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**U.S. Citizenship
and Immigration
Services**

D-1

FILE: EAC 08 073 51641 Office: VERMONT SERVICE CENTER Date:

FEB 25 2009

IN RE: Petitioner:
 Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition and certified his decision to the Administrative Appeals Office (AAO). The AAO will affirm the director's decision to deny the petition.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida limited liability company, states that it operates as a real estate construction and development company. It claims to be an affiliate of Corporacion BLDG Homes C.A., located in Venezuela. The petitioner seeks to employ the beneficiary in the position of construction manager for a period of three years.

The director denied the petition on May 6, 2008, and certified his decision to the AAO. The director cited two separate grounds for denial: (1) the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; and (2) the petitioner failed to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. The director also determined that the beneficiary's B-2 nonimmigrant status expired two days prior to the filing of the petitioner, and therefore, he was ineligible for the requested change and extension of status.

In accordance with the regulations at 8 C.F.R. § 103.4(a)(2), the director advised the petitioner that it had 30 days in which to submit a brief or other written statement to the AAO for review. As of the date of this decision, no brief has been received, and the record will be considered complete.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate in a managerial, executive or specialized knowledge capacity.

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training and employment qualifies him/her to perform the intended services in the United States; however the work in the United States need not be the same work which the alien performed abroad.

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

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), 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 petitioner filed the nonimmigrant petition on January 11, 2008.¹ The petitioner stated on Form I-129 that it employs five workers, plus 29 subcontracted employees, and noted that the beneficiary, as construction manager, would “manage and direct the Construction Division, including all construction activities, projects and personnel.”

In a letter dated January 10, 2008, the petitioner described the beneficiary’s proposed duties as follows:

As Construction Manager of [the petitioner], [the beneficiary] will be the third-highest ranking employee of the company. He will exercise wide discretionary decision-making authority, and he will be directly responsible for all aspects of the company’s construction activities, personnel and performance. His specific responsibilities will include:

* * * *

- Development, Implementation, Evaluation and Modification of the Policies and Procedures by which the Construction Division Operates – [The beneficiary] will be responsible for the creation and development of the policies and procedures by which the Construction Division operates, and such policies and procedures will govern the day-to-day operation of each construction project. Once the policies and procedures are developed by [the beneficiary] and approved by the President and/or Vice President, they will be implemented and monitored by the Team leaders of each respective construction project. . . . On a weekly basis, [the beneficiary] will analyze detailed statements of cash flow and other relevant indicators of the effectiveness of the policies and procedures of the Construction Division, and make any necessary modifications to be implemented by the Team Leaders.
- Responsibility for the Overall Performance of the Construction Division – As the Construction Manager, [the beneficiary] will be directly responsible for all aspects of the overall performance of the Construction Division and each individual construction project undertaken by the company. Intrinsic to this responsibility are the duties of managing and directing all division activities in the pursuit of optimum performance and profitability and [the beneficiary] will exercise wide authority in this regard. Firstly, [the beneficiary] will supervise the investment and management of the company capital necessary to plan and develop each construction project. Secondly, he will monitor and

¹ The record contains evidence that the Form I-129, Petition for a Nonimmigrant Worker, with filing fee and supporting documents, was in fact delivered to the Vermont Service Center on Friday, January 11, 2008, while the petition was not date stamped until Monday, January 14, 2008. The date is significant because the beneficiary’s B-2 nonimmigrant status expired on January 12, 2008. The AAO notes that the request for a change and extension of status was therefore timely filed. The director’s determination that the beneficiary was not maintaining a valid nonimmigrant status at the time of filing is withdrawn.

manage the progress of each construction project to assure that project goals are met on time and within the allocated budget. Thirdly, he will conduct daily briefings with his Team Leaders to make certain that the daily construction activities of [the petitioner] are in compliance with established company policies and procedures. . . .

