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U.S. Citizenship
and Immigration
Services

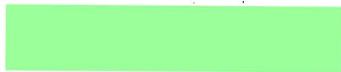


DATE: **MAR 04 2013**

OFFICE: NEBRASKA SERVICE CENTER

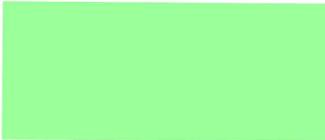
FILE: 

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center denied the preference visa petition and dismissed the petitioner's subsequent motion to reopen. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Delaware corporation that seeks to employ the beneficiary as a technical service engineer.¹ 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 did not establish: (1) that the petitioner's foreign affiliate employed the beneficiary in a qualifying managerial or executive capacity; or (2) that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity. The director subsequently dismissed the petitioner's motion to reopen, concluding that the petitioner failed to meet the requirements of a motion at 8 C.F.R. § 103.5(a)(3).

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

I. The Law

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 or managers who have previously worked for a firm, corporation or other legal entity, or an affiliate

¹ The petitioner identified the beneficiary's U.S. position as "technical service engineer" on the Form I-140, Immigrant Petition for Alien Worker, and in a flow chart submitted at the time of filing. There are numerous references to the position as "technical service manager" in the record and the petitioner asserts that the position was misstated on the Form I-140.

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 which 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.

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.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

II. Employment Abroad in a Managerial or Executive Capacity

The first issue to be addressed is whether the petitioner established that the beneficiary was employed by its foreign affiliate in a qualifying managerial or executive capacity prior to his admission to the United States.

The petitioner filed the immigrant visa petition on January 5, 2011. The petitioner is a corporation engaged in the distribution, marketing and sale of glass products. The petitioner stated that the corporation was established in 1979, has a gross income of \$300 million and currently has more than 90 employees.

In a letter dated November 22, 2010, the petitioner stated that the beneficiary served in the position of Technical Service Engineer from March 2005 to May 2006, where he had "the vital responsibility to develop and direct the company's technical service engineering functions completely with an approximate direct and indirect annual value of \$10 million." The petitioner further described the beneficiary's duties as the following:

Managing and directing quality control logistics, materials planning, and packaging for the proper response and resolution to serve the company, its affiliates and customers as the only technical service engineer at the company's plant in Mexico D.F., Mexico; Liaising with clients' senior management and engineers within and outside the company to meet clients' needs; Liaising with 2 plus university degreed engineers to maximize production and minimize costs; Supervising and directing the performance evaluations of the company's products at the customers' plants, Making recommendations for changes in the company's products and to implement field problem resolution actions; Managing, directing and coordinating 2 quality supervisors activities to maximize the utilization of resources for product and services improvement initiatives and problem resolution; and Executing the company's policies to analyze our clients' needs to deliver its products in accordance with clients' specifications and to minimize production problems in assembly plants.

Additionally, his duties included the following: Making recommendations to achieve cost reductions to support continuous improvement of products; Managing and directing the resolution of shipping, packaging and handling issues concerning the company's products; Managing and directing quality control for technical service engineering functions, and trouble shooting problems delegating tasks and other usual managerial duties. In general, [the beneficiary] managed and directed the company's technical service engineering functions and had discretionary authority over such day to day operations.

On July 22, 2011, the director issued a Request for Evidence ("RFE") in which he instructed the petitioner to submit: (1) a more specific description of the beneficiary's duties abroad which identifies the actual daily tasks performed and an estimate of how much time the beneficiary spent performing each tasks on a day-to-day basis; (2) an organizational chart depicting the

operational structure of the foreign employer at the time the beneficiary worked for the company; (3) names, titles, qualifications and job duties for the beneficiary's immediate subordinates and director supervisor abroad; and (4) any additional evidence that clearly identifies the individuals who performed non-qualifying tasks associated with the "technical service engineering" function and a description of their duties.

