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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

Office: NEBRASKA SERVICE CENTER

Date: NOV 02 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew

Chief, Administrative Appeals Office

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

The petitioner is a limited liability company organized in the State of Florida that provides technology consulting services. It seeks to employ the beneficiary as its consulting services director. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition, concluding that the petitioner had not established that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner contends that the director's decision is in error. Counsel submits a brief and additional evidence on appeal.

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).

At issue in the present matter is whether the beneficiary would be employed in a primarily managerial or executive capacity in the United States.

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

The term "managerial capacity" means an assignment within an organization in which the employee primarily

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

The term "executive capacity" means an assignment within an organization in which the employee primarily

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and

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

In a letter dated April 4, 2008 in support of the petition, the petitioner indicated that the beneficiary was previously employed as director of consulting services of [REDACTED] the petitioner's affiliate in Venezuela, prior to transferring to the U.S. company under L-1A status in April of 2006. The petitioner stated that it now seeks to employ the beneficiary as its consulting services director on a permanent, full-time basis. The petitioner stated that, in such capacity, the beneficiary "will continue to be responsible for planning, coordinating, and directing all consultancy projects; managing and reviewing complex model designs, developing productivity software tools and transferring technology to project teams including clients." The petitioner stated that the beneficiary's responsibilities include:

- Oversee activities related to project design and development, quality assurance, productivity software development and technology transfer;
- Oversee specialized financial consulting and complex model design and implementation;
- Liaison with [the company's] local, U.S. and other clients, suppliers and distributors to ensure the technical quality of all the decisions being made are in line with the customers needs;
- Evaluate the job performance of the senior consultants;
- Hire, train, retain, dismiss or replace all technical employees;
- Oversee high level technical management responsibilities for the direct operation and development of [the company] including technical leadership;
- Support computer application systems & underlying databases for clients;
- Work with clients to identify their needs, provide technical expertise in the evaluation of software solutions, testing, training, documentation, design, development, implementation and ongoing production support of these solutions;
- Production support troubleshooting applications, interaction with software vendors, as well as solving and responding to user requests.

In addition, the petitioner indicates that the beneficiary "direct[s] consulting projects" in the areas of "financial modeling software solutions," "financial consolidation reporting and performance management," and "business intelligence and budgeting and planning."

The petitioner also submitted a set of job descriptions for its employees, in which the beneficiary's position is described as follows:

Position Main Responsibilities: The Director of consulting services will manage specialized assignments or pre-sales assignments that may lead to significant revenue opportunities. The Director of Consulting Services will have a good working knowledge of most of the areas that are key to the company's business. This is a key managerial and technical position. [The beneficiary] will direct all consultancy projects, manage and review complex model designs, and transfer technology to project teams including clients.

- Provides DW consultancy, team lead, business development support, and broad project implementation skills.
- Maintains and develops personal expertise in 'specialist area' by planning and following a programme of learning and development, including obtaining relevant professional qualifications and memberships
- Develop an awareness outside [the company] within 'specialist area' and utilize knowledge gained to support ongoing service development
- Develops personal network of contacts within [the company] to ensure high levels of chargeable personal utilization
- Actively promotes [the company's] business process and IT outsourcing services with clients and develops relationships that are transferable into sales opportunities
- Supports the research and shaping with key internal stakeholders of generic business propositions within 'specialist area' to be taken to market
- Supports the creation of intellectual property including methods, approaches, sales collateral and capability development programmes to support creation and renewal of generic business propositions
- Supports the shaping of overall solution(s) with key internal and external stakeholders and may lead this activity for small solutions
- Supports in the definition of scope and deliverables for assignment with 'client' (may be internal or external) and may lead this activity for small solutions
- Deliver assignment in accordance with agreed scope, time, financial and quality measures
- Ensure effective client engagement and stakeholder management during assignment in order to mitigate risk and manage expectations
- Complete assignment review with 'client' at the end of each and every assignment (or six monthly for long term assignments)
- Shares personal knowledge of 'specialist area' through coaching and mentoring, running workshops and participating in educational activities
- Identifies and manages risk in his/her business activities and take responsibility for reporting risks in a timely, open and appropriate manner

The petitioner indicated on the Form I-140 that at the time of filing, it has seven employees. A chart dated March 2008, submitted with the Form I-140, indicates that the company's staff includes a managing director at the top, directly supervising an administration, marketing and sales employee, a "CTO director," and the beneficiary as consulting services director. The chart shows three consultants below the beneficiary.

