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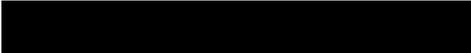
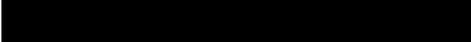
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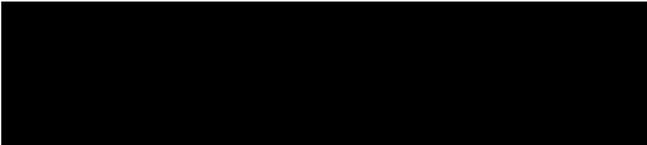
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File: EAC 08 195 51024 Office: VERMONT SERVICE CENTER Date: **JAN 07 2010**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Riew

Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 software development and services company, states that it is a subsidiary of [REDACTED], located in India. The petitioner seeks to employ the beneficiary in the position of project manager for a period of three years.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity; or (2) that the beneficiary has been employed by the foreign entity in a qualifying 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's decision does not include a proper analysis of the beneficiary's job duties or acknowledge the petitioner's arguments setting forth the beneficiary's qualifications as a manager. Counsel emphasizes that the petitioner is part of a bona fide multinational group and does not file petitions with USCIS for beneficiaries who are not qualified for the requested benefit. 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 in the United States in a primarily managerial or 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.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as 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 filed the nonimmigrant petition on July 7, 2008. The petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker that the beneficiary's proposed duties in the position of project manager

will include the following: "Beneficiary will continue to analyze projects, design, develop and implement IT projects as per user specifications. He will also maintain existing projects."

In a letter dated July 1, 2008, the petitioner stated that the beneficiary will "continue to coordinate all activities with the Director for the company," and "maintain independent supervisory authority over Internet projects in the company." Specifically, the petitioner indicated that the beneficiary will perform the following duties in his role as project manager:

Beneficiary will plan, direct and coordinate activities of designated projects to ensure that goals or objectives of each project [are] accomplished within the constraints of a given time schedule. It will be Beneficiary's responsibility to achieve the desired results within the project's budget allocation. He will review project proposals and determine time frames, funding limitations, procedures for accomplishing projects, staffing requirements, and allotment of available resources to various phases of the project. He will establish a work plan and monitor the staffing requirements of the projects. He will conduct interviews and select qualified candidates for each phase of the project.

Beneficiary will arrange for recruitment or assignment of project personnel, confer with project staff to outline work and assign duties, responsibilities and scope of authority. He will review status reports, prepare project reports for management and the client.

Beneficiary will keep himself updated with latest develops in the field by studying technical manuals, periodicals and reports. He will utilize this knowledge to develop programs to meet customized requirements. He will formulate plans outlining steps required to develop programs, using structured analysis and design and submit plans to management for approval and implementation.

Performing these duties and responsibilities entails the following:

1. Scoping projects and developing project plans
2. Attending periodical meetings of the other Project Managers and teams to define project goals and objectives.
3. Arranging recruitment of qualified programmers and technical support staff to successfully implement projects.
4. Project Budgeting, supervision and reporting.

It also involves the following responsibilities:

- a) Direct financial needs of the various projects undertaken by the company.
- b) Summarize and forecast the company's business activity and financial position in relation to projects under his supervision

In support of the petition, the petitioner submitted a proposed organizational chart for the U.S. entity, which indicates that the beneficiary, as project manager, will report to a director, who in turn reports to the group president/CTO and group chairman/CEO.

On July 15, 2008, the director issued a request for additional evidence, in which he advised the petitioner that the initial evidence did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director instructed the petitioner to submit: (1) an organizational chart for the United States entity which clearly specifies all of the beneficiary's proposed subordinates; (2) a complete position description for the beneficiary's proposed subordinates in the United States, including a breakdown of the number of hours devoted to each of the subordinates' job duties on a weekly basis; (3) information regarding how much time the beneficiary will allot to executive/managerial duties as opposed to non-managerial functions; and (4) information regarding the degree of discretionary authority the beneficiary will have over day-to-day operations in the proposed position.

