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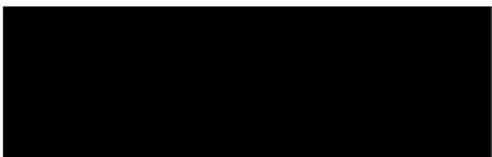
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FILE: LIN 06 050 51732 Office: NEBRASKA SERVICE CENTER Date: **MAR 07 2007**

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a Washington corporation, claims to provide a variety of retirement planning services and consultations. The petitioner states that it is the parent company of the beneficiary's foreign employer, [REDACTED], located in India. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner seeks to employ the beneficiary as its vice president for a three-year period.

The director denied the petition on March 21, 2006, concluding that the record contains insufficient evidence to demonstrate the following requirements: (1) that the beneficiary has been employed in a primarily managerial or executive capacity by the foreign entity; and (2) that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company.

Counsel for the petitioner filed the instant appeal on April 21, 2006. On appeal, counsel for the petitioner states that the beneficiary is indeed employed by the foreign company in an executive and managerial position as the managing director of the company. Counsel further states that the beneficiary supervises a professional subordinate staff of accountants, computer programmers, systems analysts, statisticians/actuaries, and a director. In addition, counsel states that the beneficiary will be employed in a primarily managerial and executive capacity with the United States company. Counsel states that the beneficiary will supervise a professional subordinate staff to whom he will delegate non-managerial tasks associated with his responsibilities. Counsel submits a brief and documentation in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The first issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary has been employed in a primarily managerial or executive capacity by the foreign entity.

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.

The instant petition was filed on December 7, 2005. On the Form I-129, the petitioner indicated that the beneficiary's duties for the past three years were the following:

Designed and developed in-house software applications, a company-specific database and a website for the firm in addition to consulting on retirement plans and preparing actuarial projections and reports.

In addition, the petitioner submitted the beneficiary's resume which indicated that the beneficiary's position since November 1999 has been as Vice President & Senior Pension Consultant for the United States company. The beneficiary's duties are described as the following:

- Design and development of software for Actuarial and retirement planning calculations using C++ and Access.
- Co-ordinate with clients and develop customized software for their 401(k) administration
- Development software for Cafeteria and welfare plans using Access
- Create database to pay benefits for the retirement plan participants
- Manage day to day activity of the buy and sell of securities and the daily valuation of the 401(k) plans.
- Manage the LAN and administer the net work [sic] for the company.
- Developed the web site for our firm
- Consult on Retirement Plan designs
- Prepare actuarial projections and reports using in house software
- Supervise 10 employees remotely from India

On December 15, 2005, the director determined that the petitioner did not submit sufficient evidence to process the petition. The director requested that the petitioner submit evidence establishing that for at least one year in the last three years of employment with the foreign company has been a position in a managerial or executive capacity. In addition, the director requested an organizational chart of the foreign company which depicts the beneficiary's position in relation to other employees, a description of the duties performed by the beneficiary, and the percentage breakdown of the time spent on each duty.

In a letter in response to the director's request, dated March 6, 2006, the petitioner submitted the following job description of the duties performed by the beneficiary for the foreign company:

Beneficiary designs the software, and supervises the programmers and the testing process. He is paid directly by the subsidiary in India.

In addition, Beneficiary performs services for Petitioner remotely while in India through his access to the company server. For example, he does plan design or review, maintains and

troubleshoots their computer network and their website, reviews most of the complicated calculations. If need be, Beneficiary calls the clients and consults with them. He also oversees financial transactions, like the review of cash flow, and review billing targets by the employees, decides on their pay scale, bonuses, etc. He interviews potential candidates if they were under-signed President. Beneficiary also reviews retirement plans for selected high profile clients. He updated clients regarding the changes in ERISA (the Employees Retirement Income Security Act) regulations. He designs the newsletters and marketing materials as well.

