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File: WAC 04 160 50477 Office: CALIFORNIA SERVICE CENTER Date: JUL 06 2006

IN RE: Petitioner:  
Beneficiary:



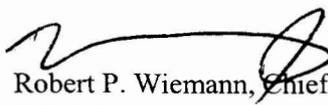
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the petition for a nonimmigrant visa. 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 employ 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 Nevada corporation, states that it is a full service provider of corporate gifts and promotional merchandise. The petitioner claims to be a subsidiary of [REDACTED] located in Hong Kong. The petitioner seeks to employ the beneficiary as its director of marketing and sales.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily 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 for review. On appeal, counsel for the petitioner asserts that the director mischaracterized the scope and size of the petitioner's business and the nature of the beneficiary's managerial duties, and those to be performed by her subordinates. Counsel claims that the beneficiary will manage two managerial/supervisory level employees, and an essential function of the petitioning organization. Counsel submits a brief and additional evidence in support of the appeal.

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.

The first issue in this matter is whether the petitioner established that the beneficiary will be employed by the United States entity in a primarily managerial capacity. The petitioner does not claim that the beneficiary will serve in an 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.

The petitioner filed the nonimmigrant petition on May 13, 2004, noting on Form I-129 its intention to employ the beneficiary as its director of marketing and sales with responsibility "to establish [a] distribution network for the parent company's products in the United States." In a May 11, 2004 letter submitted in support of the petition, the petitioner further described the beneficiary's proposed duties:

[The beneficiary] will be responsible for working with our other account managers in directing the U.S. operations with responsibility for profitable management of the accounts. With the team, she will help develop the strategy to market our services to ensure optimum success and in accordance with our company's procedures.

Specifically, her duties shall include, but not necessarily be limited to:

- Meet with corporate account managers to discuss new and exciting projects.

- Develop detailed marketing strategies that will enhance demand for clients products or in alternative create favorable public perception.
- Direct staff in creating concepts for creative marketing and promotions.
- Evaluation of competitors' practices.
- Coordinate branches business activities with overall corporate activities.
- Monitor, analyze costs and prepare budget.
- Integrate activity with parent company and worldwide offices.
- Synergize promotions locally, regionally, and coordinate with Head Office for global promotions.
- Select and direct activities of support staff, professionals and administration.

In short, it is our intention to bring [the beneficiary] to the United States for her to immediately provide her services and expertise in managing our current and forthcoming projects ensuring that the service we provide our clients are at par with [the petitioner's] standard of quality. . . .She will also be in charge of managing our expansion in the South America market handling both the Kellogg and Colgate-Palmolive accounts.

The petitioner submitted an organizational chart which depicts the current staff of the U.S. company, including a vice president, a senior manager who supervises two "creative" employees, and an associate director who supervises an account executive and an account service employee. The chart did not include the beneficiary's proposed U.S. position.

The director issued a request for additional evidence on June 10, 2004, in part instructing the petitioner to submit the following evidence to establish that the beneficiary will be employed in the United States in a managerial or executive capacity: (1) the total number of employees at the U.S. location where the beneficiary will be employed; (2) an organizational chart clearly identifying the beneficiary's position and listing all employees who will work under her supervision by name and job title, as well as a brief description of their job duties, educational levels, annual salaries/wages and immigration status; (3) a more detailed description of the beneficiary's proposed duties, including the percentage of time the beneficiary will spend on each specific duty; (4) copies of the petitioner's California Forms DE-6, Quarterly Wage and Withholding Report, for the last four quarters; and (5) copies of the U.S. company's payroll summary, and IRS Forms W-2 and W-3 evidencing wages paid to employees.

In a September 1, 2004 letter, former counsel for the petitioner provided the following description of the beneficiary's proposed duties as "Manager of Marketing and Sales":

- Act as principal liaison and local representative between [the petitioner] and corporate clients. The purpose of this liaison is to insure client accounts are serviced. She is required to meet with their management to both advise as to account status and to gather their requirements.
- She shall manage accounts to insure profitable management.

- She shall direct office staff including creative directors and graphic designers – degreed professionals, as well as administrative staff. This expansion is to allow more rapid response times demanded by clients.
- Prepare reports for home office.

