

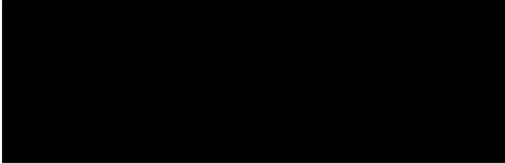
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FILE: LIN 06 155 54198 Office: NEBRASKA SERVICE CENTER Date: FEB 14 2008

IN RE: Petitioner:
Beneficiary:



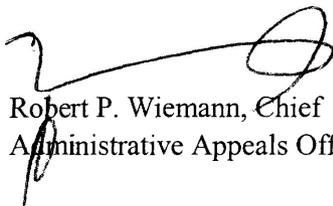
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Nebraska Service Center, denied the employment-based immigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner manufactures, markets and sells consumer and professional audio and video equipment, computer and peripheral products, and other electronic products throughout the United States and abroad. The petitioner seeks to employ the beneficiary in the position of Business Application and Systems Project Leader.

The director denied the petition on February 21, 2007 on the grounds that the petitioner failed to establish: (1) that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity prior to his transfer to the United States as a nonimmigrant intracompany transferee; and (2) that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director's decision was in error. Counsel expands upon the previous position descriptions provided by the petitioner and asserts that the beneficiary's previous foreign positions and the proposed U.S. position are managerial in nature.

Subsequent to the filing of the appeal, in an effort to resolve some apparent discrepancies between the various position descriptions provided for the beneficiary's positions with the foreign entity, the AAO requested and reviewed the initial Form I-129 petition filed on behalf of the beneficiary by the petitioning organization. The initial L-1B classification petition (EAC 01 204 52280) has therefore been incorporated into the instant record of proceeding. Upon review of the L-1B petition and supporting documentation, the AAO had additional questions regarding the nature of the beneficiary's foreign employment, and thus issued a request for additional evidence on August 30, 2007. The petitioner submitted a timely response on November 23, 2007, and all documentation included in the petitioner's response will be considered herein.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or

to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The first issue to be addressed in this matter is whether the petitioner established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity prior to his transfer to the United States to work for the petitioner as a nonimmigrant in August 2001. The petitioner does not claim that the beneficiary was employed by the foreign entity in an executive capacity.

Section 101(a)(44)(A) of the Act defines "managerial capacity" as follows:

- (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.

According to the petitioner's letter dated April 12, 2006, submitted in support of the immigrant visa petition, the beneficiary was employed abroad in the position of Team Leader of SAP Support and Maintenance Groups beginning in January 2000. The petitioner described his duties as follows:

The beneficiary was engaged in professional engineering duties as a team leader of SAP Support and Maintenance Groups. In this position, he worked closely with end users for the resolution of day-to-day system issues and managed overall resource development and planning. [The beneficiary] was responsible for coordinating the assignment and tracking of "Tickets" which relate to issues apart from ownership as well as system controls. He was also in charge of interviewing, screening and mentoring new team members.

The beneficiary was involved in leading the identification and resolution of file transfer issues between [the petitioner] and SAP systems through interactions with legacy experts. [The beneficiary] was also charged with creating functional, technical and acceptance test documents in addition to programming, testing and user training. He reviewed the code and documentations developed by other [company] engineering group members and was largely involved in establishing quality control documents and implementing quality standards within the organization. Lastly, as to [the beneficiary's] management responsibilities with the SAP systems, he was responsible for conducting regular meetings with end users and providing support which generated important feedback for future improvement and enhancement.

[The beneficiary was also engaged in various other critical development areas including the Unicorn Projects. In this capacity, he was responsible for scoping and developing technical design as well as testing and implementing one of [the petitioner's] most recognized products, the VAIO Interface, specifically in the areas of error management and file handling. [The beneficiary] performed studies on the ABAP programs and also provided tuning, instant solutions and implemented preventive measure for the customer's request. [The beneficiary] was responsible for leading the development of numerous conversion, interface and program reports as well as a combination of SDCs for the Data Vanning and Accounting Information concept (DVAI).