* * *

Beneficiary has been the Managing Director of Subsidiary since 1999 and has continued to function in that capacity even after Petition acquired Subsidiary in about October 2002. Beneficiary has senior management and many professional employees reporting to him in Subsidiary. Beneficiary provides guidance with regard to all operations such as financial, actuarial (which forms the basis of Subsidiary's business) and to some extent, technical as well.

* * *

Beneficiary's current duties are being broken down in percentages. However, it is quite impossible to give a precise percentage figure for each duty performed.

Design and review plans – 28%
Design and review plan documentation – 9%
Develop software for various pension plan calculations – 22%
Customize calculation-programs for actuarial-based applications – 18%
Oversight of financial transactions – 5%
Marketing – 3%
Overall management of Subsidiary operations – 15%

In addition, the petitioner submitted an organizational chart for the foreign company that indicates that the beneficiary is the managing director who supervises the director, director/advisor, accountant, and senior systems consultant, who in turn supervises 3 programmers, 2 analysts, and one statistician/actuarial consultant. The organizational chart only provides the name of the individual employed as the director. The petitioner did not submit a description of the duties performed by each employee of the foreign company.

The director denied the petition on March 21, 2006 on the ground that the petitioner did not establish that the beneficiary has been employed in a primarily managerial or executive capacity with the foreign company. The director stated that the petitioner's response indicated that "only 15% of the beneficiary's time was spent on overall management of its subsidiary's operations while over three-fourths of his time was spent on designing and reviewing plans, designing and reviewing plan documentation, developing software, and customizing calculation programs." In addition, the director noted that the petitioner did not submit any documentation evidencing a professional subordinate staff supervised by the beneficiary.

On appeal, counsel for the petitioner asserts that the beneficiary is in fact employed in a managerial and executive capacity, and the beneficiary supervises a staff of professional employees. Counsel states that the beneficiary's subordinate staff consists of accountants, computer programmers, systems analysts, statisticians/actuaries and directors which are all positions that are considered professional as they require a bachelor's degree in order to perform the duties necessary for these positions. In addition, counsel states that the beneficiary is not a first-line supervisor as the organizational chart indicated that the beneficiary will supervise two layers of professional employees.

Counsel's assertions are not persuasive. Upon review, the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(iii).

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform. While the petitioner has provided a breakdown of the percentage of time the beneficiary will spend on various duties, the petitioner has not articulated whether each duty is managerial or executive. Thus, the AAO must attempt to glean the nature of the beneficiary's proposed duties from the vague descriptions submitted.

The petitioner indicated in the letter in response to the director's request for evidence, dated March 6, 2006, that the beneficiary spends a combined total of 37 percent of his time to "design and review plans" and "design and review plan documentation." Thus, it appears that the beneficiary is providing the service of the business by designing and reviewing plans, rather than supervising the work prepared by subordinate employees. It appears the beneficiary will spend a majority of his time performing non-managerial duties associated with designing plans. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner further states that the beneficiary spends 22 percent of his time to "develop software for various pension plan calculations." Again, it appears that the beneficiary is providing the service of the business by developing the software for the company, rather than supervising the work prepared by subordinate employees. It appears the beneficiary will spend a majority of his time performing non-managerial duties associated with developing the software. Although the organizational chart indicates that the foreign company employs a senior systems consultant and three programmers, the petitioner did not submit a description of the duties performed by the individuals in these positions, nor do the position descriptions submitted indicate that these tasks are delegated. The petitioner does not indicate that the beneficiary is reviewing the software developed by the subordinate programmers, but instead specifically

states that the beneficiary "develops" the software. 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 Intn'l.*, 19 I&N Dec. at 604. The information contained in the beneficiary's resume, which describes the beneficiary's role in database development, development of customized software, network administration, web site development and other non-managerial technical duties supports such a conclusion.