- Supervision of Management – [the beneficiary] will be directly responsible for the performance and conduct of all individuals utilized by the Construction Division of [the petitioner] at all times while they are performing services for the company. To accomplish this, [the beneficiary] will directly supervise the Team Leaders, to whom he will delegate the direct supervision of the company's engineers, supervisors and support staff. [The beneficiary] will review and act upon daily verbal status reports from the Team Leaders, as well as monthly written Employee Performance Reports compiled for each individual utilized by the Construction Division.
- Staffing the Construction Division – As mentioned above, [the beneficiary] will be directly responsible for the performance and conduct of all individuals utilized by the Construction Division of [the petitioner] at all times while they are performing services for the company. He will exercise wide authority regarding the retention, performance and termination of the Team Leaders, engineers, supervisors and support staff of the division. In order to allow [the beneficiary] to perform his managerial duties, staffing responsibilities will likely be delegated to [the petitioner's] Construction Team Leaders. [The beneficiary] will review the monthly Employee Performance Reports and, at his discretion, conduct face-to-face interview and evaluations with specific personnel of the Construction Division to evaluate performance both on an individual level and as a group. He will maintain wide authority in the retention and termination of personnel utilized by the Construction Division, requiring approval by the President and/or Vice President only when hiring or firing a Team Leader.
- Acting as Advisor to the President and/or Vice President regarding the Company's Construction Activities – As the top manager of the company with specific knowledge of the company's various construction projects, [the beneficiary] will advise and counsel the President and/or Vice President regarding any and all issues involving the company's construction activities. Specifically, he will evaluate the feasibility, cost and individual risks or advantages of potential construction projects. [The beneficiary] will also recommend possible solutions to challenges and unforeseen obstacles arising during the planning, development and construction phases of each project.

The petitioner further indicated that the beneficiary "will spend 100% of his time performing these managerial duties."

In support of the petition, the petitioner submitted a 2008 employee list which identified a president, vice president, administrative manager, and project supervisor, as well as the beneficiary's proposed position of construction manager. According to the employee list, the petitioner's contracted employees include a payroll supervisor, two construction team leaders, 14 masons, and 13 laborers. The petitioner also submitted an

organizational chart which shows that the beneficiary will report to the company's vice president, and directly supervise the construction team leaders. The project supervisor position is depicted as lateral to the beneficiary's proposed position, with shared authority over the construction team leaders and workers.

As evidence of wages paid to payroll employees, the petitioner submitted a copy of its Florida Form UCT-6, Employer's Quarterly Report, for the second quarter of 2007. Although five employees are listed on the Form UCT-6, only two of them, the individuals who serve as vice president and the administrative manager, are identified on the organizational chart and employee list. The petitioner also submitted an exhibit labeled "Subcontracted Labor Payroll Reports" which show hours worked and rates of pay for employees of San Construction Group, Inc. The employees are designated as "Marina Blue Group." The petitioner provided reports for portions of May, June, July and August 2007. Each report lists two supervisors and varying numbers of individuals designated as "labors" and "plasters." The employees listed, including the two supervisors, are listed on the petitioner's organizational chart, although their involvement with the petitioning company appears to be limited to their role as subcontractors on the Marina Blue Condominium project. The petitioner provided copies of invoices for San Construction Group, Inc. for the months of April through September 2007, which demonstrate that the petitioner was regularly billed for "Labor for stucco work" during this period.

The director found the initial evidence insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, the director issued a request for additional evidence (RFE) on January 23, 2008, in which he requested, *inter alia*, a comprehensive description of the beneficiary's duties, a list of the petitioner's employees by name and position title, and complete position descriptions including the percentage of time spent on each duty on a weekly basis, for all employees (including the beneficiary).

In a response dated April 14, 2008, the petitioner submitted a lengthier position description for the beneficiary's proposed position of construction manager:

Plan, direct, coordinate, or budget, usually through subordinate supervisory personnel, activities concerned with the construction and maintenance of structures, facilities and systems. Participate in the conceptual development of a construction project and oversee its organization, scheduling, and implementation.