The petitioner also submitted the following “job summary” for the position of “Director, Sales & Marketing”:

- **Forecasting and budgeting** –  
Prepare annual budget vs. forecasted sales and revenue  
Budget resource requirement and allocation.
- **Conducts competitive analysis and agency presence**
- **Business development for old and new clients**
- **Project Management** –  
Assign work teams and keep track of progress  
Coordination with various [company] offices worldwide  
Keep subordinates in line with new policies, manufacturing trends and updates.  
Link between [Hong Kong] operations and overseas project management team  
Train and develop new staff hires.
- **Timeline management** –  
Monitor management timelines and delegate assignments  
Weekly management updates on project status  
Work directly with Creative Director for program pitches  
Develop final Project Checklist and deliverables
- **Program Tracking** –  
Open, maintain, and monitor timesheets for project management team  
Cost tracking of resources used per project  
Evaluate profitability of project (forecasted revenue vs. forecasted resource allocation)  
Evaluate project cost (actual expenses vs. forecasted expenses)  
Maintain budget allowances for projected expenses
- **Production/Manufacturing** –  
Liaise with Hong Kong operations team (Project Engineer, Quality Assurance Manager, Logistics Department) in all phases of production until delivery to client.  
Coordinate with U.S. partner laboratories for Quality Assurance & Quality Control

The petitioner’s job description also included the following “key responsibilities and accountabilities”:

1. **North and South America/Canada**
  - a. Program development and management:
    - i. Research
    - ii. **Creative** brief direction and management
    - iii. Facilitate creative brainstorm sessions
    - iv. Prepare presentation materials and quotations

- v. Coordinate communication between client, brand manager with [the parent company]
- b. Project execution management:
  - i. Project timeline management
  - ii. Approval process with client and licensor
  - iii. Program maintenance
  - iv. Weekly management update reports
  - v. Monitor after sales services.

\* \* \*

**3. NBD North & South America Support**

- a. Research
- b. Competitive analysis tracking
- c. Sales collateral generation for NBD

**4. Maxx US – Office Management Support**

**5. Industry relations / Networking**

The petitioner failed to provide the requested breakdown of job duties for the beneficiary and the other employees as requested by the director.

Former counsel for the petitioner noted that the U.S. company employed six employees at the date of filing and recently hired three additional employees, including two professional graphic designers, “in anticipation of the expansion of services which [the beneficiary] will be making possible.” The petitioner noted that the new employees were hired as independent contractors. The petitioner’s Form DE-6, Quarterly Wage and Withholding Report, confirms the full-time employment of the other six employees as of the date of filing.

The petitioner submitted an organizational chart depicting the beneficiary’s proposed position as “Client Service Manager.” The chart shows her direct subordinates as a creative director who in turn supervises the recently-hired graphic artists; and a project manager, who supervises a licensing coordinator and the recently hired “project management assistant.” The organizational chart shows three positions above the beneficiary including a “Director, New Business Development,” a “Director, Client Service” and a “VP, Global Clients and Strategic Development.” The petitioner provided brief job descriptions for each employee, noting that the creative director “heads the creative group and is responsible for the development of ideas, artworks and presentation visuals” with the assistance of the graphic artist. The petitioner noted that the project manager “works on day-to-day client servicing” and the licensing coordinator is “responsible for cultivating and developing studio relationships” and gathers information about “upcoming properties, trends and new ideas to be shared with the worldwide team.” The petitioner did not provide a job description for the “Client Service Manager” position.

The director denied the petition on October 5, 2004, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. The director, referencing the job description provided in former counsel’s September 1, 2004 letter, found that the majority of the beneficiary’s proposed responsibilities would include customer service and administrative

tasks. The director also found that the claimed duties were too broad and nonspecific to convey any understanding of the beneficiary's actual day-to-day duties. Finally, the director noted that several employees identified on the organizational chart did not appear on the petitioner's state quarterly wage report corresponding with the date the petition was filed, and determined that the petitioner had not demonstrated that it "has reached or will reach a level or organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis." The director concluded "the beneficiary's marketing and production-oriented duties and vaguely defined responsibilities preclude USCIS from classifying the beneficiary as a manager or executive."