The petitioner indicated that the beneficiary assumed the position of SAP Technical Consultant for the SAP Implementation Team in December 2000, and held this position until his transfer to the United States in August 2001.¹ The petitioner described the beneficiary's duties in this position as follows:

[The beneficiary] was involved in all aspects of the project life cycle from planning thru implementation. He leaded [sic] the planning of development resources in order to meet [the petitioner's] requirements. Additionally, he utilized his specialized knowledge of SAP to collect business requirements which he then analyzes and makes recommendations for design decisions based on technical feasibility. He was responsible for establishing schedules, developing new and maintaining existing programs and setting and enforcing standards. [The beneficiary] performed programming analysis and trouble shooting in order to ensure high

¹ The petitioner initially indicated that the beneficiary was transferred to the United States to serve in the position of SAP Technical Consultant in December 2000, but later clarified that this position was initially based with the foreign entity in Singapore. The record shows that the beneficiary was first admitted to the United States in L-1B status in August 2001.

standards, reviewed and approved functional requirements before execution and worked constantly on improving program code in order to optimize performance.

In support of the petition, the petitioner provided a letter from the foreign entity dated March 7, 2006, which indicates that the beneficiary was last employed by the Singapore company as a Senior Systems Engineer.

The director issued a request for additional evidence on October 5, 2006, in part, instructing the petitioner to submit a "detailed, comprehensive description" of the beneficiary's last position abroad. The director advised that the petitioner must clearly define the specific duties performed by the beneficiary and delineate the proportion of time devoted to such duties.

In a response dated December 22, 2006, the petitioner indicated that the beneficiary performed the following duties as Team Leader of SAP Support and Maintenance Groups, from January 2000 until April 2000:

Managing the essential SAP Support and Maintenance function which included the development of numerous conversion, interface and program reports as well as a combination of BDCs for the Data Vanning and Accounting Information concept (DVAI). (60%)

Responsible for managing and overseeing the scoping and development of technical design as well as testing and implementation of one of [the petitioner's] most recognized and major products, the VAIO interface, specifically in the areas of error management and file handling. (20%)

Exercising discretion over the day-to-day SAP Support and Maintenance function by performing studies on the ABAP programs and also providing tuning, instant solutions and implementing preventative measures for the customer's requests (20%)

The petitioner indicated that the beneficiary assumed the following duties from May 2000 through November 2000:

- Acting at a senior-level as Team Leader of SAP Support and Maintenance Groups, where he worked closely with end users for the resolution of day-to-day systems issues and managed overall resource development and planning. (24%)
Managing the coordination of the assignment and tracking of "Tickets" which relate to issues apart from ownership as well as system change controls (12%)
- Interviewing, screening and mentoring new team members (4%)
Exercising discretion over the day-to-day SAP Support and Maintenance essential operations by directing regular meetings with end users and providing support which generated important feedback for future improvement and enhancement. (18%)
Reviewing the code and documentations developed by other [company] engineering group members and being largely involved in establishing quality control documents and implementing quality standards within in the organization. (15%)
Leading the identification and resolution of file transfer issues between [the petitioner] and SAP systems through interactions with legacy experts. (12%)

- Establishing functional, technical and acceptance test documents in addition to programming, testing and user training. (15%)

Finally, the petitioner indicated that the beneficiary assumed the position of SAP Technical Consultant with the foreign entity in December 2000, with the following responsibilities:

Functioning at a senior-level for SAP Implementation Operations as a key leader . . . in which he spearheaded the development of Outbound & Inbound Interfaces, multiple extensions and report programs in SAP's sales and distribution/material management/finance modules through utilizing BAPI functionalities. (50%)

Exercising discretionary authority over the day-to-day SAP Implementations Operations by leading the planning of development resources in order to meet [the petitioner's] requirements. (20%)

Managing the essential SAP Implementation function and being responsible for all aspects of the project life from planning through implementation. (15%)

- Utilizing his specialized knowledge of SAP to collect business requirements which he then analyzed and made recommendations for design decisions based on technical feasibility. (5%)
- Establishing schedules, developing new and maintaining existing programs and setting and enforcing standards. (5%)

Managing and overseeing programming analysis and troubleshooting in order to ensure high standards; reviewed and approved functional requirements before execution; and worked constantly on improving program code in order to optimize performance. (5%)

The director denied the petition on February 21, 2007, concluding that the petitioner failed to establish that the beneficiary had been employed in a primarily managerial capacity with the foreign entity. The director observed that the initial position description provided by the petitioner provided little information substantiating management-level duties, and included many duties that appeared to be functional, rather than managerial in nature. The director acknowledged the position descriptions submitted in response to the request for evidence, but found that the information provided was highly generalized and did not define the beneficiary's actual duties. The director cited several examples from the record in support of his determination that the position descriptions were insufficient to establish the beneficiary's employment in a managerial capacity.