The petitioner also indicated that the beneficiary spends 18% of his time to "customize calculation-programs for actuarial-based applications." Without additional clarification from the petitioner regarding the managerial or executive duties involved, this duty also appears to be related to software development. These duties have not been shown to be managerial or executive in nature. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner further states that the beneficiary spends 15 percent of his time with the "overall management of subsidiary operations." The regulations require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. In the instant matter, the petitioner indicated that only 15 percent of the beneficiary's time is spent in supervising the subordinate staff and managing the company. Thus, it appears that the beneficiary is not primarily performing managerial or executive duties for the foreign company.

In addition, although the organizational chart for the foreign company indicates a director, a director/advisor, a senior systems consultant, an accountant, three programmers, two analysts and one statistician/actuarial consultant, the petitioner did not submit any documentation evidencing that these individuals are actually employed by the foreign company. The petitioner did not provide any financial documents for the foreign entity which would show salaries paid to the employees, tax forms, or financial statements. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. In addition, in support of the initial petition, the petitioner submitted an organizational chart for its corporate group which indicated that the foreign entity has six employees, while the subsequent chart depicts ten positions. The petitioner has not provided persuasive or consistent evidence of the staffing of the foreign organization. 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).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory,

professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. On appeal, counsel for the petitioner submits documentation to establish that the positions claimed to be supervised by the beneficiary, including an accountant, computer programmers, a systems analyst, statistician/actuaries, and two directors, are positions that are considered professional because they normally require an individual with a bachelor's degree in that field in order to fill these positions. However, as discussed above, the petitioner did not submit any documentation of the existence of these employees at the foreign company, and did not submit any documentation of the duties performed by the beneficiary's subordinates at the foreign company. Thus, it is impossible to determine if the employees supervised by the beneficiary are in fact professional positions.

Furthermore, if the position offered to the beneficiary is executive in capacity, the statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the instant matter, the petitioner has not presented evidence of the staff supervised by the beneficiary and thus has not established that the beneficiary is in a position of executive capacity with the foreign company.

Based upon the beneficiary's performance of non-qualifying duties, and the lack of evidence of the company's staffing levels, it cannot be concluded that the beneficiary has been employed by the foreign entity in a managerial or executive capacity. Accordingly, the appeal will be dismissed.

The second issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

The nonimmigrant petition was filed on December 7, 2005. The Form I-129 indicates that the beneficiary will be employed in the position of vice president for the petitioner, which claimed to have seven employees. In a support letter dated September 9, 2005, the beneficiary's proposed duties in the U.S. are described as the following:

Beneficiary as Vice-President for Petitioner will be responsible for managing the Bellevue, Washington office, consulting with clients and designing appropriate retirement plans. In addition, he will supervise and manage all of the staff, recruit, hire and layoff staff as needed. He will manage the finances of the Petitioner's office, market Petitioner's services to new clients, and perform any other necessary duties to run the office as it seems fit.

In addition, the petitioner submitted an organizational chart of the U.S. entity. The chart indicates that the president will supervise the beneficiary as vice president. The charts also indicates that the beneficiary will supervise six employees located at the foreign company, 12 employees of a recently acquired company, [REDACTED] and nine employees located at the U.S. office. The chart does not indicate the name, job titles or job duties of the employees supervised by the beneficiary.

In addition, the petitioner submitted an advertising brochure for the U.S. company which indicated that the U.S. company is a "retirement plan consulting firm." The brochure lists 18 different services provided by the U.S. company.

On December 15, 2005, the director determined that the petitioner did not submit sufficient evidence to process the petition. The director requested that the petitioner submit a breakdown of the percentage of time the beneficiary will spend on executive duties and non-executive duties. In addition, the director requested a list of the employees in the U.S. company that will perform the 18 services listed in the company's advertisement brochure as mentioned above.