On January 29, 2009, the director issued a request for further evidence (RFE). With respect to the beneficiary's position in the United States, the director requested a more detailed description of the beneficiary's specific day-to-day duties, including an estimate of the percentage of time dedicated to each task. The director also requested a detailed organizational chart for the U.S. company that should illustrate the "current structure with the addition of the permanent position of the beneficiary." The chart is to include the names of all departments and teams, the names and detailed description of the job duties for the beneficiary's immediate supervisor and subordinate employees.

In a letter dated January 29, 2009, responding to the RFE, the petitioner repeated the descriptions of the beneficiary's duties provided earlier and added the following:

As Director of Consulting Services [the beneficiary's] responsibilities include project management and the following responsibilities:

- **Project Scope:** Manage the work that must be done in order to deliver an integrated solution usually composed of products and services. This position needs to have a good understanding of business processes to synthesize recommendations, participate at facilitating change, and act as a consultant for ongoing programs.
- **Risk Management:** Establish a strategy of continuous risk management that enables proactive decisions and actions throughout the project life cycle and create an environment to support it where the project team has visible, measurable, and repeatable processes for managing these risks.
- **Request for Change:** Act as liaison to the management review board (or equivalent stakeholders) for review and decision on all inquiries for modification to the agreed-upon project scope / statement of work of the product or services to be delivered.
- **Project protocol:** Establish (as mutually agreed to) the policies and procedures for the project, *e.g.*, quality assurance, team reference guide, communication plan, and setting up the environment.
- **Resources:** Manage (as mutually agreed) those personnel and resources used to complete tasks in a project.
- **Administration:** Maintain the Master Project Plan to include at least the Communication Plan (communication within / cross team and external entities), the Team Reference Guide Plan (identifies team and external team members), and the Master Project Schedule.
- **Track and control:** Stays current and involved in collecting conditions of the project relative to resources (people and optionally funding / cost), schedule (time), and features (the solution and its quality) as specified by the established project protocol. In addition, perform the process of comparing actual performance with planned performance, analyze variances, evaluate possible alternatives and take appropriate corrective action (control) as specified by the established project protocol.
- **Project Evaluation and Status Report:** Evaluate project via post mortem process, document results and publish to team. Communicate and publish status with regard to resources (people and optionally funding / cost), schedule (time), and features (the solution and its quality) that influence project performance and completion. Identify opportunities for improvement to project management processes. Submit

improvement ideas and examples of deliverables to fellow project management team members for review and acceptance.

The petitioner also added to the previously submitted list of the beneficiary's responsibilities the phrase "[a]bility to work independently on small/medium projects or as a team member on larger projects."

The petitioner further indicated that approximately 60% of the beneficiary's time is spent in project management, including "planning, coordinating and controlling project development and implementation teams"; approximately 5% is spent on "administrative work regarding billing, hiring and evaluating personnel"; 20% is spent on "visiting clients and partners, coordinating and writing proposals and sales presentations"; and 15% is spent on "training, public relations, methodology development and documentation."

The petitioner also provided job descriptions for its other employees, including the managing director; chief technology officer; administration, marketing and sales employee; and six consultants. The petitioner stated that the consultants "[p]articipate as . . . consultants or senior consultants on a specific client programming engagement supervised by [the] Director of Consulting Services." The petitioner also provided an updated organizational chart for the U.S. company, dated January 2009, which show the beneficiary supervising only four out of the six consultants named in the job description. In a separate section in the January 2009 letter, the petitioner included another chart, which shows the same four individuals under the beneficiary, but each with the title "senior consultant." The petitioner also stated, "Please note that other consultants are contracted on a regular basis for specific clients programming engagements. The contracted services are supervised by our Senior Consultants under the coordination of . . . our Director of Consulting Services."

In denying the petition, the director found the petitioner has failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director observed that "the evidence of record indicates that the beneficiary will necessarily be involved in routine and mundane duties required for the operation of a small business." The director further found that the small number of staff employed would not be sufficient to relieve the beneficiary from the day-to-day duties required for such a business, and the beneficiary's proffered salary of \$40,000 "is not commensurate with that of a true multinational executive." Further, the director found the evidence does not support a conclusion that the beneficiary's subordinates are managerial, supervisory or professional as required for the beneficiary to meet the definition of manager under the regulations. The director pointed out that the administration, marketing and sales employee and the chief technology officer do not appear to supervise any subordinates, nor do they qualify as "professionals." The director also noted that the four full-time employees under the beneficiary's supervision cannot be classified as professionals, managers or supervisors.