The petitioner filed an appeal on November 4, 2004. On appeal, counsel for the petitioner again identifies the beneficiary's proposed position as "Client Service Manager." Counsel provides an overview of the petitioner's corporate group, noting that the petitioner's ultimate parent company is "one of the world's leading advertising and marketing services corporations," while the petitioner's direct parent company has a "global network of subsidiaries" capable of providing "global full service project management capabilities including product development, creation, licensing, promotional strategy, sourcing and SCM, quality control and assurance, logistics and fulfillment, manufacturing, operations and engineering for a full range of promotion and management services to a full range of industries throughout the world."

Counsel asserts that the director mischaracterized the petitioner as a "small company" and ignored "the actual business realities of the corporation's . . . actual business operations." Counsel notes that while the petitioner has only nine employees, it "plays an integral part in its global business operations." Counsel notes that the petitioner and its overseas operations are fully integrated, and, since many of the brands the petitioner serves are located in the United States, the petitioner plays an integral role in servicing these accounts. Counsel further describes the scope of the beneficiary's duties:

As Client Services Manager, [the beneficiary] will manage not only the two key departments, Creative and Operations Departments at [the petitioner's] Los Angeles office, she will also have responsibility for managing various aspects of [the parent company's] manufacturing, quality control, and safety employees in the Hong Kong Office. . . . [The beneficiary] will manage 6 U.S. employees in additional [sic] to the Operational Department employees in Hong Kong.

Counsel further asserts that, with respect to the beneficiary's U.S. subordinates, the petitioner previously explained that it hired additional employees subsequent to the filing of the petition in anticipation of the beneficiary's transfer to the United States. The petitioner submits evidence of payments to the three contracted employees, along with evidence that two of the three employees are now on the petitioner's payroll. Counsel contends that while the beneficiary will perform some executive duties, she will serve the company in a "primarily managerial position." Counsel emphasizes that the beneficiary will: supervise two subordinate managerial and professional employees who will in turn manage the creative and operations departments; make policy decisions and implement policy directives mandated by senior management regarding marketing and promotion planning operations, including responsibility for establishing new market

demand forecasting procedures; and function at a senior level within the petitioner's organizational hierarchy, receiving only general supervision from senior managers.

Counsel further states that even if the beneficiary didn't manage a subordinate staff of professional managerial or supervisory personnel, she would still qualify for the benefit sought because she will manage the creative and operations departments which produce the actual promotion products for the company's corporate clients. Counsel asserts that as "Client Services Representative," the beneficiary will manage the petitioner's "core business function, the actual management and establishment of the strategy to concept development of the promotional initiatives for its global clients."

In support of the appeal, the petitioner submits a November 3, 2004 letter from the foreign entity's president, who states that as "Client Services Manager" the beneficiary will "manage the client interface of [the petitioner] with the Operations and Creative/Product Departments for design, manufacturing, product safety and compliance for KFC, Kellogg and Colgate Palmolive" and be responsible "for managing the various operational units in Hong Kong, like engineering, quality assurance and quality control to ensure all products meet the client's budget, product and engineering specifications, safety and quality compliance requirements." The foreign entity noted that the beneficiary would:

- Manage product design, manufacturing capabilities and limitations and provide direction to the creative director and product designers in the Los Angeles office.
- Manage customized product cost analysis to provide account managers with direction on premium programs that ensure profitability for [the petitioner]
- Utilize in depth knowledge of ever-changing product safety and regulatory standards around the world and manage the Operations Department for [the petitioner] on behalf of our clients' promotional products. She must ensure that the Operations Department's product development is in compliance with all regulatory standards and be able to represent [the petitioning organization], at a management level, regarding all product safety decisions with third party product testing laboratories and our client's Quality Assurance Teams.
- Manage Maxx Marketing corporate product safety policy guidelines and standard operating procedures up to date with respective national safety agencies and laboratories.

Counsel's assertions are not persuasive. Upon review, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look 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 either in an executive or managerial capacity. *Id.* Here, the petitioner has consistently claimed that the

beneficiary will perform primarily managerial duties as defined at section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A).