In a letter dated August 14, 2008, counsel for the petitioner provided his assurance that the beneficiary "is being transferred for the specific purpose of managing the functions that his job title represents and not to actually perform the duties normally associated with them." Counsel noted that the petitioner has been undergoing rapid expansion in the United States and India, and stated that the beneficiary's presence is needed "to ensure that in this period of expansion, [the petitioner] continues to train engineers and outfit them with outstanding practical based skills." Counsel emphasized that the beneficiary has "intimate knowledge of the tasks related to design and production of [the petitioner's] development life cycle."

Counsel indicated that the beneficiary will be responsible to supervise and control the work of several professional employees, and noted that a Bachelor's degree or equivalent is required for most employees of the company. Specifically, counsel stated that the beneficiary will supervise two senior software engineers, who both possess Master's degrees in business administration, and also have the authority to recommend personnel actions such as hiring or firing personnel on projects that he is managing. Counsel further stated:

[The beneficiary] will primarily be managing, supervising and controlling other professionals, and support staff who perform the ordinary day-to-day activities necessary for all IT based Projects to operate successfully. It is our understanding that he will initially be engaged in training people locally to fill supportive IT positions within [the U.S. company]. The Company currently has several staff engineers on payroll who complete the day-to-day tasks required both in-house and at various client worksites, so [the beneficiary] will not be required to perform day-to-day tasks, or work at client sites.

The petitioner indicated that the beneficiary's time will be allocated as follows:

- Scoping projects and developing project plans; [15-20%]
- Arranging recruitment of qualified engineers and teams to define project goals and objectives; [20-25%]
- Direct financial needs of the various projects undertaken by the company; [5-10%]
- Project budgeting, supervision and reporting; [20%]

- Summarize and forecast the company's business activity and financial position in relation to projects under his supervision; [25%]

Counsel stated that the beneficiary is "directly responsible for satisfying the client/user in terms of the specific deliverables in the project, but does not directly perform the duties associated with their execution." Counsel emphasized that the beneficiary's department is small because one of his initial functions will be to locate qualified candidates to serve on various projects.

Counsel indicated that the beneficiary will have "a great degree of discretionary authority" over day-to-day operations, which will include serving as a sole point of client contact for project issues; determining project schedules and ensuring adherence to schedules; determining standards and quality requirements; carrying out impact analysis and effort estimation using function point analysis; grievance handling; developing new policies and processes for efficient function of projects; and recruiting additional staff as needed.

The petitioner submitted a revised organizational chart for the U.S. company, which indicates that the beneficiary will report to the "Director Annuities & Sales CRM" and supervise two senior software engineers. The chart indicates three open positions which are subordinate to the software engineers. The petitioner submitted resumes for the beneficiary's proposed subordinates.

The director denied the petition on November 5, 2008, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director determined that the beneficiary would not function at a senior level within an organizational hierarchy, other than in position title. The director further determined that the petitioner did not establish that the beneficiary would manage an essential function of the organization, or be involved in the supervision and control of the work of other supervisory, professional or managerial employees who could provide relief from performing the services of the corporation. The director also noted that the beneficiary's proffered annual salary of \$60,000 is "incongruous with that of an employee who is actually managing other bona fide managers or professionals." The AAO notes, however, that a beneficiary's salary is an admissibility factor and not a criterion to be used in determining his or her prospective employment capacity. The director's finding with regard to the latter is not supported by any statute, regulation or precedent decision.

On appeal, counsel objects to the director's conclusions. With respect to the beneficiary's salary, counsel asserts that the petitioner has committed to continuing to pay the beneficiary's Indian salary, equivalent to \$18,000 annually, in addition to the proffered U.S. salary of \$60,000, and he will continue to receive a pension, medical coverage and a year-end bonus in India.