In a response to the director's request, dated March 6, 2006, the petitioner submitted the following description of the duties the beneficiary will perform in the position of vice president for the U.S. company:

In the US, Beneficiary's duties would be to visit clients or referral sources in person to improve the business. Petition has recently acquired their competitor [REDACTED] (hereinafter "[REDACTED]") in November of 2005. Beneficiary will be in charge of merging the two operations into one, involving organization of employees, integration of the two computer network servers, data consolidation and delegation of work load. He will hire and train a marketing person and a manager to do part of the day-to-day office operations. Now that the Petitioner has doubled in size and tripled in potential revenue, Beneficiary will focus on consulting on actuarial-based retirement plans, designing such plans and reviewing the work of other financial consultants who will all report to the Beneficiary.

[REDACTED] served a different demographic than Petitioner, so Beneficiary will have to become knowledgeable as intimately as possible about several hundred new clients, financial goals and needs. He will need to negotiate with banks for working capital management, lease of additional office equipment, etc.

* * *

Regarding the services listed on Petitioner's brochure as submitted with the L-1A petition, Beneficiary will be engaged with each task as described below. It is not possible to predict precisely the percentage of time to be spent on each task and subject to business exigencies, a best-judgment estimate is provided.

Plan design. Beneficiary will do the plan design for most but not all of the clients, although he will review all of the plan designs – 15%

Acquisition of plan documents and summary plan descriptions. This will be consultants' job delegated by Beneficiary – 1%

Document Review. Beneficiary will review plan documents before they are mailed to the client and also while the documents are submitted to the US Internal Revenue Service for approval – 1%

The review will typically include verification of the following:

- that the document conforms to the original plan design;
- that the plan passes all the discrimination tests as defined by [REDACTED]
- that the provisions in the document also conforms to [REDACTED]
- that the formulas and assumptions are all correct per IRS code regulations.

Plan installations, new plan enrollment meetings, annual employer meetings, and 401(k) plan record keeping. Beneficiary would only review the problematic situations and even then, only with the financial consultants and his manager are unable to solve the problems by themselves – 10%

Profit sharing plan record keeping, money purchase plan record keeping, and cross tested plan calculations and record keeping. Cross-tested profit sharing plans are complicated and are a hybrid of actuarial calculations and defined contribution plans involving discrimination testing. The most complicated plan designs plans will be reviewed by Beneficiary particularly if testing is not successful. Beneficiary will then be responsible for making an executive decision about the status of plan formulae – 24%

Trust Accounting. Beneficiary will perform occasional review – 4%

Actuarial and administration system design and implementation. Beneficiary will perform a thorough review of actuarial calculations-based retirement plans such as target benefit pension plans, cross-tested profit sharing plans, defined benefit pension plans or any combination/hybrid of these plans. Beneficiary will do the initial plan design, consult with the client about the plan design, review plan documents, review discrimination tests, evaluate funding problems or minimum funding requirements, IRS reporting etc. This is a very complicated process and can only be properly executed an [sic] experienced person with actuarial knowledge – 35%

Compliance Testing. Beneficiary will perform review only if complications arise – 2%

IRS/DOL filings. Beneficiary will perform occasional review – 2%

5500 reporting – 0%

Plan Terminations. Beneficiary will perform occasional reviews except for defined benefit or actuarial based plans – 2 %

Annual plan administration. Beneficiary will supervise performance of plan administrators, actuaries, accountants, and financial/business and other consultants – 3%

Benefit claim processing. These tasks will be performed by staff supervised overall by Beneficiary – 1%

In addition to the above duties, Beneficiary will do a substantial amount of telephone and in-person marketing with the referral sources, including CPAs, financial brokers, investment consultants, financial planners, ERISA attorneys etc. He will prepare marketing materials, brochures and website content for Petitioner.

The director denied the petition on March 21, 2006 on the ground that insufficient evidence was submitted to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that a majority of the beneficiary's time will be spent in providing the services of the U.S. company, rather than supervising a subordinate staff who would perform the non-qualifying tasks.