However, the petitioner and counsel have utilized at least three different job titles to identify the beneficiary's proposed position in the United States, an inconsistency which raises questions regarding the credibility of the information submitted regarding the beneficiary's proposed duties. The petitioner stated on Form I-129 that the beneficiary would serve as its "Director of Marketing and Sales." In response to the request for evidence, the petitioner and counsel referred to the beneficiary as "Director, Sales and Marketing" and provided a detailed description of that position, but also submitted an organizational chart identifying the beneficiary's proposed position as "Client Service Manager" reporting to a "Director, New Business Development" and a "Director, Client Service." None of these three positions were identified on the petitioner's initial organizational chart. On appeal, the beneficiary is referred to as both "Client Service Manager," and "Client Service Representative" and the foreign entity's president submits a position description which includes duties that were not previously mentioned, most notably, responsibility for managing the entire operations department of the petitioner's Hong Kong parent company. Based on the petitioner's representations, the beneficiary has served as both a client service manager and as a manager or director of sales and marketing for the foreign entity, so it is reasonable to assume that these are distinct positions with clearly defined responsibilities within the petitioner's organization. It is the petitioner's burden to clearly describe the position that is being offered to the beneficiary. *See* 8 C.F.R. § 214.2(1)(3)(ii). Without this information, it is difficult to conduct a meaningful analysis of the remainder of the evidence submitted in support of the petition.

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. 582, 591-92 (BIA 1988). Furthermore, the AAO notes that in response to a request for evidence or on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). For these reasons, the AAO will consider only that evidence offered in support of the beneficiary's proposed employment in the position of "Director of Marketing and Sales" with the U.S. company.

The petitioner's response to the request for evidence included a lengthy description of this position. However, based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary will primarily perform non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties did not provide the percentage of time the beneficiary would allocate to each of the listed duties. Thus, the record as presently constituted does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion will actually be non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Any 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).

The AAO acknowledges that some of the beneficiary's duties related to forecasting and preparing budgets, developing marketing strategies, and project management, may be considered managerial in nature. However, many of the beneficiary's proposed duties are either clearly non-managerial or are too vaguely defined to be considered managerial in nature. For example, the beneficiary's responsibility for "program development and management" includes non-managerial duties such as performing research, participating in "creative brainstorm sessions," working directly on program pitches, and preparing client presentation materials. The beneficiary's responsibilities also include conducting competitive analysis, performing unspecified duties related to "business development for old and new clients," performing research, competitive analysis tracking and "sales collateral generation" for "NBD," "monitor[ing] after sales services," tracking project costs, and unspecified duties related to "office management support" and "industry relations/networking." The beneficiary also appears to be solely responsible for liaising with the parent company's operations team during the production and delivery process. Without additional explanation, or evidence that she would be directing lower-level employees to perform non-qualifying duties associated with sales, marketing, business development and day-to-day communications with the overseas entity, the record suggests that the beneficiary is directly involved in routine research, marketing, client communications, client servicing, creative and operations/liaison duties that comprise the daily operations of the business. These duties do not appear to be incidental to the beneficiary's daily duties. It is not possible to determine that the beneficiary's duties associated with these activities would be primarily managerial functions. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988).

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary primarily performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940, F.2d 1533 (Table) 1991 WL 144470 (9<sup>th</sup> Cir. July 30, 1991). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties related to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

In the instant matter, the petitioner has failed to show that non-qualifying duties will not constitute the majority of the beneficiary's time. The provided job descriptions do not allow the AAO to determine the amount of time the beneficiary will devote to managerial versus non-managerial duties.

On appeal, counsel asserts that the beneficiary will supervise "two managerial/supervisory level employees" in the petitioner's "creative and operations departments" who will relieve her from performing non-qualifying duties and in turn supervise their own staff of four employees, including professional employees. Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising

employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

The record as presently constituted does not clearly establish the job titles and job duties of the beneficiary's proposed subordinates, which makes it difficult to evaluate the petitioner's claims that the beneficiary will supervise subordinate managerial and supervisory employees. The organizational chart submitted with the initial petition failed to identify the beneficiary's proposed position within the U.S. company. Four of the seven employees on the chart, including an "associate director," an "account executive," an "account service" employee, and a "creative" employee, do not appear on the petitioner's California Form DE-6, Quarterly Wage and Withholding Report for the quarter in which the petition was filed. The employees who do appear on the Form DE-6 are [REDACTED] (identified as "vice president"), [REDACTED] (identified as "senior manager") and [REDACTED] (identified as "creative" working under [REDACTED]). The petitioner's Form DE-6 includes four employees who were not identified on the initial organizational chart.