In an appellate brief received on April 24, 2007, counsel for the petitioner asserts that the director erred in determining that the beneficiary was not employed by the foreign entity in a primarily managerial or executive capacity. Counsel asserts that the beneficiary managed the essential SAP Support and Maintenance function, and "specifically managed a team of six (6) developers in the SAP Support and Maintenance division." Counsel makes numerous references to the beneficiary's accomplishment of various objectives through his "team" and further describes the beneficiary's claimed supervisory duties as follows:

He assigned tasks to subordinates, dealing with the resolution of technical issues with the operational systems used to support business (SAP Support and Maintenance function). The

team developed numerous conversion, interface and program reports as well as a combination of BDS for the Data Vanning and Accounting Information concept (DVAI). [The beneficiary] was responsible for the work product of these six (6) developers, and held regular meetings to review the team's progress and assisted in directing the team to meet deadlines and resolve tasks assigned.

Counsel further states that the beneficiary was "a senior member of the [foreign entity's] SAP team and managed a team of six (6) degreed (Master's degree and Bachelor's degrees) professionals." Counsel also adds that the beneficiary "developed policies and standards which the entire SAP Support and Maintenance Group carried out."

With respect to the beneficiary's role as SAP Technical Consultant with the foreign entity, the position he assumed in December 2000, counsel states on appeal that the beneficiary "managed a development team of 25 professionals who developed solutions customized in SAP." Counsel expands upon the previously submitted position description, noting the beneficiary's delegation of various tasks to his team members.

Upon review of the record, including the evidence submitted on appeal, the AAO noted significant discrepancies between the position description included with the initial petition, which appeared to include a number of non-managerial engineering duties and no apparent supervisory responsibilities, and the position description eventually submitted on appeal, in which it is claimed that the beneficiary managed up to 25 professionals. As noted above, the AAO requested and incorporated into the record the initial L-1B classification nonimmigrant petition filed by the petitioning company on June 4, 2001. The previous nonimmigrant petition was requested in order to further clarify the nature of the beneficiary's duties while employed by the foreign entity.

According to a letter dated June 12, 2001, signed by Haruka Fujii, Supervisor, International Human Resources for the petitioner, the beneficiary was employed by the foreign entity as a Systems Engineer from January 2000, assigned to the Project Management Department (SAP), where his duties included the following:

[A]s part of the SAP SD/MM Implementation Project team, he has been responsible for developing customized ABAP programs to meet the clients' business needs and technical specifications. He also provides clients with training and advice on functions and use of such programs. In addition, he gathers information and analyzes their technical specifications, requirements, as well as business procedures, and estimates costs and other conditions related to the requested system development. He develops programs to transfer various business data from clients' legacy systems to the SAP system utilizing advanced technology such as BDC, BAPI and Direct Data Transfer, and develops interface to connect SAP system with other related systems. He performs unit tests, writes technical specifications for programs in development, tests and analyzes programs and systems, and converts master and transactional data from legacy systems to SAP systems. Additionally, he prepares user-training materials and provides clients with user training. Finally, he gathers feedback from clients, reviews system performance, and recommends modifications to enhance functions.

The AAO issued a request for evidence on August 30, 2007, in which it advised the petitioner that upon review of the L-1B nonimmigrant petition filing, there was nothing in the beneficiary's foreign job description to suggest that the beneficiary supervised other employees, led teams of engineers, managed essential functions, or served at a senior level within the foreign entity or within a specific function. Rather, the AAO found that the beneficiary appears to have been performing technical and client-related tasks typical of a qualified systems engineer.

The AAO further observed that the position descriptions submitted in support of the instant immigrant petition for the positions of "Team Leader, SAP Support and Maintenance Team" and "SAP Technical Consultant," bear little resemblance to the petitioner's earlier descriptions of the beneficiary's role as a "systems engineer" for the foreign entity, and it would appear that the positions of "systems engineer," "team leader" and "SAP technical consultant" are separate and distinct positions within the petitioner's international organization. The AAO's preliminary assessment was therefore that the beneficiary's job titles and duties with the foreign entity have been misrepresented, or, at a minimum, inflated, in order to establish his eligibility for the requested immigrant visa classification.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988). Pursuant to section 204(b) of the Immigration and Nationality Act, an employment-based petition cannot be approved unless and until the immigration authorities have determined "that the facts stated in the petition are true."

