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**U.S. Citizenship  
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File: LIN 06 090 51515      Office: NEBRASKA SERVICE CENTER      Date: **OCT 23 2006**

IN RE: Petitioner:  
Beneficiary:



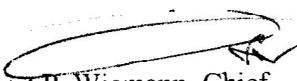
Petition:      Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN 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, Nebraska 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 in the position of response commander of a hazardous materials emergency response team 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 is a **mining and chemical production** company and claims a qualifying relationship with the foreign employer, [REDACTED] of Canada. The petitioner seeks to employ the beneficiary for a period of three years.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) the beneficiary has been employed by the foreign entity 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, the petitioner asserts that the beneficiary's duties both overseas and in the United States are primarily those of a manager. In support of this assertion, the petitioner submits a brief and additional evidence.

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 beneficiary will be employed by the United States entity in a primarily managerial capacity.<sup>1</sup>

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.

In the letter dated January 27, 2006, appended to the initial Form I-129 petition, the petitioner described the beneficiary's prospective position in the United States as follows:

[The petitioner] would like to qualify [the beneficiary] to render intermittent managerial service as the Response Commander, to oversee on-location emergency services that are being carried out by the Technical Specialists of in [sic] the Emergency Response Team (ERT) on an intermittent basis. The average time of the ERT's service needed in the United States will only be approximately 10-30 days a year (3 to 6 times a year and each will last approximately 3 to 5 days). The ERT is a specially trained in-house service team based in Canada with [the foreign employer]. The ERT is called to respond to emergency and/or crisis situations during the transportation of [the petitioner's] own highly hazardous chemical products, such as Sulphuric Acid and Sulphur Dioxide, to the United States. [The beneficiary] is the Response Commander of the Company's ERT. Thus, he will need to manage the performance of the emergency response services in the United States when needed.

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<sup>1</sup>Because the petitioner is seeking to classify the beneficiary as a manager and not as an executive, the AAO will restrict its analysis to whether the beneficiary will be employed primarily in a managerial capacity.

The petitioner further explained in the letter that the ERT consists of "a Base Commander, Response Commanders and Technical Specialists, divided into 4 shift teams for round-the-clock service. Each of the ERT shift teams is led by a Response Commander who supervises about 4-5 Technical Specialists to ensure the emergency services are performed in a safe and effective manner." Therefore, there are four response commanders, including the beneficiary.

Finally, the petitioner described the beneficiary's job duties in the United States as follows:

The Response Commander is the lead person in the ERT's on location service team and functions at a senior level with respect to managing and directing his team of Technical Specialists to provide and perform emergency services. The Response Commander oversees, manages and designates various assignments and tasks to his Technical Specialists team, ranging from 4 to 5 depending on the magnitude of the situation, to properly perform the assigned tasks in controlling and handling the emergency situation, with the ultimate objective of minimizing casualties and property losses. The ERT's Technical Specialists team assigned to the United States have already been granted L-1B status.

While responding to emergency conditions in the United States, the Response Commander will be responsible for managing and controlling all field response and relief activities that are performed and carried out by the Technical Specialists. He will also provide direction and manage the communications link with the Base Commander. He will evaluate the nature and magnitude of the emergencies, and plan and designate appropriate tasks for the Technical Specialists to carry out in order to respond to the emergency situations. He will make arrangements for other related special personnel and/or equipment for assistance.

\* \* \*

As the Response Commander of the [ERT's] Technical Specialists, and while responding to emergency conditions in the United States, [the beneficiary] will be responsible for the following:

- Organizing and directing the team's (Technical Specialists) performances and their participation throughout the emergency action, with authority to act on behalf of the Company at the emergency site including all dealings with other agencies, authorities, public and media;
  - Keeping the Base Commander up-to-date with information as required during emergencies;
  - Planning and determining methods, modes and logistics to be followed by the Technical Specialists in order for them to provide the most suitable and expeditious response services;
- Ensuring arrangements are made to cover all aspects of the specific nature of each emergency incidents [sic];
- Consulting with Technical Advisors and providing telecommunications to those first arrived on scene (e.g. First Responders – Fire Fighters) regarding hazards and

appropriate steps that should be taken at the scene to preserve public safety;  
Alerting and arranging team members (Technical Specialists) and determine and arrange for specialized equipment that is necessary for the specific incident to reduce or eliminate hazardous contaminations and casualties; and  
Supervising the performance of 4-5 Technical Specialists to ensure all the Company's in-house safety and response procedures are followed throughout the incident in a safe and effective manner.