Duties:

1. Confer with supervisory personnel, owners, contractors and design professionals to discuss and resolve matters such as work procedures, complaints, and construction problems.
2. Determine labor requirements and dispatch workers to construction sites.
3. Develop and implement quality control programs.
4. Direct acquisition of land for construction projects.
5. Direct and supervise workers.
6. Evaluate construction methods and determine cost-effectiveness of plans, using computers.

7. Inspect and review projects to monitor compliance with building and safety codes and other regulations.
8. Interpret and explain plans and contract terms to administrative staff, workers, and clients, representing the owner or developer.
9. Investigate damage, accidents, or delays at construction sites, to ensure that proper procedures are being carried out.
10. Obtain all necessary permits and licenses
11. Plan, organize, and direct activities concerned with the construction and maintenance of structures, facilities, and systems.
12. Prepare and submit budget estimates and progress and cost tracking reports.
13. Prepare contracts and negotiate revisions, changes and additions to contractual agreements with architects, consultants, clients, suppliers and subcontractors.
14. Requisition supplies and materials to complete construction projects.
15. Schedule the project in logical steps and budget time required to meet deadlines.
16. Select, contract, and oversee workers who complete specific pieces of the project, such as painting or plumbing.
17. Study job specifications to determine appropriate construction methods.
18. Take actions to deal with the results of delays, bad weather, or emergencies at construction site.

The job description also included a list of 45 “daily work activities.” As the list is part of the record, it will not be repeated in its entirety here.

The petitioner also provided position descriptions for the positions of president, vice president, administrative manager, project supervisor, construction supervisor, mason, and construction laborer. The petitioner resubmitted the organizational chart submitted with the initial petition. The petitioner provided some additional invoices for subcontract labor related to the Marina Blue project, dated between October and December 2007.

The petitioner provided a list of five “Construction, Management & Consulting” projects in which it claims to be participating. The only signed contract in the record relating to any of the listed projects is between the petitioner, as subcontractor, and Engineer Control Systems, Corp., as contractor, for stucco work to be performed for the Marina Blue Condominium. According to the terms of the agreement, work on the project was scheduled to commence in February 2007 and was to be completed within 24 weeks. It is not clear from the evidence in the record that this project was ongoing in 2008.

The director denied the petition on May 6, 2008 and certified his decision to the AAO in accordance with 8 C.F.R. § 103.4(a). The director concluded that the petitioner had failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. The director noted that although the petitioner indicated that the beneficiary will supervise “Construction Team Leaders,” the record did not establish that the petitioner actually employs such workers, and the petitioner failed to provide a description of job duties for this position. The director also noted that the record lacks the requested breakdown of how much time the beneficiary and other United States workers will spend on their job duties on a weekly basis.

In denying the petition, the director determined that, while the beneficiary would likely perform some managerial duties, most of the duties assigned to him do not rise to the level of being managerial or executive in nature. The director found insufficient evidence to establish that the beneficiary will actually supervise managerial, supervisory or professional employees. The director concluded that the beneficiary's detailed position description suggests that he will act as a first-line supervisor to laborers and construction workers, and will not manage an essential function of the organization.

As noted above, the petitioner was given proper notice that the director's decision was being certified to the AAO for review, and was advised that it had 30 days in which to submit a brief or other written statement for consideration. No brief or additional evidence has been incorporated into the record of proceeding.

Upon review, and for the reasons discussed herein, the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director's decision to deny the petition will therefore be affirmed.

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 in either an executive or a 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). While it appears that the beneficiary in this matter would perform some managerial duties, the evidence of record falls short of establishing that the beneficiary would be performing primarily managerial or executive duties.

The petitioner initially provided a lengthy, but vague and nonspecific description of the beneficiary's duties that was insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity. For example, the petitioner generally classified the beneficiary's duties as development and implementation of policies and procedures for the construction division, responsibility for the overall performance of the division, supervision of management within the division (namely "team leaders"), staffing of the supervision, and acting as an advisor to the company's president and vice president. The petitioner indicated that all duties would be managerial and that 100% of the beneficiary's time would be delegated to such functions. However, the petitioner only identified broad managerial functions and offered little specific information as to what the beneficiary would be doing on a day-to-day basis as the petitioner's construction manager. Furthermore, the description suggests that the beneficiary will primarily carry out his responsibilities through subordinate personnel, yet, as discussed further *infra*, the record contains no evidence of such employees. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Accordingly, the director reasonably requested a comprehensive description of the beneficiary's proposed duties and a breakdown of the number of hours to be devoted to each duty on a weekly basis. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities.