The AAO therefore requested that the petitioner provide the following additional evidence: (1) an explanation from the petitioning company addressing the submission of two entirely different accounts of the beneficiary's job titles and job duties for the same period of employment abroad; (2) if available, standard position descriptions maintained by the foreign entity's human resources department for the positions of systems engineer, team leader and SAP Technical Consultant; (3) evidence to substantiate the petitioner's claim that the beneficiary managed teams of employees including the names, position titles, job duties and dates of employment for the 6-member and 25-member teams that purportedly worked under the beneficiary's supervision; (4) organizational charts depicting the staffing structure of the foreign entity for the beneficiary's period of employment abroad; and (5) any available personnel records identifying the beneficiary's job title during his employment abroad, such as personnel evaluations completed by his supervisor, an offer letter, or other company records or documentary evidence to corroborate the beneficiary's status as a managerial employee during his period of employment with the foreign entity.

The petitioner has submitted a timely response to the AAO's request for evidence. In a letter dated November 21, 2007, counsel states that the petitioner's organization "utilizes very general internal job titles," and notes that the beneficiary's position titles with the foreign entity from January 2000 through October 2005, at which time he was transferred to the payroll of the U.S. company, were "Contract Systems Engineer," "Contract Senior Systems Engineer," and "Senior Systems Engineer." The petitioner submits a letter from the foreign entity indicating that the beneficiary held the position of "Contract Systems Engineer" from January 4, 2000

through August 7, 2002. The foreign entity indicates that the beneficiary became a "Permanent Staff member" on March 1, 2003, and explains that while his earlier job title included the term "contract" the beneficiary was a direct employee of the company, albeit with an employment contract valid for a specific period of employment.

Counsel explains that "external functional job titles are utilized within parts of the [petitioner's] organization to provide further detail of any employee's position and function." Counsel states that the beneficiary's functional job titles were in fact Team Leader of SAP Support and Maintenance Groups and SAP Technical Consultant. The petitioner submits a letter dated November 19, 2007 from ██████████ who is identified as the beneficiary's former supervisor, who explains that the beneficiary, as a Contract Systems Engineer, was assigned to the Unicorn project as a Team Leader, SAP Support and Maintenance Groups, with responsibility for managing six professionals. These employees are identified by name and job title, and include a Contract ABAP Developer, a Contract SAP Finance Consultant, a Contract SAP Sales and Distribution employee; two Contract ABAP trainees and a Contract SAP Material Master Consultant. Mr. ██████████ states "it is not the Company's practice to maintain records on contract employees and therefore cannot provide date of employment on the above contractors."

In a separate letter dated November 19, 2007, ██████████, who is identified as the beneficiary's previous supervisor, stated that the beneficiary was employed as a Contract Systems Engineer, with a functional job title of SAP Technical Consultant, from December 2000 through August 7, 2002. ██████████ states that the beneficiary "was assigned to be the leader of a development team consisting of 25 ABAP professionals," and notes that the names, position job titles, job duties and dates of employment are not available because it "is not the corporate practice of the company to maintain records of contractors."

Counsel notes that the foreign entity does not maintain job requisitions containing general descriptions of the job duties for positions within its organization, but clarifies again that the positions of systems engineer, team leader and SAP Technical Consultant are not separate and distinct positions. Counsel contends that the beneficiary's responsibilities for managing teams comprised of six professionals and 25 professionals were "thoroughly discussed" in the initial I-140 Immigrant Petition, in response to the director's request for evidence, and in the appellate brief. Counsel again clarifies that the foreign entity does not maintain employment records for contract employees, and therefore cannot provide organizational charts depicting these positions. Counsel states that the foreign entity does not have prior organizational charts that depict the beneficiary's position, as it is not the company's practice to maintain copies of such charts.