Counsel also objects to the director's finding that "USCIS is not convinced" that the beneficiary will actually be carrying out the duties described in the petitioner's and counsel's statements, noting that such statements are typically deemed sufficient to establish eligibility by a preponderance of the evidence. Counsel further emphasizes that the beneficiary's department is scheduled for expansion upon his arrival in the United States that "one of his first job duties would be to hire additional local personnel for his team." Counsel states that the beneficiary will not perform day-to-day duties, but rather will spearhead their local expansion for senior software engineers, programmer analysts and quality assurance professionals.

Upon review, the petitioner has not established that the beneficiary will be employed in the United States 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.*

Furthermore, 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 prove 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 (9th Cir. July 30, 1991). Here, while the record suggests that the beneficiary will have authority over assigned projects, the petitioner has not established that the beneficiary's duties will be primarily managerial or executive in nature.

The petitioner's initial description of the beneficiary's duties was insufficient to establish that the beneficiary would perform primarily managerial or executive duties. Rather, the description indicates that the beneficiary will perform both supervisory duties as a project manager, while also serving as a technical resource for assigned projects. For example, the petitioner indicated that the beneficiary will "plan, direct and coordinate activities of designated projects," including such potentially qualifying duties as determining project timelines, procedures, staffing and resource allocation. However, the petitioner also indicated that the beneficiary's duties include studying technical manuals, developing programs to meet customized requirements, using structured analysis and design to develop programs, and submitting them to management for approval. The petitioner further summarized the beneficiary's proposed duties as "analyze projects, design, develop and implement IT projects as per user specifications" and "maintain existing projects." The petitioner did not, however, clarify how any of these technical responsibilities would fall under the statutory definitions of managerial or executive capacity, as defined at sections 101(a)(44)(A) and (B) of the Act. Rather, these duties are more indicative of a senior technical staff member than a manager.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. In response to the RFE, counsel provided a breakdown of the percentage of time the beneficiary would allocate to his various duties; however, this breakdown does not appear to encompass all of the duties specified at the time of filing, particularly the non-managerial duties. Specifically, counsel, in his response to the RFE dated August 14, 2008, provided a list of eight specific job duties to be performed by the beneficiary, which included enhancing "the overall technical structure while analyzing business information and data processing problems for major accounts," determining efficient ways to deliver solutions to customer problems using automation solutions, and acting as the primary liaison responsible for determining customer requirements. Yet, when counsel provided the breakdown of the beneficiary's duties in the same letter, these technical and customer liaison duties were conspicuously absent, as were the non-qualifying duties that were included in the petitioner's initial letter, as addressed above. Instead counsel indicated that the beneficiary will spend 20 to 25 percent of his time arranging recruitment of engineers and teams, an additional 25 percent of

his time on summarizing and forecasting business activity and financial position, up to 10 percent of his time "directing financial needs of the various projects", 20 percent of his time on budgeting and reporting, and 15 to 20 percent of his time on project planning. A breakdown of the beneficiary's position which does not include all of the beneficiary's proposed duties must be considered incomplete and is of limited probative value in establishing that the beneficiary's duties would be primarily managerial in nature. When responding to a request for evidence, 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 its associated job responsibilities.

Furthermore, the petitioner provided no insight as to the number or types of projects anticipated to be placed under the beneficiary's supervision. This information is critical in determining whether the beneficiary's job duties are realistic within the context of the petitioner's organization and operations. For example, a project manager who is responsible for multiple, simultaneous projects, may have significantly different duties compared to a project manager who supervises one discrete project team at a time. The petitioner indicates that the beneficiary "will manage various aspects of software development and maintenance projects per Project Management Framework," but does not clearly indicate the scope of the beneficiary's responsibility and authority within that framework. Reciting the beneficiary's vague job responsibilities or broad business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will 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 petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. A review of the record with respect to the petitioner's staffing levels undermines the petitioner's claim that the beneficiary will primarily perform managerial or executive duties.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