In a letter dated October 12, 2011, the petitioner provided the following description of the foreign technical service engineer position:

40% Liaising with clients' senior management and engineers within and outside the company to meet clients' needs;

15% Supervising and directing the performance evaluations of the [the petitioner's] glass products at the customers' plants, Making recommendations for changes in [the petitioner's] glass products and to implement field problem resolution actions;

15% Managing, directing, and coordinating quality supervisors activities to maximize the utilization of resources for product and services improvement initiatives and problem resolution; and Executing the Company's policies to analyze our clients' needs to deliver its products in accordance with clients' specifications and to minimize production problems in assembly plants.

15% Managing and directing the resolution of shipping, packaging and handling issues concerning the company's products; Making recommendations to achieve cost reductions to support continuous improvement of products;

15% Managing and directing quality control for technical service engineering functions, and trouble shooting [*sic*] problems delegating tasks and other usual managerial duties.

The petitioner submitted an un-translated organizational chart for its Mexican affiliate which depicts the beneficiary as one of seven employees with the job title "S.T.C." all of which reported to a person with the title "GTE. S.T.C. NACL." The beneficiary's supervisor reported to a product quality manager (*gerente de calidad de producto*).

The petitioner stated in its letter that the beneficiary reported to a technical service manager and had no subordinates. However, the petitioner clarified that he "managed essential functions" at its Mexican affiliate's plants and "functioned at a senior level within the organizational hierarchy and exercised full discretionary authority." Specifically, the petitioner stated that the beneficiary managed the following functions: (1) oversaw quality control and service engineering; (2) led the liaison activities between the company's manufacturing plant and clients to meet clients' needs; (3) directed performance evaluations and developed and directed policies to execute the company's service readiness plan; and (4) directed resolution of shipping, handling, packaging, and inventory issues.

The petitioner's response to the RFE also included the company's official position description for the position of Technical Services Engineer within the Mexican affiliate. The description is dated November 2005 and bears the name of the beneficiary and his supervisor. According to this description, the purpose of the position is to "investigate quality related issues with the customer, sales, and manufacturing plant to resolve problems in the most efficient manner."

The specific "main responsibilities" of the position included the following "operational duties":

- Attend all quality product claims of our customers according to the established procedure.
- Provide a pro-active service in order to anticipate customer needs.
- Assist and give technical support in test runs, first runs in plants and with the customer.
- Providing a pro-active service to link the external customer and the manufacturing plant
- Detect opportunity areas to improve the glass container functionality in a customer's line and manufacturing plants as well.
- Audit inventories when necessary.
- Monitor quality held inventory.
- Monitor re-select/repack crews and oversee them [*sic*] work when necessary.
- Enter and maintain information in the IBM AS-400 software.
- Develop activities assigned by supervisor

The job description also included the following "strategic" duties:

- Maintain a good service level with internal and external customers.
- Provide information to allow the good understanding between the customer and the other areas of the organization.
- Comply with the ISO 9001 standard.
- Observe competitor's bottle, cartons, and palletizing for ideas to improve our package.

Finally, the official position description identifies the following "key decisions for which the position is responsible":

- Determine if a customer's complaint is justified.
- Determine disposition of non-conforming products.
- Determine placement of hold on all inventory outside of a customer's specifications.
- Define and clarify quality ranges.
- Make visits to customer's facility.
- Verify corrective and preventive actions as a result of a non-conformity.
- Determine if ware needs to be returned to customer.

The job description indicates that the position of technical service engineer has no direct reports and no budgetary authority. The stated requirements for the position include three years of experience in a glass manufacturing plant, knowledge of quality specifications, sampling methods and filling processes for glass containers and skills with laboratory instruments for physical tests of glass containers, as well as diagnostic skills in field performance problems.