With respect to the job descriptions provided for the positions the beneficiary held abroad, counsel contends that the duties are not entirely different as suggested by the AAO in the request for evidence. Counsel states that the job descriptions utilized in support of the immigrant petition "were much more detailed " than those utilized in the L-1 nonimmigrant petition filing. Counsel attributes any differences to the petitioner's need to accurately describe the day-to-day duties in as much detail as possible. In a letter dated November 19, 2007, the petitioner's Human Resources Manager explains that the job descriptions provided by the petitioner in the initial L-1B filing, the L-1B extension and the L-1A amendment petitions filed on behalf of the beneficiary focused on "the technical aspects of [the beneficiary's] positions abroad, and not on the managerial duties he performed in his positions abroad." The petitioner explains that it sought "further clarification" of the

beneficiary's job duties in preparation for filing the instant immigrant petition, and therefore utilized more detailed job descriptions.

Counsel asserts that while the job descriptions "may not match word-for-word, the overall function and duties of the positions have not been changed." Counsel reiterates that any differences may be attributed to the director's request for a more detailed position description, whereas the previous L-1B petition contained no such request.

Finally, in response to the AAO's request for contemporaneous personnel records identifying the beneficiary's job titles, the petitioner has provided copies of the beneficiary's employment contracts with the foreign entity while employed as a direct contract employee, and performance reviews conducted by the foreign entity from 2000 through 2005, which confirm the internal job titles as discussed above.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary was employed by the foreign entity 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.*

Although the petitioner has submitted evidence to clarify the company's use of different job titles for his period of employment with the foreign entity, the record still contains inconsistent accounts of the beneficiary's job duties that have not been adequately explained. As noted by the director, the initial description provided by the petitioner was insufficient to establish that the beneficiary would primarily perform the high-level duties associated with the statutory definition of managerial capacity. *See* section 101(a)(44)(A) of the Act. The petitioner stated that the beneficiary performed "professional engineering duties," worked with end users to resolve "day-to-day system issues," and was responsible for "creating functional, technical and acceptance test documents," "programming, testing and user training," "scoping and developing technical design," "testing and implementing" a product interface, performing studies, and providing tuning, instant solutions, and preventative measures. All of these duties suggest that the beneficiary was directly involved in product development, requirements gathering and customer support functions as an engineer, rather than in a capacity that could be considered managerial. 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).

While the petitioner indicated that the beneficiary would "manage resource development and planning," "coordinate the assignment and tracking of tickets, interview, screen and mentor new team members, and "lead" certain development efforts, the petitioner did not describe in any detail the beneficiary's level of authority within a team, function or other component of the foreign organization, or otherwise indicate the specific managerial tasks associated with these duties. 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). Overall, the description suggested that the beneficiary performed a combination of non-qualifying duties and may have performed some duties consistent with a lead or senior role within a project team. The initial position description for the beneficiary's later position of SAP technical consultant was similar, in that it included non-qualifying duties such as utilizing specialized knowledge to collect business requirements, analyzing business requirements, performing programming analysis, and troubleshooting. Notably, at the time of filing, the petitioner did not indicate that the beneficiary was responsible for supervising a staff of subordinate personnel in either of his previous positions with the foreign entity.

As noted by the director, the petitioner's response to the director's request for evidence did not assist in clarifying the beneficiary's role within the foreign company. While much of the content was similar to that included in the petitioner's initial description, the petitioner added language such as "managing the essential SAP Support and Maintenance function," "managing the essential SAP Implementation function," "exercising discretion over the day-to-day SAP Support and Maintenance essential function," and "exercising discretionary authority over the day-to-day SAP Implementations Operations." Notwithstanding the addition of these managerial connotations, the petitioner still indicated that the beneficiary developed various reports, performed studies, resolved day-to-day system issues, provided tuning, provided instant solutions, implemented preventative measures for customer requests, and collected and analyzed business requirements, duties that have not been shown to be managerial in nature. Whereas the petitioner previously stated that the beneficiary was responsible for the scoping and development of technical designs, testing and implementation of a product interface, the petitioner indicated in response to the request for evidence that the beneficiary was "responsible for managing and overseeing" these activities. Similarly, instead of "coordinating the assignment and tracking of Tickets," and "performing programming analysis and troubleshooting," the petitioner indicated that the beneficiary was "managing the coordination" of assignment and tracking of tickets, and "managing and overseeing programming analysis." In sum, the initial description appeared to have the beneficiary doing more of the actual work, while the second iteration of the job has the beneficiary managing more of the actual work done within the scope of his assigned projects.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). 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, while the petitioner provided a breakdown of how the beneficiary's time was allocated among various responsibilities, the director correctly observed that this information was largely non-responsive to the director's request that the petitioner delineate the specific duties performed by the beneficiary and the amount of time spent on them. For example, the petitioner's statement that the beneficiary spent 60 percent of his time "managing the essential SAP Support and Maintenance function" is insufficient to establish that his position was primarily managerial in nature. 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 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. § 204.5(j)(5). 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.