The petitioner also provided an organizational chart for the ERT confirming that the beneficiary is one of four response commanders who report to a base commander and who supervise technical specialists.

On February 24, 2006, the director requested additional evidence regarding the beneficiary's purported managerial duties.

In response, the petitioner provided a letter dated April 18, 2006 in which it explained, *inter alia*, that the beneficiary's "intermittent duties in the United States are in a 'function' managerial capacity" and in which it detailed the duties of the Technical Specialists, the performance of which allegedly relieve the beneficiary of performing the routine duties of the ERT.

On May 18, 2006, the director denied the petition concluding that the beneficiary will be a first-line supervisor of non-professional employees and that the petitioner failed to establish that the beneficiary manages an essential function of the organization.

On appeal, the petitioner asserts that the beneficiary will manage an "essential function" in the United States as the response commander, the function being the "emergency response to hazardous/chemical accidents." The petitioner further asserts that the beneficiary's duties will involve only "decision making and management" and that all of the actual duties will be performed by the technical specialists, not the beneficiary.

Upon review, the petitioner's assertions are not persuasive.

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.*

The petitioner has failed to prove that the beneficiary will act in a "managerial" capacity by managing an "essential function" of the organization. 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. The term "essential function" is not defined by statute or regulation. However, to allow the broad application of the term "essential function" to include any minor or low-level function within a business would render the term meaningless. The term "essential" is defined as "inherent" or "indispensable." *Webster's II New College Dictionary* 384 (2001). Accordingly, the petitioner must establish that the function is inherent and

indispensable to the business rather than a low-level collateral task that is superfluous to the company's essential operations.

In this matter, the petitioner has alleged that the beneficiary will manage an "essential function" when he "manages" an emergency response to a hazardous material or chemical accident in the United States. As explained in the record, the beneficiary is one of four response commanders employed and trained by the foreign entity. Each response commander is assigned to one of four shifts, and each shift has four to five technical specialists who report to the response commander. The ERT (Emergency Response Team) is ultimately led by a single base commander to whom all four shift response commanders, including the beneficiary, report.

In view of the above, the beneficiary will not manage an "essential function" of the organization. According to the record, the base commander likely manages the "essential function" as described by the petitioner as the leader of the ERT, although the record is not clear on this point, and the management of the essential function may actually be at a higher level within the organization and/or the "essential function" may encompass safety and emergency functions broader than those addressed by the ERT. Regardless, the beneficiary's low-level role as one of four shift supervisors who supervises the occasional as-needed clean up of hazardous releases is certainly not the management of an "essential function." The beneficiary's job is no more essential to the organization than the technical specialists' management of their individual clean up activities. Arguably, every first-line supervisor, indeed every employee, manages his or her own "function" within an organization and could claim that this function is "essential." However, as explained above, such a broad reading of the statute would render it meaningless. Therefore, as the petitioner has not established that the beneficiary will manage an essential function of the organization, the beneficiary appears to be a first-line supervisor who cannot be classified as a managerial employee. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology Intl.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Moreover, even assuming the beneficiary's managed function could be classified as essential, the job description provided for the beneficiary is insufficient to prove that he primarily manages this function. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 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. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. While the petitioner repeatedly asserts that all of the day-to-day duties would be performed by the technical specialists, it is simply not credible that the beneficiary would not perform any non-managerial duties during an emergency response. Absent a clear and credible breakdown of the time to be spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary will be 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial capacity as required by 8 C.F.R. § 214.2(l)(3)(ii).