The director denied the petition on November 29, 2011, concluding that the petitioner failed to establish that the foreign entity employed the beneficiary in a managerial capacity. In denying the petition, the director emphasized that there were material inconsistencies between the petitioner's narrative description of the beneficiary's duties and the foreign employer's official position description for the technical service engineer position. The director noted that the petitioner's description of the position was overly vague and noted that it failed to provide additional information regarding the beneficiary's specific duties in response to the RFE. Further, the director found that, based on the position's official description, the responsibilities of the technical service engineer position were primarily non-qualifying in nature and involved customer and product support. The director dismissed the petitioner's subsequent motion to reconsider on March 12, 2012 and did not disturb the original decision.

On appeal, the petitioner reiterates its position that the beneficiary was performing duties as a functional manager while serving as Technical Service Engineer for just over one year before his transfer to the United States.

Upon review, the petitioner's assertions are unpersuasive. The evidence of record does not establish that the foreign entity employed the beneficiary in a primarily managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, the service will look first to the petitioner's description of the job duties. *See* 8 C.F.R. 204.5(j)(5).

Here, while the petitioner maintains that the foreign entity employed the beneficiary as a function manager, the petitioner has submitted two completely different descriptions for his former position. The petitioner indicated in its narrative statements that the beneficiary allocated 60 percent of his time to "supervising" "managing," and "directing" engineering, quality control, logistics and other functions; however, it submitted an official company position description which indicates that the technical service engineer performs no duties that could be classified as managerial or executive under section 101(a)(44) of the Act. 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.* at 591.

Although the director explicitly remarked on this material discrepancy, the petitioner has failed to submit any explanation or clarification as to the true nature of the beneficiary's duties. The

AAO cannot reconcile the petitioner's claims that the beneficiary managed all technical service engineering functions with a position description that indicates that the position was primarily charged with providing technical service and products support, with limited decision-making authority. Duties requiring regular and ongoing contact with the customer such as reviewing customer's complaints, visiting customer facilities, and directly monitoring products, specification compliance and problem resolution do not reflect the role of a function manager. Further, the AAO finds the official company description, which is more detailed, specific and prepared contemporaneously with the beneficiary's employment abroad, to hold greater probative value in assessing the true nature of the beneficiary's prior position.

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. 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).

In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. As discussed above, the petitioner's claims that the beneficiary managed an essential function at the foreign entity are undermined by the petitioner's submission of a job description which clearly indicates that the beneficiary actually performed the technical services function, rather than managing it.

While the petitioner submits an expert opinion letter to refute the director's adverse finding that the petitioner's narrative position description of the beneficiary's "function manager" role was vague, the opinion letter fails to acknowledge the "official" position description of the technical service engineer position, which clearly indicates that the beneficiary's position abroad involved primarily non-qualifying technical support duties. Since the inconsistency between the two job descriptions was one of the stated reasons for denial, and has not been clarified, the petitioner has not overcome the reasons for denial. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Since the opinion offered here was not based on a complete review of the record as it pertained to the beneficiary's foreign employment, the opinion is not found to be persuasive.

For the foregoing reasons, the petitioner has not established that the foreign entity employed the beneficiary in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

III. Employment in the U.S. in a Managerial or Executive Capacity

The remaining issue to be addressed is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity.

The petitioner submitted a letter dated November 22, 2010 signed by its vice president of finance and administration. The letter stated that the beneficiary had been employed by the petitioner in his current role since April 2010 and "he will have the vital responsibility to manage and direct key functions in our US operations, namely manage and direct quality control logistics, materials planning, and packaging for the proper response and resolution to serve our customers, the Company and our affiliates." His duties would include the following:

Discretionary authority to negotiate key contractual provisions with an economic impact of \$100,000 to \$1 million per contract for the return of glass products, pre- and post- order product changes which are related to glass manufacturing processes; Liaising with two (2) university degreed plant engineers with the Company's affiliates in Mexico to reach quality standards, maximize operational efficiency; and reach goals for quality assurance to minimize returns and reduce costs; Liaising with clients' senior management and engineers [operations directors or quality directors] to meet the needs of our clients including [REDACTED] Liaising with the Company's president concerning contract negotiations to target clients' needs and win contracts; Managing and directing special projects including the implementation of quality systems to meet client requirements; and Evaluating requirements of clients for glass products to the [sic] determine the goals, metrics, and strategy.