Furthermore, in the case of a function manager, USCIS will consider such factors as the beneficiary's position within the company's organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the direct or indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages, in order to obtain a clear picture of the beneficiary's role within the organization as a whole. The petitioner's vague statement that the beneficiary devoted the majority of his time to managing an essential function and "functioned at a senior-level with the SAP Support and Maintenance Group operations function," without any further explanation or evidence, is insufficient to establish his eligibility for this immigrant visa classification. The petitioner has not provided any evidence of the organizational structure of the foreign entity during the beneficiary's period of employment abroad, thus the claim that he functioned at a senior level cannot be confirmed. Although the petitioner indicates that no organizational charts exist for the requisite time period, it is reasonable to expect the foreign entity to at least identify the reporting structure within the beneficiary's specific group and the job titles of the employees who were senior to him. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, it must be emphasized once again that when replying to the director's request for evidence, the petitioner did not indicate that the beneficiary managed a team of subordinates during his role as a "team leader" or "SAP Technical Consultant." The petitioner indicated that the beneficiary spent 4% of his time during the period from May 2000 to November 2000 "interviewing, screening and mentoring new team members," which falls significantly short of establishing that the beneficiary was primarily a personnel manager.

Therefore, based on the above, the AAO concurs with the director's determination that the evidence submitted with the initial petition and in response to the director's request for evidence was insufficient to establish the beneficiary's employment abroad in a primarily managerial capacity. The position descriptions were general and nonspecific and did not establish any clear distinctions between the qualifying and non-qualifying duties performed by the beneficiary.

Further, a review of the position description provided by the petitioner in support of the beneficiary's L-1B petition supports a conclusion that the beneficiary's role with the foreign entity was primarily that of a technical staff member, rather than that of a manager of professional personnel or an essential function of the foreign organization. The AAO acknowledges the petitioner's and counsel's assertions that any perceived differences between the description submitted in support of the L-1B petition and that submitted in support of the immigrant petition were due to the level of detail provided. However, the job description provided by the petitioner in 2001, while shorter in length, included specific, concrete duties that are clearly not included in the record for the immigrant petition. The petitioner indicated that the beneficiary personally developed customized programs to meet clients' business needs, provided clients with training and advice on the

functions and use of developed programs, gathered information and analyzed specifications and requirements, developed programs to transfer business data from legacy systems to SAP systems, developed interfaces, performed unit tests, wrote technical specifications, tested and analyzed programs and systems, converted data from legacy systems to SAP systems, prepared training materials, and provided user training.

Since the petitioner does not indicate that this position description was inaccurate, the AAO must conclude that the position description provided in support of the instant petition was, at best, incomplete, as it failed to include many of these non-managerial duties previously attributed to the beneficiary. While the petitioner would have understandably focused on technical aspects of the position to establish the beneficiary's qualifications as a specialized knowledge employee, the petitioner has not adequately explained the complete absence of any reference to the leadership, supervisory or managerial responsibilities now claimed to have comprised the beneficiary's primary duties while employed abroad. 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). 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.*

Finally, with respect to the beneficiary's claimed management authority over teams of six to 25 professionals while employed by the foreign entity, the AAO must emphasize that these claimed subordinates were not mentioned by counsel or the petitioner prior to filing the instant appeal. Notwithstanding counsel's claim that the beneficiary's supervisory responsibilities were "thoroughly discussed" in the initial petition and in response to the request for evidence, there was simply no mention in the record of these subordinate staff prior to the denial of the petition. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The petitioner did mention that the beneficiary managed a team of 25 staff members during the period from August 2001 through September 2005; however, he was in the United States during this time period.