On appeal, counsel restates the descriptions of the beneficiary's U.S. position provided by the petitioner and asserts that the director's decision focused on only part of the beneficiary's position and failed to take into account the rest of the descriptions. Counsel contends that the beneficiary's position "in fact includes all that is required for executive/managerial status." Further, counsel contests the director's finding that the beneficiary's proffered salary of \$40,000 "is not commensurate with that of a true multinational executive." Counsel notes that in fact the beneficiary was offered

\$72,000 a year, as the petitioner stated in the April 4, 2008 letter, and that he is actually receiving compensation at the rate of \$84,000 a year plus bonuses. Counsel further contends that the qualifications of the chief technology officer and the administration/sales/marketing employee are not relevant to this analysis as they are not the beneficiary's employees. Counsel asserts that the beneficiary supervises four subordinate employees who qualify as professionals, as well as occasional contracted consultants. Counsel points out that the definition of "professional" under 8 C.F.R. § 204.5(k)(2), which the director cited, is applicable to the category of "aliens with extraordinary ability" and not to the present petition. Counsel further claims that all personnel working for or hired by the petitioner hold university or advanced degrees.

Upon review, the AAO finds that the petitioner has failed to establish that the beneficiary would be employed in the United States in a primarily executive or managerial capacity.

Preliminarily, the AAO notes that there is no statutory or regulatory requirement with respect to the *amount* of salary to be paid to an alien seeking classification under section 203(b)(1)(C) of the Act as a multinational executive or manager. Therefore, the director's observation that the beneficiary's proffered salary "is not commensurate with that of a true multinational executive" will be withdrawn, insofar as it was a factor in the director's determination that the beneficiary would be not be functioning in a primarily executive or managerial capacity in the United States.¹

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. § 204.5(j)(5). 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.* Beyond the required description of the job duties, the U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

Further, it is noted that the definitions of executive and managerial capacity each 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). Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that the beneficiary's duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

¹ While the petitioner is required to establish that the prospective employer has the ability to pay the beneficiary's proffered wages pursuant to the regulations at 8 C.F.R. § 204.5(g)(2), the AAO notes that the U.S. company's ability to pay the proffered wages is not at issue here.

It is noted that the petitioner submitted three different descriptions of the beneficiary's job responsibilities. While they include some detail of the beneficiary's duties and responsibilities, taken as a whole, the descriptions still fail to provide a coherent picture of the beneficiary's day-to-day responsibilities, and more importantly, still fail to demonstrate that the beneficiary's functions are *primarily* managerial or executive in nature.

Specifically, the beneficiary's job duties as described by the petitioner appear to include a substantial number of technical responsibilities. For example, according to the petitioner's April 4, 2008 letter, in addition to "oversee[ing]" various components of the project, the beneficiary's responsibilities also include: "[s]upport computer application systems & underlying databases for clients"; "[w]ork with clients to identify their needs, provide technical expertise in the evaluation of software solutions, testing, training, documentation, design, development, implementation and ongoing production support of these solutions"; and "[p]roduction support troubleshooting applications, interaction with software vendors, as well as solving and responding to user requests."

Similarly, the separate job description submitted along with the initial petition lists a number of responsibilities which suggest that the beneficiary directly provides technical services to the company's clients rather than manages or directs the provision of such services. For example, the beneficiary "[s]upports the research and shaping with key internal stakeholders of generic business propositions within 'specialist area' to be taken to market"; "[s]upports the creation of intellectual property including methods, approaches, sales collateral and capability development programmes to support creation and renewal of generic business propositions"; "[s]upports the shaping of overall solution(s) with key internal and external stakeholders and may lead this activity for small solutions"; "[s]upports in the definition of scope and deliverables for assignment with 'client' (may be internal or external) and may lead this activity for small solutions." More generally, the petitioner claimed that the beneficiary "provides DW consultancy, team lead, business development support, and broad project implementation skills"; and "delivers assignment in accordance with agreed scope, time, financial and quality measures."

In addition, among the beneficiary's job responsibilities that the petitioner listed in response to the RFE was a reference to the "[a]bility to work independently on small/medium projects or as a team member on larger projects," which would suggest that the beneficiary is involved in some projects as a "team member," or the sole consultant rather than as management. This is evident in certain service contracts included in the record, such as the "Contractor Agreement" between the U.S. company and [REDACTED] dated December 11, 2007, where the beneficiary appeared to be the only named employee of the U.S. company assigned to the project. In another instance, the beneficiary is named along with two other employees of the U.S. company as "consultants" on a Statement of Work in connection with a service agreement dated January 8, 2008. There was no information that would distinguish the beneficiary's role from that of the other two consultants in that instance.