Additionally his duties will include the following: Liaising with Company clients and [company] manufacturing plants in Mexico; Managing and directing outside contractors in the U.S. and Europe including Refurbco Inc. and UTI Logistics in Europe and other temporary workers provided by staffing agencies such as United Staffing as needed with an approximate annual direct cost of \$1 million per year; Supervising and directing performance evaluations for the Company's products at the customers' plants; Making recommendations for changes in the company's products and to implement field problem resolution actions; Managing, directing and coordinating resources for product and services improvement initiatives and problem resolution; Executing the Company's policies to analyze our clients' needs to deliver the Company's products in accordance with clients' specifications and to minimize production problems in assembly plants; Making recommendations to achieve cost reductions to support continuous improvement of products; Managing and directing the resolution of shipping, packaging and handling issues concerning the Company's products; Managing and directing quality control for technical service engineering functions, and trouble shooting

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[sic] problems delegating tasks and other usual managerial duties. In general, [the beneficiary] will continue to manage and direct the Company's U.S. technical service engineering functions and will have discretionary authority over such day to day operations.

Additionally, the petitioner included charts listing the beneficiary's responsibilities, in pertinent part, as follows:

Oversee Quality Control, Materials Planning & Packaging - Responsibility to oversee, manage and direct the development of the service engineering functions - -- quality control, materials planning, and packaging for the proper response and resolution -- to serve U.S. customers with an approximate direct and indirect annual value of \$5 million. This function is an integral part of the Company's growth because the Technical Service Engineer leads the coordinated response to identify, correct, and improve the entire spectrum of the Company's products from design through response and resolution of customer issues.

Lead Liaison Activities with Clients to Meet Needs – Responsibility to lead and direct liaison with senior management, quality control managers, and engineers within and outside the company to meet clients' needs.

Manage, Develop & Direct Performance Evaluations – Responsibility to lead and direct a team of engineers and quality control managers within and outside the company to conduct performance evaluations of the company's products at the customers' plants and make recommendations for changes in the Company's products. Related responsibility to manage, direct, and coordinate resources with managers and professionals within the Company and clients for product and services improvement initiatives and problem resolution.

Technical Management - Manages and directs quality control for technical service engineering functions for U.S. customers; Manages and directs quality control for technical service engineering [sic] Evaluates and determines department's compliance with departmental budget & disposition of quality claims; evaluates prospective new department employees; assists in determining disposition of legal claims; & monitors preventive & corrective actions from quality complaints; & trouble [sic] shooting problems.

In the RFE issued on July 22, 2011, the director requested a description of the beneficiary's specific duties including the actual daily tasks performed and an estimate of how much time the beneficiary would spend on each task. The director also requested an organizational chart identifying employees who will be directly or indirectly managed or supervised by the beneficiary. The chart was to include employee names, position titles and duties, and qualifications for any subordinates. The director also asked for evidence clearly identifying those individuals who would be performing any non-qualifying tasks associated with the beneficiary's area of responsibility.

In a letter dated October 13, 2011, in response to the RFE, the petitioner stated that the beneficiary would serve as technical services manager. The petitioner reiterated that the beneficiary would have the responsibility to manage and direct key functions in the U.S. operations, namely managing and directing quality control logistics, materials planning, and packaging for the proper response and resolution to serve customers, the company and its affiliates. In addition, the petitioner provided the following statement regarding the beneficiary's allocation of time among duties:

5% Discretionary authority to negotiate key contractual provisions with an economic impact of \$100,000 to \$1 million per contract for the return of glass products, pre- and post- order product changes which are related to glass manufacturing products.

5% Managing and directing outside contractors in the U.S. and Europe including [REDACTED] and [REDACTED] in Europe and other temporary workers provided by staffing agencies such as United Staffing as needed with an approximate annual direct cost of \$1 million per year.