The AAO acknowledges the petitioner's submission of statements from the beneficiary's previous supervisors attesting to his management of contract workers who are identified as professionals, and its claims that no organizational charts, employment records, position titles, job duties, dates of employment, etc. are available. The AAO finds these statements insufficient to overcome the inconsistencies in the record with respect to the beneficiary's claimed supervisory duties. The beneficiary's performance appraisals conducted during the period of employment in question (January 2000 through August 2001) do not suggest that he was employed in a supervisory or managerial role, and he was not evaluated on job functions such as "leadership skills," "staff development skills," and "supervisory skills" until after his promotion to the role of "Senior Systems Engineer," subsequent to his transfer to the United States. Further, the fact that the beneficiary was initially hired as a "Contract System Engineer," for a preliminary term of only seven months, further diminishes the petitioner's claim that he was hired by the foreign entity to perform primarily managerial duties.

While the petitioner claims that no standard position descriptions or organizational charts are maintained by the foreign entity's human resources department, the petitioner is not exempt from providing some

explanation or documentary evidence as to where the beneficiary's position of "Contract Systems Engineer" fell within the company's organizational scheme. It is reasonable to expect that the foreign entity could at a minimum describe the typical career ladder for engineers within its organization. Absent some explanation as to how the company is organized, or how it denotes managerial positions internally, the petitioner has not established that the foreign entity designates the position of "contract systems engineer" as a management-level position within its organizational hierarchy. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Based on the foregoing discussion, the petitioner has not established that the beneficiary was employed by the foreign entity in a primarily managerial capacity. For this reason, the appeal will be dismissed.

The second issue to be addressed is whether the petitioner established that the beneficiary would be employed by the United States entity in a primarily managerial capacity. Again, the petitioner does not claim that the proffered position is in an executive capacity.

In its letter dated April 12, 2006, the petitioner stated that the beneficiary would be employed in the managerial position of Business Application and Systems Project Leader. The petitioner described the beneficiary's duties as the following:

In this managerial capacity, [the beneficiary] continues to be responsible for development and maintaining of SAP programs in the area of SAP R/3, SAP Business Information Warehouse (BW) and SAP Advanced Planner and Optimizer (APO). He conducts analysis of user needs, directs application troubleshooting, and supervises and gives support and direction for other technical engineers as well as oversees engineering operations.

During systems implementation, he is responsible for leading the entire team and provides expertise in the areas of analysis and conflict resolution. He acts as a liaison with the process owners, [the petitioner's] project engineers and our external consulting group. He is also responsible for directing the development of various projects such as Supply Chain Order Management Account Receivable (SOAR) which involved APO and R/3 systems. Additionally, [the beneficiary] directs and supervises the planning and development of product specifications which requires a mastery of complex systems such as Remote Function Call (RFC), for intermediate document (IDOC), Business Application Programming Interface (BAPI), LSMW and SAP Batch Data Communication (BDC) programming. [The beneficiary] is also a key leader in [the petitioner's] e3 project implementation in which he has spearheaded the development of Outbound & Inbound Interfaces, management/finance modules through utilizing BAPI functionalities.

[The beneficiary] exercises a wide-latitude in discretionary decision-making authority on day-to-day matters and directly manages twenty-five (25) staff members, all whom possess a Bachelor's degree or higher in their specialized field. He sets goals for the team, delegates

work to each member, evaluates their work performance, and has the authority to recommend various personnel actions, such as hiring and firing of his subordinate employees.

The petitioner provided an organizational chart for the "SAP/Supply Chain Competence Center," which depicts the beneficiary as a "project leader" responsible for supervising "Off-shore Development ISSAP." The beneficiary's immediate supervisor is identified as a systems manager, who in turn reports to a "Systems Manager, SAP Development."

On October 5, 2006, the director issued a request for evidence instructing the petitioner to submit a "detailed, comprehensive description" of the beneficiary's proposed position. The director advised that the petitioner must clearly define the specific duties performed and delineate the proportion of time devoted to such duties.

