been and would be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel asserts that the Service erred in its decision by failing to consider the growth of the United States entity during its first year of operation.

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.

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 (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(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 petitioner states it was established in 2000 and that it is a wholly-owned subsidiary of [REDACTED] located in Tokyo, Japan. The petitioner claims two (2) employees and seeks to extend the employment of the beneficiary as vice president of development for a two-year period at an annual salary of \$60,000.

The issue in this proceeding is whether the beneficiary would be employed in a primarily managerial or executive capacity.

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

"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:

"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
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner describes the beneficiary's duties for the "past year" as follows:

The alien's [beneficiary's] responsibilities included managing and directing the employer's products design department and personnel. As such, the alien supervised professional personnel, including software engineers and developers, and exercised a wide latitude in discretionary decision-making in establishing departmental goals, objects [sic], budgets and long-term expansion plans. The alien had the authority to hire, fire, train and recommend employees for promotion. The alien exercised discretion over day-to-day operations of the employer's Computer Graphics Research and Development Department, reporting to top-level executives only.

The petitioner submitted an organizational chart indicating that the beneficiary reported directly to the president of the United States entity. The chart further indicated that the beneficiary had two subordinate "Producer" manager positions reporting to him. However, both the organizational chart and the payroll documentation submitted with the chart indicated that both Producer manager positions were vacant as were the four (4) "Project Manager" positions reporting to the Producer managers.

In response to the Service's request for additional information, the petitioner submitted a letter dated August 20, 2001, which stated, in pertinent part, that:

During the preceding 12 months, [the beneficiary] Vice President, Development, has been responsible for (i) negotiating development agreements with THQ, Infogrames and Electronic Arts; (ii) coordinating development lines and development schedules between such companies and our parent company in Japan, [REDACTED] (iii) directing the hiring and allocation of development personnel for [REDACTED]

JAPAN as required by such development projects; (iv) directing financial planning based on current contract commitments. [The beneficiary] has devoted one hundred percent (100%) of his time to directing the management of our business activities, specifically including product development. [The beneficiary] is responsible for establishing corporate policy and goals and exercises a wide latitude in discretionary decision-making related to development/licensing contracts.

On appeal, counsel states that the Service failed to consider that this petition was a request for an extension of an already approved "new office" petition and as such, the Service should have given significant weight to the fact that the petitioner had income in excess of four (4) million dollars during its initial year of operation. Counsel further states, in pertinent part, that:

[T]he beneficiary has certainly meant [sic] the definition, under 8 CFR 214.2(1)(ii)(B), of a person whose "Managerial capacity" has included the management of "an essential function within the organization, or a department or subdivision of the organization," thereby evidencing that the beneficiary should have been granted an extension of L-1 classification.

Counsel asserts that the petition was denied because the United States entity did not have a sufficient number of employees and that such focus was erroneous and that the Service did not consider the overall success of the business during its first year of operation, which indicated that additional employees were not needed. However, counsel's assertion fails to consider the statutory requirements for eligibility. The beneficiary is charged with, in part, overseeing a subordinate staff sufficient to relieve him from having to perform non-managerial duties, thereby freeing him to perform in a primarily managerial of executive capacity. The record, as presently constituted reflects no subordinate employees, and does not demonstrate that the majority of the operational duties can be performed without utilizing the executive and management position(s). It appears that with only three United States employees, one being designated as "President," the other two being designated as subordinate vice presidents, the beneficiary would by necessity perform the operational duties of the U.S. organization.

Counsel avers that the Service had previously approved other L-1 petitions for this beneficiary and therefore should approve this extension. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If, however, the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute

contained in the current record, the approval would constitute clear and gross error on the part of the Service. The Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g. Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive position. The petitioner has not provided a comprehensive description of the beneficiary's purported duties. Even though counsel asserts that the beneficiary's duties are managerial and executive in nature and that the beneficiary has been and will be managing a "function", the record lacks sufficient evidence to support counsel's contentions. The petitioner claims that the beneficiary supervised professional personnel, including software engineers and developers, and exercised a wide latitude in discretionary decision-making in establishing departmental goals and objectives, budgets and long-term expansion plans as well as having the authority to hire, fire, train and recommend employees for promotion. However, in the absence of any subordinate employees, such claim is questionable. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. Furthermore, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be directly involved in the manufacture and sale of computer games. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed by the beneficiary on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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.