40% Oversee, manage, and direct the development of the service engineering functions for quality control, materials planning, and packaging for the proper response and resolution to serve customers including [REDACTED] and [REDACTED] and its affiliates. The scope of this duty ranges from the design of new glass products, manufacturing, warehouse inventory, accounting, and customer specification through the customer's use of the company's glass packaging products. Quality control is understanding market requirements and translating them to specific designs that the manufacturing plants can follow and evaluating final product performance at the customers' line, besides the goals, metrics and strategy. Management of packaging materials is everything related to how the main product will be packed, handled, stored, contained, and displayed. This is a multitasking activity since it requires close monitoring and understanding of all the surrounding elements that compose a container such as labels, closures, filling process, transportation, storing, and display facilities while also ensuring that esthetics [*sic*] and functionality are met.

20% Liaise with senior management, engineers, operations, packaging or quality directors within and outside the company to meet clients' needs.

10% Lead and direct a team of engineers and quality control managers within and outside the company to conduct performance evaluations of the company's products at the customers' plants. Develop and direct recommendations for changes in the company's products to implement field problem resolution actions.

10% Manage, direct, and coordinate resources with managers and professionals within the Company and clients for product and services improvement initiatives

and problem resolution. Liaising with university degreed plant engineers with the Company's affiliates in Mexico to reach quality standards, maximize operational efficiency; and reach goals for quality assurance to minimize returns and reduce costs.

10% Lead and direct recommendations to achieve cost reductions to support continuous improvement of products; formulate policy, direct and lead project teams for service improvement initiatives and problem resolution.

The petitioner also provided an organizational chart for the U.S. company, dated October 11, 2011. The chart indicates that the beneficiary reports to a quality assurance manager and supervises one quality assurance supervisor and one technical service engineer. According to the petitioner, the quality assurance supervisor position requires a bachelor's degree in industrial engineering and a minimum three years of experience in a glass manufacturing plant. The position description was as follows:

This position supervises the audits and re-select/pack and reviews packaging operations to confirm the products manufactured by [the petitioner's] affiliates are delivered in accordance with the defined quality specification set by [the petitioner's] customers and Quality Department. The duties include the following: Audit inventories to verify finished goods are within the product specification guidelines; Hire, train and supervise re-select/repack crews at various project locations; Direct training for new hires to learn the Company's proprietary quality control procedures; Report information to Quality Department on a daily basis; Comply with ISO 9001 standard; Recommend changes in sampling methods of [the petitioner's] affiliate products, as needed; Taking corrective actions as needed to maintain the quality process; Applying quality controls to achieve objectives; and Managing the Company's training program for quality control at the Laredo, Texas warehouse facility.

A duty description for the technical service engineer was included since the employee was listed on the petitioner's organizational chart as subordinate to the beneficiary, but it is noted in the employee's description that he actually works for an affiliate of the petitioner. The duty description for the technical services engineer is precisely the same as the quality assurance supervisor's duty description. The petitioner also noted that the beneficiary's supervisor, the general assurance manager, is located in Monterrey, Mexico.

Also as part of the RFE response, the petitioner submitted a third description of the beneficiary's duties with the petitioner. This description was very similar, but not exactly the same as the description provided in the initial petition. However, no specific detail was provided, rather, it was another generalized broad discussion of the beneficiary's overall responsibilities in four separate functional areas already provided in the original charts.