On appeal, counsel for the petitioner states that the subordinate staff will provide the services of the business. Counsel states that "petitioner has also indicated, if not directly then by almost direct implication from the type of service rendered, that for most of the work itemized, certain types of staff will do the work such as financial analysts/consultants and actuaries." In addition, counsel states that since the U.S. company just acquired a new company, it is hard to articulate the specific staff that will manage each duty. Counsel further states that the beneficiary will supervise professional employees. Finally, counsel for the petitioner clarifies that the beneficiary will review the work done by a subordinate staff.

Counsel's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. An employee who "primarily" performs the tasks necessary to produce a product or provide a service is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I & N Dec. at 604.

In the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform. While the petitioner has provided a breakdown of the percentage of time the beneficiary will spend on various duties, the petitioner has not articulated whether each duty is managerial or executive. Thus, the AAO must attempt to glean the nature of the beneficiary's proposed duties from the vague descriptions submitted.

The petitioner indicated in the letter in response to the director's request for evidence, dated March 6, 2006, that the beneficiary will spend a total of 35 percent of his time to "initial plan design, consult with client about the plan design, review plan documents, review discrimination texts, evaluate function

problems or minimum funding requirements, IRS reporting etc.” Since the petitioner has not indicated a support staff that will prepare and design the plans, it appears that the beneficiary is providing the service of the business by designing the review plans, rather than supervising the work prepared by subordinate employees. It appears the beneficiary will spend the greatest portion of his time performing non-managerial duties associated with designing and review plans functions. 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 Intn’l.*, 19 I&N Dec. at 604.

On appeal, counsel for the petitioner asserts that even though the beneficiary will spend 35 percent of his time in the design and implementation of plans as mentioned above, it does not mean that only the beneficiary will be performing the function. Counsel states that “[the beneficiary] will perform a thorough review of the actuarial calculations etc. but the work itself will have to be done by competent professionals, namely actuaries/statisticians and financial analysts, etc.” Counsel for the petitioner has not explained why the petitioner did not previously indicate that the subordinate staff will design the plans, rather than the beneficiary himself, in the original petition and in response to the director’s request for evidence. 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. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner further states that the beneficiary “will do a substantial amount of telephone and in-person marketing with the referral sources” and the beneficiary will “prepare marketing materials, brochures and website content for Petitioner.” Without additional clarification from the petitioner regarding the managerial or executive duties involved, the AAO cannot distinguish this vague responsibility from routine marketing and web design tasks. These duties have not been shown to be managerial or executive in nature. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Furthermore, although the organizational chart indicates several positions subordinate to the beneficiary, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. In addition, the petitioner indicated that the U.S. entity recently acquired a new company which the beneficiary will supervise. However, the petitioner did not submit any documentation to evidence that the U.S. entity acquired the company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. According to the organizational chart for the U.S. entity, it appears that the beneficiary will supervise 27 employees, however, the petitioner did not

submit the names, titles and/or job duties of these individuals. In addition, the petitioner failed to provide any documentation of the existence of these employees at the company. Furthermore, the petitioner claimed to employ only seven employees on Form I-129 and initially indicated that the beneficiary would manage the Bellevue, Washington office. Thus, it is impossible to determine if the beneficiary supervises a staff of professional employees.

Furthermore, if the position offered to the beneficiary is executive in capacity, the statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the instant matter, the petitioner has not presented evidence of the staff supervised by the beneficiary and thus has not established that the beneficiary will hold a position in an executive capacity with the U.S. entity.

As discussed above, the beneficiary's job description included primarily non-qualifying duties associated with the petitioner's day-to-day functions, and the petitioner has not identified nor submitted evidence of sufficient employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of an executive or manager as contemplated by the governing statute and regulations.

Based upon the lack of a comprehensive job description, the beneficiary's apparent performance of many non-managerial duties, and the lack of evidence of the company's staffing levels, it cannot be concluded that the beneficiary will be employed by the U.S. entity in a managerial or executive capacity. Therefore, the appeal will be dismissed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.