In a response dated December 22, 2006, the petitioner, through counsel, indicated that the beneficiary performs the following duties in his current role as Business Application and Systems Project Leader:

- Managing, directing and overseeing the entire team and providing expertise in the areas of analysis and conflict resolution during systems implementation. (21%)
- Directing the development of various projects such as Supply Chain Order Management Account Receivable (SOAR) which involve APO and R/3 systems. (10.5%)
- Directing and supervising the planning and development of product specifications which requires a mastery of complex systems . . . (10.5%)
- Managing and overseeing the development and maintenance of SAP programs in the area of SAP R/3, SAP Business Information Warehouse (BW) and SAP Advanced Planner and Optimizer (APO). (10.5%)
- Conducting analysis of user needs, directing application troubleshooting, and supervising and giving support and direction for other technical engineers as well as overseeing engineering operations. (10.5%)
- Acting as a liaison with process owners, [company] project engineers and our external consulting group (7%)
- Continuing to exercise a wide latitude of discretionary decision-making authority on day-to-day matters and directly manages twenty-five (25) staff member, all whom posses [sic] a Bachelor's degree or higher in their specialized field. He sets goals for the team, delegates work to each member, evaluates their work performance, and as the authority to recommend various personnel actions such as hiring and firing of his subordinate employees. (30%)

The director denied the petition on February 21, 2007, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. The director acknowledged that the initial position description included some managerial duties, such as the oversight and recommendation of personnel actions of subordinate employees, but found that the description was insufficient to establish that the beneficiary would meet all four criteria of managerial capacity. The director noted that the petitioner had not defined how the beneficiary would be "responsible" for various activities, what is involved in his liaison duties or how he will "spearhead" interface development. The

director further found that it was unclear how much time the beneficiary would devote to functional tasks such as analysis and troubleshooting.

The director acknowledged the position description submitted in response to the request for evidence, but found that it primarily reiterated the information previously provided and already deemed to be insufficient. The director further stated:

[T]he petitioner did not further explain the broad, general terms used or clearly discuss the specific duties to actually be performed by the beneficiary. Stating that the beneficiary will be "managing" or "directing" without defining his specific duties is not sufficient. The petitioner was advised that the prior description was overly broad, but in response provided no specific information regarding the duties of the position as requested. Therefore, the record does not adequately demonstrate that the beneficiary will be primarily employed in a managerial or executive capacity in the United States.

On appeal, counsel for the petitioner submits a slightly expanded version of the position description provided by the petitioner in response to the request for evidence. Counsel emphasizes the beneficiary's "wide latitude of discretionary decision-making authority on day-to-day matters," and the following supervisory duties:

[The beneficiary] manages, directs and oversees a team of 25 developers, and provides expertise in the areas of analysis and conflict resolution during systems implementation. He assigns tasks to the team members and reviews status with the team members to ensure they are on schedule. [The beneficiary] provides direction to the team on how to meet business requirements and reviews the project plan with the team to make sure that the customer's requirements are met. [The beneficiary] conducts periodic meetings with the team to ensure that the company's policies and standards are met. He provides technical direction for resolving complex issues. He also maintains the project work plan and schedule for all development tasks, and reports weekly to the higher management.

Counsel emphasizes that the beneficiary has the authority to recommend the hiring and firing of team members, evaluates their work performance, and exercises day-to-day discretion over his team and the projects assigned to them.

Upon review, the petitioner has not established that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity.

The AAO acknowledges that the petitioner states that the beneficiary will devote at least 51 percent of his time to supervising a team of 25 professional subordinate staff members, all of whom possess at least a Bachelor's degree. 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).

Therefore, if the petitioner demonstrates that the beneficiary's primary duty is to supervise a team of subordinate professionals, and establishes his authority to make or recommend hiring and firing decisions, the petitioner will establish that the beneficiary is employed in a qualifying managerial capacity. However, the petitioner has not identified with any specificity who the beneficiary supervises, where they are located, or what their job functions are, nor has it provided documentary evidence in support of its claims, such as evidence of the beneficiary's authority to evaluate work performance of his subordinates and to make hiring and firing recommendations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. As noted above, the record contains an organizational chart which shows the beneficiary as project leader and depicts "off-shore development, ISSAP" under him. However, the organizational chart falls significantly short of establishing the number and type of subordinates the beneficiary supervises and how the off-shore staff relieves him from performing non-managerial tasks associated with the project or projects he is claimed to lead.

It is noted that the director denied the petition primarily on the basis of the petitioner's failure to adequately describe the beneficiary's actual duties. Counsel has provided additional details on appeal to explain how the beneficiary "manages," "directs" and "oversees" various project activities. However, the additional information relates to the beneficiary's delegation of tasks to subordinates who have not been sufficiently documented in the record. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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. Overall, based on the lack of explanation and documentary evidence regarding the existence and function of the beneficiary's claimed subordinate staff, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial capacity. Accordingly, 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.