Finally, the petitioner provided another document which appears to be the company's official position description for the technical services manager position, dated June 1, 2010. While this

document is unsigned and does not have the beneficiary's name on it, it does list the quality assurance manager and technical service engineer as the position's only two direct reports. Presumably, this document represents a fourth description of the beneficiary's duties with the petitioner as technical services manager as follows:

- Administer the investigations of quality complaints.
- Oversee the flow of information to manufacturing plants.
- Provide technical assistance to customers.
- Process consumer complaints and assist legal counsel.
- Establish quality levels with customers.
- Monitor department expenses versus budget.
- Assist on special projects relative to quality.
- To comply with the defined Matrix of Responsibility created for [the petitioner] while emphasizing the Quality System Review and the fulfillment of its objectives.
- Verify each complaint is thoroughly investigated and manufacturing plant is advised of findings.
- Verify department and company procedures are followed.
- Process quality claims, assigning responsibility.
- Assist in training of new service engineers.
- Determine department's compliance with departmental budget.
- Determine disposition of quality claims.
- Evaluate prospective new department employees.
- Assist in determining disposition of legal claims.
- Monitor preventive and corrective actions from quality complaints.

Upon review of the petitioner's response, the director determined that the petitioner did not establish that the beneficiary would be primarily employed in a managerial or executive capacity. The director observed that the petitioner described the beneficiary's overall responsibilities but failed to provide specific tasks and actual duties that the beneficiary would perform on a daily basis, as requested.

Further, in reviewing the evidence in support of the petition, the director noted discrepancies between the beneficiary's duties as provided in the petitioner's letters and the 2010 official company job description for the beneficiary's position. In the 2010 description for Technical Services Manager, the beneficiary was expected to perform duties such as monitoring department expenses, provide technical assistance to customers, process consumer complaints and process quality claims. In the petitioner's letter and subsequent narrative description, this same job position included responsibilities that were much broader in scope and included language such as "leading," "directing," "overseeing," and "managing." The director recognized these conflicting job descriptions and expressed concern that based on the official position description, the beneficiary was likely engaged in activities that required performing the function and not managing the function. The director found that the petitioner had not established that the beneficiary would be performing high level responsibilities as required under the statute.

On January 3, 2012 the petitioner submitted a legal brief and documentation to the director with a motion to reconsider the decision. The legal brief and another letter from the Vice President stated that effective January 1, 2012, the beneficiary would be promoted to a new position. The beneficiary would still be a technical service manager but he would report to a different manager and have a broader area of responsibility. This promotion reflected a change in salary and change in duties which were broadly listed but not sufficiently detailed. A new organizational chart was included showing that five subordinate technical service engineers, two quality assurance supervisors, one technical service intern and a technical service coordinator all reporting directly to the beneficiary. The beneficiary reported to both the company president, and the quality assurance manager. The director dismissed the motion on March 21, 2012 without addressing the merits of the petition and the evidence submitted on motion.

On appeal the petitioner asserts that the director failed to properly consider the beneficiary's managerial duties. The petitioner further asserts that the director misunderstood the nature of a functional manager's duties and failed to appreciate the evidence presented. As part of the appeal, the petitioner requests consideration of the RFE response and the motion to reconsider.

In examining the executive or managerial capacity of the beneficiary, the service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). The petitioner's letter in support of the the initial petition provided a general description of the beneficiary's overall responsibilities in the United States. The petition also included several charts which provided slightly more detail regarding the beneficiary's responsibilities in four separate areas. Subsequently, the petitioner provided two more descriptions in the RFE response. One of these two descriptions included a percentage of time allocated to a list of generalized responsibilities similar to those previously noted. The final duty description was an "official" duty description and it was completely different from anything previously submitted. As noted by the director, this "official" description listed numerous duties, most of which appeared to be non-qualifying such as processing claims, monitoring actions, proving technical assistance to customers, and processing complaints. Overall, the petitioner's submission of these varying descriptions for the same position results in a very unclear picture of the scope of the beneficiary's authority and of exactly what duties will perform on a day-to-day basis in the position of technical services manager. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

At the time of filing, the petitioner stated the the beneficiary was to be employed as a functional manager responsible for essential functions of the company. As noted above, in order to establish that the beneficiary's position is a function manager position, the function managed must be described with specificity. 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.