Thus, based on the evidence of record, it appears that the beneficiary is, to an unknown extent, directly performing technical tasks involved in the company's consulting work rather than managing the projects as claimed. It is noted that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one

"primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner was asked by the director to provide more details of the beneficiary's day-to-day duties, "including an estimate of the percentage of time dedicated to each duty." In response, the petitioner restated the previously provided job descriptions and added another list of responsibilities under the headings of "Project Scope," "Risk Management," "Request for Change," "Project Protocol," "Resources," "Administration," "Track and Control," and "Project Evaluation and Status Reports." In reviewing the latter, it appears that rather than providing more details for the job responsibilities previously described as requested, the petitioner has described an altogether different set of job responsibilities. It is noted that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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).

Further, rather than providing an estimate of the percentage of time dedicated to *each duty* as the director requested, the petitioner simply stated that approximately 60% of the beneficiary's time is spent on project management; 5% is spent on administrative work; 20% is spent on "visiting clients and partners, coordinating and writing proposals and sales presentations"; and 15% is spent on "training, public relations, methodology development and documentation." This breakdown of the beneficiary's time, particularly the 60% spent on "project management," is not a satisfactory response to the director's query. Based on the petitioner's response, it is not clear which of the beneficiary's described duties are actually considered part of the 60% allocated to "project management." This failure of documentation is important because, as discussed above, a significant portion of the beneficiary's duties appear to be purely technical in nature and therefore do not fall directly under traditional managerial duties as defined in the statute. Without a further breakdown of time spent on each duty, including the duties that may be considered non-managerial, the AAO cannot determine whether the beneficiary is *primarily* performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). The AAO also notes that the purpose of the RFE was to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The 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. *See* § 101(a)(44)(A)(ii) of the Act. 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.

In this instance, the record is insufficient to establish that the beneficiary indeed supervises other supervisory, professional, or managerial employees. First, the AAO notes and agrees with counsel's assertion that the qualifications of the chief technology officer and the administration/sales/marketing employee are not relevant to this analysis as they are not the beneficiary's subordinates. However, the petitioner has not demonstrated that the three consultants who were the beneficiary's subordinates at the time the petition was filed qualify as professionals.²

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, although counsel claims that all personnel working for the petitioner hold university or advanced degrees, the petitioner has not, in fact, established that a bachelor's degree is actually necessary to perform the work of the consultants working under the beneficiary.

Additionally, even assuming, *arguendo*, that the consultants qualify as "professional employees," given the previously discussed lack of detail regarding the amount of time the beneficiary actually spends on managerial duties, and evidence indicating that the beneficiary himself works as a consultant some of the time, it is unclear how much of the beneficiary's time is actually spent supervising the consultants, such that he could be said to "primarily supervise" professional employees.

The petitioner also has failed to demonstrate that the beneficiary supervises any managerial or supervisory employees. As noted earlier, documentation submitted with the initial petition indicates that at the time the petition was filed, the beneficiary supervised three consultants. The record contains no evidence of other employees working under the supervision of these consultants. Going

² It is noted that the petitioner submitted additional information in response to the RFE showing that it has expanded staff as of the response date in January 2009. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, the AAO must determine the petitioner's eligibility based on the make up of its staff at the time the petition was filed, as described in the organization chart dated March 2008, which was submitted with the Form I-140.

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)).

Accordingly, the AAO finds the record is insufficient to show that the beneficiary is a personnel manager who primarily supervises and controls the work of other supervisory, professional, or managerial employees. See § 101(a)(44)(A)(ii) of the Act.

The evidence also fails to establish that the beneficiary qualifies 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 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.

As previously discussed, although the petitioner claims that the beneficiary's main function is project management, the descriptions of the beneficiary's job responsibilities fail to establish that the beneficiary's daily duties are in fact primarily attributable to managing that function rather than directly performing the technical duties related to the function. Again, 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. at 604. Accordingly, the AAO cannot conclude that the petitioner has established that the beneficiary manages an essential function, such that he could be considered a function manager.

In light of the foregoing, the AAO concurs with the director's conclusion that the petitioner has failed to establish that the beneficiary would be employed in a primarily executive or managerial capacity in the United States. For that reason, the petition will be denied.

Beyond the director's decision, the AAO finds that the petitioner has failed to establish that the beneficiary was employed by the foreign entity in a primarily executive or managerial capacity.