In response to the director's request for evidence, the petitioner submitted a new organizational chart. The employee previously identified as the "vice president" is depicted as the "Director, New Business Development." The chart includes a "Vice President, Global Clients and Strategic Development" and a "Director, Client Service" who were not included on the previous chart. [REDACTED] who was previously identified as a senior manager overseeing the creative team is depicted as a "project manager" overseeing a licensing coordinator and a project management assistant, who joined the company subsequent to the filing of the petition. [REDACTED] who was previously depicted as a "creative" employee is depicted as "creative director" overseeing two graphic artists who were employed as independent contractors. Finally, as mentioned above, the beneficiary is identified on the second organizational chart, but the petitioner changed her job title from "Director, Sales and Marketing" to "Client Service Manager" and failed to provide a description of the newly offered position. The petitioner showed the beneficiary as "Client Service Manager" overseeing the project manager, who is responsible for "day-to-day client servicing," and the creative director, who is responsible for "development of ideas, artworks and presentation visuals" and heading the "creative group." However, based on the various changes in the employees' job titles between the time of filing and the petitioner's response to the request for evidence, the AAO cannot conclude that the beneficiary, as the "Director of Marketing and Sales," would primarily supervise supervisory, managerial or professional personnel as of the date the petition was filed.

Again, 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 591-92. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

On appeal, counsel contends that the director erred by mischaracterizing the size, nature and scope of the petitioning company, asserting that, regardless of the number of employees in the United States, the company is "an integral part in its global business operations" of the group of companies that includes the petitioner and the beneficiary's foreign employer. Counsel asserts for the first time on appeal that the beneficiary will manage the operational department employees of the petitioner's parent company. As discussed above, this

assertion has not been substantiated in the record. The job description and organizational chart provided in response to the director's request for evidence made no mention of the beneficiary's responsibility for managing any overseas employees, much less management of an entire department. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. 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, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a two-year-old marketing company with six payroll employees and one creative employee working on a contract basis. As discussed above, the petitioner has submitted two different organizational charts and inconsistent information regarding the positions held by several of its employees, as well as inconsistent information regarding the beneficiary's proposed position. These discrepancies make it difficult to perform a meaningful evaluation of the petitioner's staffing levels and the ability of the petitioning organization to support a new managerial position. Reviewing the organizational chart submitted in response to the director's request for evidence, five of the six payroll employees employed at the time of filing had managerial or executive titles. Notwithstanding the petitioner's assertion that the beneficiary will manage two departments, the petitioner did not submit evidence that it employed sufficient subordinate staff members who would perform the actual day-to-day, non-managerial operations of the petitioner's creative and operations departments. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act.

Counsel's claim that the petitioner's business should be considered an integral part of its parent company's global operations is not persuasive. While the AAO does not doubt that the petitioning organization is an integral component of its corporate group, and operates in conjunction with these companies, the fact that the small, but growing U.S. company is part of a larger group does not automatically elevate the beneficiary's proposed role to a qualifying managerial position. The petitioner must still provide a consistent job title for the beneficiary, detailed descriptions of the beneficiary's duties and the amount of time she will devote to each duty, evidence that the beneficiary will perform primarily managerial duties, consistent descriptions of the beneficiary's subordinates' job titles and duties, and evidence that the U.S. company is sufficiently complex organizationally to require another managerial position. The evidence submitted is insufficient to establish that the beneficiary's actual duties will be primarily managerial. 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 AAO acknowledges counsel's on appeal that the beneficiary would serve as a function manager of the petitioning organization's "core business function" based on her oversight of the creative and operations departments. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed job description that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial. The petitioner has failed to establish any clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary. Specifically, the petitioner submitted no information to establish the percentage of time the beneficiary will perform the claimed managerial duties, although the beneficiary's job description includes some duties that are not managerial. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in the United States in a managerial or executive capacity. For this reason, the appeal will be dismissed.

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.