At the time the petition was filed, the petitioner indicated that the beneficiary would be responsible to "arrange recruitment of qualified programmers and technical support staff," but did not identify any staff who would report to the beneficiary immediately upon his assignment to the United States, nor did it identify any proposed subordinate positions on the organizational chart that accompanied the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved

at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

In response to the RFE, the petitioner indicated that the beneficiary would manage two senior software engineers who would be implementing the programming logic for the project, following technical architecture and configuration management specifications, escalating/troubleshooting issues and assessing candidates for the "programming team." The petitioner did not offer any explanation as to why these subordinates were not identified at the time the petition was filed, nor did it indicate that the beneficiary recruited these resources, although it previously stated that the beneficiary would be charged with selecting members of his team. One of the beneficiary's proposed subordinates, [REDACTED], according to his resume, has been employed by the petitioner in the United States since 2006. He indicates that his job title is software engineer, but the duties described in his resume are similar to those proposed for the beneficiary and include leading projects, understanding client requirements, estimating efforts and costs, attending client meetings, and planning and scheduling tasks. These duties are also dissimilar from the duties the petitioner indicates [REDACTED] will perform under the beneficiary's supervision. Although the petitioner appears to have begun staffing the beneficiary's team as of the date it responded to the RFE, it provided no additional insight into how work would be divided among team members and provided no details regarding the intended project or its size and scope. Given the similarity between the beneficiary's duties and those of his proposed subordinate, it is difficult to discern his proposed level of authority.¹

Regardless, even if the petitioner had clearly delineated the beneficiary's supervisory authority at the time of filing, the AAO notes that the record does not establish that the beneficiary would primarily be responsible for supervising professional, supervisory or managerial personnel. As discussed above, the petitioner has not clearly delineated how the beneficiary's duties would be divided among qualifying and non-qualifying duties and the AAO cannot affirmatively determine that he would be primarily a personnel manager.

For the same reason, the petitioner has not established that the beneficiary would be employed in the United States as a function manager. 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 clearly describes the duties to be performed in managing the essential function, i.e. 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. *See* 8 C.F.R. § 214.2(l)(3)(ii). In

¹ The AAO further notes that the beneficiary and the two proposed subordinates identified on the organizational chart all currently hold H-1B status. USCIS records reflect that the beneficiary's proffered salary for his H-1B position was \$50,000, while his two subordinates, according to information provided by the petitioner on the Forms I-129, were offered salaries of \$90,000 and \$85,000, respectively. (EAC 09 145 53128, EAC 08 216 50609, and EAC 08 255 51105.) Again, while an employee's salary is not indicative of his employment capacity, the large disparity in wages between the beneficiary and his claimed subordinates raises some question as to the employees' relative levels of authority.

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.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

As discussed above, the petitioner failed to provide a clear breakdown as to what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's proposed tasks, as discussed above, require him to directly participate in software development and customer service activities that do not fall directly under traditional managerial duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing his 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).

Therefore, based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed by the U.S. company in a qualifying managerial or executive capacity.

The second issue in this matter is whether the petitioner established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

In its letter dated July 1, 2008, the petitioner stated that the beneficiary is currently employed by the foreign entity as a project manager, performing the following duties:

Beneficiary researches and evaluates user requests for new or modified programs. He is responsible for satisfying the client/user in terms of the specific deliverables in the project. He creates detailed design documents, including program specifications and test plans from higher-level design and functional documents. He is also responsible for delivering tested, bug-free and documented programs and projects.

The beneficiary participates in the testing process and ensures the successful implementation and use of the system to be implemented. Beneficiary takes on any additional responsibilities as decided by the Project Leader. He holds consultations with the objective of clarifying program objectives and determines feasibility, cost effectiveness and capabilities. Beneficiary makes recommendations for modifications as required and carries out such modifications.