If the beneficiary is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, the petitioner must submit evidence that in the three years preceding entry as a nonimmigrant, the beneficiary was employed by the entity abroad for at least one year in a managerial or executive capacity. 8 C.F.R. § 204.5(j)(3)(i)(B).

In the April 4, 2008 letter, the petitioner indicated that the beneficiary was employed by [REDACTED] a Venezuelan affiliate of the U.S. company, from December 2003 until April 2006, when he was transferred to the United States under L-1A status. The petitioner stated, "During his employment with the foreign entity, [the beneficiary] served as Consultant, Senior Consultant, Project Manager and Director of Consulting Services." In the letter responding to the RFE, the petitioner specified that the beneficiary was promoted to Senior Consultant in December 2004 and to Director of Consulting Services in July 2005 and held that position "until his transfer to the United States in August 2006." In the same letter, the petitioner stated that the beneficiary "had direct responsibility over ALL CONSULTING PROJECTS carried out by [the] company including Project Management, Technical Design, Quality Assurance and Technology Transfer to the Project Team." The petitioner included a list of main tasks performed by the beneficiary, along with the percentage of time spent on each task.

First, the AAO notes that there are some inconsistencies in the record with respect to the time period during which the beneficiary actually held the position of Director of Consulting Services in the foreign entity. In his Form G-325A, Biographic Information, which was submitted with his concurrently filed Form I-485, the beneficiary indicated that he has resided in California since March 2006. Further, on that same form, the beneficiary reported that he worked for the foreign company in Venezuela from December 2003 to July 2006 and stated his occupation as "Consultant" for that entire time period. Further, USCIS records indicate that the beneficiary was in the United States in B-2 status as of February 15, 2006 and was still in the United States when his first L-1 petition was filed on April 11, 2006. This information is inconsistent with the petitioner's statement in response to the RFE that the beneficiary held the title of Director of Consulting Services for the foreign entity from July 2005 until his transfer to the United States in August 2006. The petitioner has not clarified or explained these inconsistencies regarding the beneficiary's last position 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). These unresolved inconsistencies raise the question of whether the beneficiary indeed held the position of Director of Consulting Services at the foreign entity for at least one year out of the three years preceding the filing of the petition as claimed. If the beneficiary held any position other than Director of Consulting Services during the relevant one-year time period prior to his admission to the United States as a non-immigrant, the petitioner has failed to include in the record any evidence demonstrating that such other positions would qualify as managerial or executive in nature. As such, the record as presently constituted does not conclusively demonstrate that the beneficiary functioned in a managerial or executive capacity overseas during the requisite period.

Even assuming the beneficiary did hold the position of Director of Consulting Services for the foreign entity for at least one out of the three years preceding the filing of the petition, the record is insufficient to show that the beneficiary's responsibilities in that position qualify as primarily executive or managerial in nature. Again, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). 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.* Further, 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 at 1533. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that the beneficiary's duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

Here, the petitioner has provided a description of the beneficiary's duties abroad, with a breakdown of percentage of time spent per category of duties. Based on that job description, a significant proportion of the beneficiary's duties appear to be technical rather than managerial in nature. For example, according to the petitioner, the beneficiary's duties included:

- Develop and recommend solutions based on customer needs (10%)
- Identify, design and estimate technology solutions commensurate to client needs (10%)
- Respond to client requests for immediate issues (5%)
- Analyze each client's specific situation and determine underlying problems and recommend proper solutions (5%)
- Decipher specific documentation and ensure project quality (5%)
- Identify technological inefficiencies and propose changes that may include process redesign and tool recommendation (5%)
- Evaluate system requirements, check/approve/comment/support sales proposals (5%)
- Develop system and user acceptance test plans, test cases, regression tests, and ensuring the overall quality and conduct project closing (5%)
- Verify methodology compliance and attend Board meetings and report findings (5%)

Thus, it appears the beneficiary spent more than half his time directly performing technical tasks involved in the company's consulting work rather than managing the projects as claimed. 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. at 604.

In light of the foregoing, the AAO finds that the petitioner has failed to establish that the beneficiary primarily functioned in an executive or managerial capacity in his overseas employment. For this additional reason, the petition will be denied.

Finally, the AAO acknowledges that USCIS previously granted an L-1A petition filed by the petitioner on behalf of the instant beneficiary. It must be noted that many I-140 immigrant petitions are denied after USCIS or a U.S. Consular officer abroad approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103. Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the

United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Despite the previously approved petition, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. See section 291 of the Act. Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous nonimmigrant petition approval by denying the instant petition.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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