The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Not only were the duties included in the second description generic, they appear to have been taken verbatim from the U.S. Department of Labor's Occupational Information Network and can be accessed at <http://online.onetcenter.org/link/details/11-9021.00>. As such the provided description did not provide the required detailed account of the beneficiary's actual duties or role within the context of the petitioner's organization. Furthermore, there are significant differences between the duties and level of authority when comparing the two position descriptions provided, and the AAO is not in a position to determine which, if either, presents an accurate depiction of the beneficiary's actual role within the company. 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).

Finally, as noted by the director, the petitioner failed to provide the requested breakdown of how the beneficiary's time would be allocated among his various duties. 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). 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. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Overall, absent a clear, consistent and credible description of the actual duties to be performed and the amount of time he will devote to managerial duties, it cannot be concluded that the beneficiary's position with the U.S. company will be in a primarily managerial or executive capacity.

The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. A review of the record with respect to the petitioner's staffing levels undermines the petitioner's claim that the beneficiary will primarily perform managerial or executive duties.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of

the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Here, the petitioner initially indicated that the beneficiary will directly supervise construction team leaders, each responsible for a project, and that these employees would, in turn, supervise "the company's engineers, supervisors, and support staff." However, the petitioner has not corroborated its claim that it actually employs team leaders, engineers, supervisors or support staff. The petitioner claims to have only five payroll employees, including a president, vice president, administrative manager, and a project supervisor, positions which are all lateral or senior to the beneficiary's proposed position. While the petitioner's organizational chart shows that the beneficiary and the project supervisor will jointly supervise two construction team leaders, masons and construction laborers, the evidence in the record shows that these individuals are all employees of San Construction Group, Inc. and have been hired as subcontractors in connection with one of the petitioner's five or six claimed projects, namely the "Marina Blue Condominium." The petitioner has not indicated who, if anyone, is staffing the other projects nor has it provided documentary evidence of the other claimed contracts. 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)). Based on the evidence of record, it cannot even be determined whether the "Marina Blue" project was ongoing at the time the petition was filed, as it was initially intended to be completed during the third quarter of 2007. The petitioner has not established that it actually employs, either directly or indirectly, the claimed subordinate staff of team leaders, engineers, supervisors and workers that the beneficiary is claimed to supervise. Therefore, notwithstanding the petitioner's assertions, the record does not support a finding that the beneficiary will supervise and control any staff, much less a subordinate staff composed of supervisory, professional, or managerial employees, as required by section 101(a)(44)(A)(ii) of the Act.

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. § 214.2(l)(3)(ii). 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 Intr'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

While the record establishes that the beneficiary will likely have oversight authority over the day-to-day activities of any construction projects secured by the company in the future, it does not contain sufficient evidence to establish that he would assume primarily managerial duties upon approval of the petition. While

the petitioner's organization may eventually develop to the point where it requires the beneficiary's services in a primarily managerial capacity, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Furthermore, the beneficiary's position is lateral to that of the project supervisor with supervisory authority over the same alleged employees, suggesting that he will not occupy the senior position with respect to the construction function, but rather will share his authority with another employee. The petitioner has not shown that the beneficiary will function at a senior level within the organizational hierarchy with respect to the function managed, or that his duties will be primarily the high-level managerial duties required by the statutory definitions.

Overall, the petitioner's claims are undermined by its failure to provide a consistent, credible description of the beneficiary's duties, its failure to document that it employs the beneficiary's claimed subordinate staff, and its failure to adequately corroborate its claims that it is actually engaged in the claimed five to six fully-staffed construction projects. 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Accordingly, the director's decision will be affirmed and the petition will be denied.