The second issue in this appeal is whether the beneficiary has been employed by the foreign entity in a primarily managerial capacity.

In the letter dated January 27, 2006, appended to the initial Form I-129 petition, the petitioner described the beneficiary's position in Canada as follows:

[The beneficiary] became [the foreign entity's] Fire Captain (Lieutenant) in July 2002 and has held this managerial position until presently. He is responsible for maintaining the safety operation of [the foreign entity's] smelter and refinery and its 1,300 employees who work at the smelter and refinery location. The position leads and supervises a staff team of up to 30 consisting of fire-fighters, safety and maintenance crews and laborers. In specific, [the beneficiary] has direct management authority over about 10 firefighters on a regular shift. In the event of emergency situations, his subordinate firefighters can be increased to up to 20. In addition to the firefighters, [the beneficiary] also manages the maintenance crew, consisting of 2 pipefitters and 2 electricians. The maintenance crew is supported by in-house laborers and outside contract labor services. Depending on the scale of the event/job, the supporting laborers range from 4 to 10 persons. The fire-fighters and the maintenance crews are responsible for performing site safety, which includes maintenance works and emergency prevention and response services. [The beneficiary] assigns job tasks to these crews on the maintenance of site safety such as buildings [sic] structures, fire extinguishers, SCBA, emergency equipment and Dispatcher duties, etc. Thus, as the Fire Captain, he has discretionary authority in managing and ensuring the safety practices and conditions of the Company's smelter and refinery to avoid accidents, which is an extremely important function. The proper and effective management of the site environment and safety measures will eliminate accidents and save lives. [The beneficiary] oversees and directs the performance of this essential function by leading a team of the [foreign entity's] in-house Fire Fighters to perform emergency and rescue services utilizing his management skills as well as his knowledge of the [foreign entity's] rescue and searching procedures should accidents occur. He also determines the appropriate fire and hazardous chemicals extinguishing and rescue methods and equipment that needs to be used according to the specific nature of the accidents, such as fire apparatus pumps, portable trailer pumps, various mobile platforms and lifts. He manages the proper uses of these [sic] equipment and procedures that are performed by the internal fire fighters. He functions in a senior level with respect providing safety services to the [foreign entity's] smelter and refinery. He is familiar with the [foreign entity's]

various in-house systems that are specifically designed and installed within the smelter and refinery, such as the sprinkler suppression systems, dye pipe systems, wet systems, deluge [sic] systems and pre-action systems to determine the appropriate methods and procedures to be used for accident prevention as well as for taking care of accidents when they occur.

The petitioner also provided an organizational chart showing that the beneficiary is one of three fire captains, that he reports to a single fire chief, and that he, along with the other fire captains, supervise firefighters and maintenance workers.

The petitioner also explained in its letter dated January 27, 2006 that the beneficiary serves as a response commander of the ERT in Canada. The duties are materially identical to his proposed duties in the United States as these relate to actual emergencies. However, the petitioner also provided a summary of the beneficiary's Canadian duties before and after an emergency. The petitioner does not explain what percentage of the beneficiary's time is dedicated to his Canadian response commander role when compared to his fire captain role, although the gist of the petitioner's evidence is that the fire captain role is the beneficiary's primary position with the foreign entity.

On February 24, 2006, the director requested additional evidence regarding the beneficiary's purported managerial duties.

In response, the petitioner provided a letter dated April 18, 2006 in which it clarified its position on the beneficiary's classification: "Please note that [the beneficiary's] intermittent duties in the United States are in a 'function' managerial capacity, and while in Canada, his full time duties and position is the 'traditional' line manager capacity." The petitioner further supported this assertion as follows:

Reporting to the Operating Manager, Property Services, the [beneficiary] supervises the shift operation of the Emergency Services section to provide effective firefighting, emergency chemical response, first aid, ancillary services, and directs the day-to-day operation of the power and water distribution systems.