The petitioner submitted an organizational chart for the foreign entity depicting the beneficiary as project manager, with three subordinate employees, including a quality analyst and two software engineers. The chart indicates that the beneficiary reports to a project leader.

In the request for evidence issued in July 15, 2008, the director instructed the petitioner to provide additional evidence showing the management and personnel structure of the foreign entity, including the number of subordinate supervisors working under the beneficiary's supervision, their job titles and duties; the amount of time the beneficiary allots to executive or managerial duties as opposed to non-managerial functions; and the degree of discretionary authority the beneficiary has over day-to-day operations.

In his response to the RFE, counsel for the petitioner stated that the beneficiary serves as a project manager in the foreign entity's CTO office, and reports directly to the managing partner of the foreign entity. Counsel further stated:

The beneficiary has been managing, supervising and controlling other professionals, and support staff who perform the ordinary day-to-day activities necessary for the CTO Office to operate successfully. [The beneficiary's] function is to oversee these individuals and assist with growth of the CTO Office, which is comprised of the best technical and professional people.

Counsel indicated that the "executive skills" required for the beneficiary's current position include the following:

- To create, execute and adjust project plans as necessary.
- To prepare business requirement specifications and system design documents.
- To coordinate with the client and development team in order to finalize requirements.
- To prepare and maintain project schedules and quality related documents
- To adhere to schedules, standards and quality requirements.
- To adhere to defined milestones and achieve delivery of the final product.
- To carry out Impact Analysis and Effort Estimation using function point analysis.
- To allocate resources to individual tasks in consultation with the Team Lead for a particular project.
- To identify project risks, plan for mitigation, and resolve risks on arrival.
- Proactively look for areas of customer value added opportunities
- To interact with customers and resolve all business related issues.

Counsel stated that "an overwhelming portion of the time spent by the Beneficiary is devoted to managerial/executive duties," while a "negligible portion" is devoted to non-managerial/executive duties. Counsel stated that the beneficiary's discretionary authority includes serving as the sole point of client contact for project-related issues; determining project schedules; determining standards and quality requirements for projects; carrying out impact analysis and effort estimation; grievance handling; and developing policies and processes for the efficient functioning of projects under his supervision.

The petitioner submitted a revised organizational chart for the foreign entity which depicts the beneficiary as a project manager in the CTO office, supervising two software engineers and a quality analyst, and reporting directly to the managing partner of the foreign entity. The petitioner also submitted resumes for the beneficiary's three subordinates.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. The AAO notes that the director's analysis with respect to this issue was confusing, as the director referred to the petitioner's failure to establish how many other individuals in the company were working in similar roles and found that the beneficiary's 12 months of expedience with the company "does not appear to be inordinate in the realm of software project managers who work for information technology consulting firms." Overall, the director's analysis with respect to this issue suggests that the director was applying criteria more appropriate to an employee employed in a specialized knowledge capacity rather than to a managerial or executive employee.² While the AAO concurs with the director's conclusion that the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity, the director's analysis will be withdrawn.

On appeal, counsel states that while the beneficiary has gained specialized knowledge, such knowledge is not the basis of the petition. The petitioner submits copies of three performance appraisals conducted by the beneficiary in August 2008 as evidence of his position as a manager within the organization. The petitioner also submits copies of internal e-mail correspondence which counsel states demonstrates "the supervisory (beyond that of a first line officer) role that Beneficiary plays within Petitioner's organization." The new evidence shows that the beneficiary conducted the technical portion of performance appraisal forms for his three claimed subordinates for the "Market Data Server" project.