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

The petitioner stated that the beneficiary has been employed by the foreign entity as a project manager since December 2004, with the following responsibilities:

His overall duties as Project manager include the direction and management, via subordinate managers, of all activities and personnel involved in the company's various construction projects. His authority and responsibility for all construction activities and personnel of [the foreign entity] are second only to those of the President and General Manager of the company, under who [the beneficiary] works with only general supervision. His daily responsibilities include:

- Development, implementation and monitoring of project policies, goals and procedures;
- Responsibility for the oversight, via subordinate management, of the daily activities of each company construction project;
- Supervision of management personnel, employed professionals and support staff involved in the company's various construction projects, including: [a construction engineer, a construction supervisor, a site foreman, construction workers, a steel assembly supervisor, and steel assembly workers]

- Retention, evaluation and termination of all personnel, managers and professionals involved in the company's construction projects;
- Monitoring of the construction activities of the enterprise to ensure that it operates in a manner most advantageous to the accomplishment of established company goals and objectives; and
- Analysis of construction operations to evaluate operational performance, efficiency and economy, and the development, establishment and implementation of improvements where necessary.

The petitioner indicated that he beneficiary spends 100% of his time performing managerial duties and that the managers and professionals he supervises report directly to him on a daily basis regarding the company's construction projects.

The petitioner submitted a copy of the foreign entity's organizational chart depicting the beneficiary as Projects Manager, and directly supervising a construction engineer, and a projects engineer. The chart indicates that the construction engineer supervises a construction supervisor, a steel assembly supervisor, who in turn supervise a site foreman, construction workers and steel assembly workers. The petitioner submitted a 2007 employee list for the foreign entity, which includes the beneficiary, the two supervisors, and the construction engineer, who is identified as "resident engineer" on the list. The individual identified as "site foreman" on the organizational chart is identified as "head of construction" on the petitioner's employee list. The petitioner also submitted payroll records for the foreign entity's managerial, administrative and construction employees.

In the RFE issued on January 23, 2008, the director requested additional evidence to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. Specifically, the director requested a list of foreign employees identifying each employee by name and position title, as well as a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis, including one for the beneficiary. The director also requested additional information regarding the number of subordinate supervisors managed by the beneficiary, and the beneficiary's degree of discretionary authority in day-to-day operations.

In a letter dated April 14, 2008, counsel for the petitioner stated that the number of supervisors under the beneficiary's management is five, including the construction engineer, project engineer, construction supervisor, steel assembly supervisor and site foreman. Counsel indicated that the beneficiary devotes 100% of his time to executive duties and "is permitted the highest degree of authority as it relates to all aspects of the actual construction or the project." Counsel further stated that the foreign entity's president and general manager would defer to the beneficiary on "virtually all construction engineering matters."

The petitioner re-submitted the foreign entity's 2007 employee list and organizational chart and submitted an expanded description for the beneficiary's position. The AAO notes that the description is identical to that submitted in response to the RFE for the beneficiary's proposed construction manager position in the United States. The petitioner also submitted position descriptions for the positions of general manager, resident engineer, construction supervisor, administrative manager, administrator, "purchases," contract administrator,

construction laborers, cement masons and concrete finishers, reinforcing iron workers, structural metal fabricators and fitters, surveyor-topographer, welder, and worksite safety/security supervisor.

The director denied the petition on May 6, 2008, concluding that the petitioner failed to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. The director noted some discrepancies between job titles listed on the organizational chart compared to those indicated on the foreign entity's employee list, and noted that the record lacks job descriptions for the position of "project engineer" and "construction engineer," two of the positions claimed to be supervised by the beneficiary. The director acknowledged that the beneficiary likely performs some managerial duties, but found the evidence insufficient to establish that the beneficiary is primarily engaged in managerial functions.