In this matter, the petitioner failed to clearly and consistently describe the beneficiary's duties and thus failed to effectively establish the proportion of the beneficiary's daily duties attributed to managing the claimed essential function as required by the statute. In response to the RFE the petitioner did allocate a percentage of time to each the beneficiary's duties, however the percentages were allocated to generalized areas of responsibilities taken from the original letter. The petitioner did not offer any further detail of the beneficiary's tasks as requested by the director.

Further, the petitioner provided other duty descriptions for the beneficiary that were broadly defined and included duties that appeared to be non-qualifying. These non-qualifying duties were not included in the petitioner's breakdown of the beneficiary's duties; therefore, the percentages provided cannot be considered to provide an accurate breakdown of the beneficiary's time. For example, duties such as "managing and directing the resolution of shipping, packaging and handling issues" and "managing and directing special projects" do not provide any insight into what tasks the beneficiary would perform on a daily basis. The duty description that provides the most detailed account of the position is the official position description, and this is the description that includes a number of non-qualifying duties not mentioned elsewhere in the record. Overall, based on these inconsistencies, it is not possible to determine from the record and the general descriptions provided whether the beneficiary will primarily be performing non-qualifying duties associated with the "services engineering" function or will be managing the function.

As noted above, the petitioner has submitted an expert opinion letter to refute the director's findings that the petitioner's position description was vague. Again, the letter fails to acknowledge the "official" position description for the technical support manager which includes duties that are quite different from the petitioner's narrative descriptions of the beneficiary's duties, and duties that appear to be clearly non-qualifying in nature. According to the affidavit, this individual reviewed the petition and the director's decision and offers his opinion that the director erred in finding the beneficiary was not qualified as managerial or executive in his position. Notably, the affiant stated the beneficiary was engaged in managerial duties but he also did not reference the applicable statutes in his analytical process. He noted "the beneficiary's job description may well be 'generic and lacks specific descriptions' but that is the nature of the managerial position he held" in support of his assertion that more specificity of a manager's job description is not always possible.

Nevertheless, not only is specificity possible but it is required if the petitioner is to meet the burden of proof for this petition. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give

less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). Since the opinion offered here is not based on the critical statutory definitions and it fails to address the inconsistent duty description, the opinion is not found to be persuasive. Further, since the inconsistency between the two job descriptions was one of the stated reasons for denial, and has not been clarified, the petitioner has not overcome the reasons for denial.

Notwithstanding the petitioner's assertion that the beneficiary is a function manager, since the beneficiary is expected to "oversee, manage, and direct the development of the service engineering functions for quality control, materials planning, and packaging for the proper response and resolution to serve customers" presumably there are employees to be directly or indirectly supervised by the beneficiary and to carry out non-qualifying duties associated with the function. Nevertheless, the organizational chart provided by the petitioner reflects only two individuals subordinate to the beneficiary and one of them works outside the United States. Despite the director's request for information regarding employees subordinate to the beneficiary, and employees expected to perform non-qualifying duties, the petitioner failed to provide any employees names or positions to reflect who the beneficiary would be managing, directing and overseeing on a daily basis. Given the large scope of claimed duties, lack of subordinate personnel, and lack of an explanation from the petitioner it is unclear how the beneficiary could limit himself to primarily performing only in a managerial capacity. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial in nature.

As part of the appeal, the petitioner asserts that the beneficiary has been promoted and given an increased salary and new duties. Specifically, the beneficiary "will have the vital responsibility to manage and direct key functions in our US operations, namely manage and direct quality control logistics, materials planning, and packaging for the proper response and resolution to serve our customers." The petitioner stated that in addition to new responsibilities, the beneficiary would now manage and direct five technical service engineers, two quality assurance supervisors, a technical service intern and a technical service coordinator. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). 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'r 1998). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

Based on the foregoing discussion, the petitioner has not established that it would employ the beneficiary in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

It must be also be noted that many I-140 immigrant petitions are denied after USCIS 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 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). 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).

IV. Conclusion

The petition will be denied for the above stated reasons. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.