Upon review, the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

As with the beneficiary's proposed duties in the United States entity, the petitioner indicates that the beneficiary performs both qualifying and non-qualifying duties and fails to establish how the beneficiary's time is divided among these tasks. For example, the petitioner initially indicated that the beneficiary "researches and evaluates user requests for new or modified programs," "creates detailed design documents, including program specifications and test plans from higher-level design and functional documents," "participates in the testing process," "makes recommendations for modifications," and takes on "additional responsibilities as decided by the project leader." Such duties appear to be consistent with a senior technical role rather than a managerial position, and the petitioner did not explain how such duties would fall under the statutory definition of managerial or executive capacity. *See* section 101(a)(44)(A) and (B) of the Act. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not

² The AAO notes that in responding to the RFE, counsel cited to several L-1B precedent decisions in support of his assertion that the beneficiary possesses "essential knowledge" of user needs and the developmental processes of the Indian office. Such references may have led to some confusion on the part of the director in adjudicating the petition.

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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner also offered no description of the nature and scope of the project or projects to which the beneficiary has been assigned during his one year of employment with the foreign entity, and instead has described his duties in only general and vague terms. As noted above, the beneficiary's 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 internal e-mail correspondence submitted on appeal confirm that the beneficiary is directly involved in developing client solutions and not necessarily supervising lower-level personnel in carrying out such tasks. For example, one e-mail describes the beneficiary as "our main developer working on this project migrating mds requester to the new server." The beneficiary indicates that he has "never used Netscape Enterprise Server. . . so I need some time to read its documentation before mds-requester to work properly on new server." Although the e-mails include technical questions posed to the beneficiary by other employees, none of the e-mails are from the beneficiary's subordinates, nor do any instructions issued to the beneficiary come from his claimed supervisor. In addition, the petitioner submitted an invoice issued by the foreign entity to a client for services provided by 38 company employees in April 2008. The list indicates that the beneficiary was among these employees and the client was charged a billable rate of \$113 per hour for his services. The client was charged between \$100 and \$167 per hour for the services of each employee provided by the foreign entity, and only six employees were charged out at a rate lower than \$113. The beneficiary's claimed subordinates were not among the employees on the list. This evidence suggests that the beneficiary may be required to perform software consulting duties outside of the normal scope of his duties as a project manager.

In addition, the AAO notes an inconsistency in the record with respect to the beneficiary's level of authority. The initial organizational chart and the petitioner's letter in support of the petition reflect that the beneficiary reports to an employee with the job title "project leader." In response to the RFE, the petitioner indicated that the beneficiary reports directly to the managing partner of the foreign entity. The e-mail correspondence submitted on appeal suggests that the beneficiary's supervisor is Pranay Parekh, an employee who does not appear on either of the organizational charts for the foreign entity. 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).

The AAO acknowledges that the evidence submitted on appeal confirms that the beneficiary supervises the three claimed professional subordinate employees, at least within the scope of the "Market Data Server" project. However, as with the proposed U.S. position, the record does not establish that the beneficiary is *primarily* supervising professionals or that such employees relieve the beneficiary from performing non-qualifying duties associated with designing and delivering projects to the petitioner's clients. Furthermore, the record does not establish that the beneficiary primarily manages an essential function of the organization, or that he operates at a senior level within the foreign entity's organizational hierarchy.

The petitioner has failed to establish any clear distinctions between the qualifying and non-qualifying duties of the beneficiary. Specifically, the petitioner submitted no information to establish the percentage of time the beneficiary actually performs qualifying duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive. The petitioner's claim that the beneficiary devotes only a negligible amount of time to non-qualifying duties is not supported by the evidence of record.

A beneficiary's "control," management or direction over a company, a department or component of a company, or an essential function cannot be assumed or considered "inherent" to his position merely on the basis of broadly-cast job responsibilities. USCIS will not accept a managerial job title and a general job description in lieu of the required detailed description of the beneficiary's job duties. In the present matter, the petitioner has failed to document what proportion of the beneficiary's duties are managerial functions and what proportion are non-managerial. Absent a clear and credible breakdown of the time spent by the beneficiary performing specific, well-defined duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary would be primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d at 24.

Accordingly, the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.