The director also emphasized that the petitioner failed to provide the requested detailed breakdown of how much time the beneficiary and the foreign entity's other employees spend on each job duty on a weekly basis. Regardless, the director found that most of the duties ascribed to the beneficiary do not rise to the level of being managerial or executive in nature, but rather suggest that he has acted as a first-line supervisor to laborers and other construction workers. The director concluded that absent a clear and credible breakdown of the time the beneficiary has spent performing each of his duties, USCIS cannot determine what proportion of his duties have been managerial. The director also found that the petitioner failed to establish that the beneficiary's duties have been executive in nature, noting that his level of authority over activities at construction sites does not rise to the level of establishing goals and policies for a complex organization.

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

As the beneficiary's current position as "project manager" and the proffered position of "construction manager" are virtually identical, it is noted that all of the deficiencies discussed above are applicable to the AAO's analysis of the issue of the beneficiary's employment capacity with the foreign entity. The initial description identified general managerial functions, yet offered no insight into what the beneficiary actually did on a day-to-day basis as a project manager with the foreign entity. Outlining the beneficiary's broad responsibilities, such as monitoring project policies, goals and procedures; overseeing the daily activities of construction projects through subordinate management; monitoring construction activities; and analyzing construction operations to evaluate operational performance, is not sufficient to satisfy the petitioner's burden to establish that the beneficiary's are primarily managerial or executive in nature. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In response to the director's request for additional evidence, the petitioner submitted a job description that was taken from the U.S. Department of Labor's Occupational Information Network. Again, the petitioner is required to submit a detailed description of the beneficiary's actual duties and his role within the scope of the petitioner's organization. A generic position description prepared by the U.S. Department of Labor does not fulfill this requirement. The position description submitted in response to the RFE is also substantially different from the position description submitted at the time of filing, and is descriptive of an employee who performs a number of operational, administrative and first-line supervisory duties. Again, 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.

For the reasons stated, both position descriptions are lacking in probative value, and the record is also devoid of any evidence of the amount of time the beneficiary devotes to the various job duties described, information that was specifically requested by the director. 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). Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager. See, e.g., *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The AAO acknowledges that, based on the foreign entity's organizational chart, payroll records, and employees list, it does appear that the beneficiary supervises subordinate personnel in his role as a project manager. However, as noted by the director, the petitioner's evidence does not establish that the beneficiary has been primarily managing a subordinate staff of managers, supervisors or professionals. See section 101(a)(44)(A)(ii) of the Act.

An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. In order to be a supervisor, the employee must be shown to possess some significant degree of control or authority over the employment of a subordinate. See generally *Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (*Cited in Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)).

The petitioner indicates that the beneficiary supervises a total of five supervisors, including a construction engineer, a projects engineer, a construction supervisor, a site foreman and a steel assembly supervisor. However, in response to the director's request for detailed position descriptions for all employees supervised by the beneficiary, the petitioner included position descriptions for a "resident engineer" and a "construction supervisor." Both of these descriptions were in a generic format similar to the beneficiary's position description and included many duties, including supervisory duties, that overlapped with the beneficiary's claimed duties, thus raising questions as to whether these employees are actually subordinate to the beneficiary. Nevertheless, the petitioner failed to submit the requested job descriptions for several of the supervisory employees claimed to be managed by the beneficiary. 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). Moreover, the petitioner has not established that the beneficiary's subordinate employees require a bachelor's degree, such that they could be classified as professionals. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

In summary, the petitioner's claim that the beneficiary is employed in a primarily managerial or executive capacity is undermined by its failure to provide a clear, consistent and credible description of the beneficiary's actual duties, the amount of time he devotes to specific duties, and its failure to clearly describe the duties performed by the beneficiary's subordinates. Notwithstanding the beneficiary's job title and placement on the petitioner's organizational chart, the lack of persuasive evidence in the record makes it impossible to conclude that the beneficiary performs primarily managerial duties as a project manager with the foreign entity. A beneficiary's "control," management or direction over a company or a function cannot be assumed or considered "inherent" to his position merely on the basis of broadly-cast job responsibilities.

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.

ORDER: The director's decision dated May 6, 2008 is affirmed. The petition is denied.