[The beneficiary] supervises a crew of about 12-30 union personnel consisting of Protective Services Officers (Firemen) and trade technicians. In specific, [the beneficiary] directly supervises the Protective Services team consisting of up to 10 Firemen on a regular shift and up to 20 in the event of emergencies. In addition to the Firemen, he also manages 4 trade technicians (2 fitters and 2 Electricians) who are first line supervisors. These trade technicians will follow instructions given by [the beneficiary] to plan and perform the lay out, installation, maintenance, assembly, inspection and repair of piping, steaming and related electrical systems and components. As outlined in the in-house job description, these Fitters and electricians supervise Apprentices and trades helpers (collectively "laborers") who then perform the actual on location repair and maintenance works according to the plans.

The petitioner also provided further details regarding the beneficiary's job duties, but did not specify how much of his time is spent supervising the alleged "first line" supervisors, i.e., the electricians and fitters.

Finally, the petitioner provided in-house job descriptions for both the beneficiary and the subordinates who are alleged to be first-line supervisors. While the job descriptions confirm that the electricians and fitters are assisted by others, the petitioner fails to reveal how much time is spent by these employees supervising or managing others.

On May 18, 2006, the director denied the petition concluding that the beneficiary is a first-line supervisor of non-professional employees. Specifically, the director determined that the supervised employees are not professional, supervisory, or managerial, and that the petitioner failed to prove that the electricians and fitters are truly functioning in supervisory or managerial capacities.

On appeal, the petitioner asserts that the director erred and that it has established that the beneficiary manages other supervisory or managerial employees. The petitioner also expands its argument and asserts that the record establishes that the beneficiary, as a fire captain, also manages an "essential function" in the organization.

Upon review, the petitioner's assertions are not persuasive.

Once again, 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) and (iv). 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.*

In this matter, the job descriptions and organizational charts provided do not establish that the beneficiary will supervise and control the work of supervisory, managerial, or professional employees.

First, the job descriptions for the beneficiary's subordinate employees fail to establish that these employees are truly functioning as supervisory, managerial, or professional employees. While these employees undoubtedly work with less experienced employees or laborers, and may at times direct their work, this does not automatically establish that they are supervisory or managerial employees. The job descriptions provided by the petitioner, including the in-house job descriptions provided in response to the request for evidence, emphasize the electricians' and fitters' technical skills and not their supervisory or managerial roles. Therefore, as the petitioner has not established that any of the beneficiary's subordinates are professional, managerial, or professional employees, it has not established that the beneficiary is employed in a primarily managerial capacity. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. at 604.

Second, even assuming that the electricians and fitters are managerial or supervisory employees, the petitioner has not established that the beneficiary is primarily engaged in managing these employees. While managing these employees may be a part of the beneficiary's job, unless the beneficiary is primarily engaged in performing these, or other, managerial duties, he cannot be considered to be employed in a managerial capacity. In this matter, the petitioner has not established that the beneficiary is primarily engaged in managing the electricians and fitters or in performing any other managerial duties. 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 International*, 19 I&N Dec. at 604.

Finally, the petitioner has not established that the beneficiary manages an "essential function" of the organization as a "fire captain." As explained in the record, the beneficiary is one of three shift fire captians, all of whom report to a fire chief and/or the operating manager of property services (the two organizational charts provided by the petitioner provide conflicting information regarding the supervision of the fire captians). Regardless, similar to the beneficiary's prospective role in the United States, the beneficiary's low level role as one of three shift supervisors is certainly not the management of an "essential function." The beneficiary's job is no more essential to the organization than the fire fighters' management of their individual functions. As explained above, every first-line supervisor, indeed every employee, could argue that he or she manages his or her own "function" within an organization and could claim that this function is "essential." However, such a broad reading of the statute would render it meaningless. Therefore, as the petitioner has not established that the beneficiary will manage an essential function of the organization, the beneficiary appears to be a first-line supervisor who cannot be classified as a managerial employee.

Accordingly, the petitioner has not established that the beneficiary is employed abroad in a primarily managerial capacity as required by 8 C.F.R. § 214.2(l)(3)(iv).

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. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.