



**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

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 Delaware corporation, is engaged in the repair and service of pulp and paper equipment and machinery. It claims to be a subsidiary of [REDACTED], located in Canada. The petitioner states that the beneficiary has been employed by the U.S. company and related entities in L-1A status on an intermittent basis since 2001. The petitioner seeks to employ the beneficiary for two additional years in the position of field service manager.<sup>1</sup>

The director denied the petition, concluding that the petitioner failed to establish: (1) that the beneficiary would be employed in a primarily managerial or executive capacity in the United States; or (2) that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the beneficiary performs both managerial and executive duties, supervises managerial and professional personnel, and is not engaged in the day-to-day work of the business. The petitioner submits a brief and additional evidence in support of the appeal.

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 three years preceding the beneficiary's application for admission into the United States. In addition, 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) 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.

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<sup>1</sup> The petitioner initially stated on Form I-129 that the beneficiary has been offered the position of Senior Field Service Supervisor, and later submitted an amended petition indicating that the correct position title is Field Service Manager. The petitioner has submitted sufficient evidence to demonstrate that the latter is the beneficiary's actual job title.

- (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 issue in this matter is whether the petitioner established that the beneficiary has been and will be employed in a primarily managerial capacity. The petitioner indicates that the beneficiary holds the same position with the same duties in the United States and Canada and divides his time between the foreign and U.S. entities. As such, the following discussion will encompass both the beneficiary's foreign and U.S. employment capacity. The petitioner does not claim that the beneficiary has been or will be employed in an executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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.

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, on September 6, 2007. In a letter dated July 27, 2007, the petitioner stated that the beneficiary has been and will be employed in the position of field service manager, dividing his time between the United States and Canada, and performing the following duties:

He will be responsible for the direction, supervision and coordination of the technical service group. He will direct and supervise the planning of the erection of new machinery and equipment through his staff. He will direct the service and repair of installed equipment department. He will also coordinate with engineering (internal and external), manufacturing, shipping and delivery, inspection, erection, start-up and other related activities. [The beneficiary] will perform project management functions as assigned by the Vice President, General Manager or otherwise associated with the responsibility.

He will, in this position, oversee the technical service group in the installation and/or maintenance of our highly complex and technical products at our clients' locations. More specifically, he will oversee Field Service Engineers, who in turn oversee on site employees. He will supervise others including intermediate supervisory personnel as they verify alignment, timing and heat bearing. He will further be required to interpret and utilize technical drawings and blueprints to accomplish his assignments.

[The beneficiary] will be required to develop, coordinate and implement the required educational programs to train the various employees in the active and planning stages. He will consult with the department originators and approve training procedures (and documentation) from functional areas to ensure effective utilization of training methods and subject coverage.

He will review and appraise the work performance of his department personnel, either directly or through subordinate Managers and Supervisors, and implement action for improvement. He will review and approve of employee performance appraisals, promotions, merit increases and other personnel related matters.

On November 14, 2007, the director issued a request for additional evidence (RFE) in which he requested, *inter alia*, additional evidence to establish that the beneficiary has been and will be employed in a primarily managerial or executive capacity. Specifically, the director requested: (1) an organizational chart for the United States entity and complete position descriptions for all U.S. employees; and (2) additional information regarding the management and personnel structure of both the foreign and U.S. companies, including the number of subordinate supervisors under the beneficiary's management, their job titles and job duties, the amount of time the beneficiary allots to managerial/executive duties, and the degree of discretionary authority the beneficiary has over day-to-day operations in the United States and Canada.

In a letter dated January 30, 2008, the petitioner indicated that the beneficiary has been performing the same duties in the United States and Canada, although he spends more time training workers while in the United States. The petitioner indicated that the beneficiary's role of field service manager involves the following:

[The beneficiary's] responsibilities range from working directly with the customer to working with engineers, supervisors, foremen and workers under his supervision in order to complete a particular task or contract. He will spend time training individuals on correct repair and

trouble shooting methods. In doing this he will also be evaluating individuals performance, attitude and aptitude relative to the job being asked of them.

The petitioner stated that the beneficiary may supervise between two and six subordinate supervisors while fulfilling a customer contract, depending on the size of the job and the work location. Specifically, the petitioner indicated that the beneficiary's subordinates may include a shift foreman, field service supervisor, lead welder, lead millwright, and specialty machinists, any of which may lead a small work crew. The petitioner further stated that the beneficiary spends nearly 100 percent of his time on "managerial/technical duties" because he is responsible for the financial success of a job, as well as customer satisfaction. Finally, the petitioner indicated that the beneficiary has extensive authority over day-to-day operations, including the authority to "determine the correct course of action from both a technical point of view as well as from a manpower position."

In addition, the petitioner provided a separate job description for the field services manager position, which lists the following duties:

- Plans, prepares and coordinates, in collaboration with the Sales and Engineering Teams, the equipment installations and start-up of either new o[r] rebuilt equipment.
- Analyzes and solves operational and maintenance problems experienced by the . . . customer with their equipment.
- Plans, prepares and coordinates repairs, maintenance and equipment modification projects, assigned to him or is a part of.
- Provides technical assistance to [company] customers when planning major shutdowns for preventative maintenance purposes.
- Participates with the inspections of the defective equipment and provides an analysis of malfunctions leading to the breakdown.
- Selects and supervises a skilled team of welder-assemblers and laborers participating in the activities previously mentioned.
- Selects, inspects and prepares all necessary materials to enable the execution of the activities listed above. If necessary, load and prepare the mobilized units necessary for the execution of the previously mentioned activities.
- Provides a detailed report of his activities and those of the service team under his supervision, if necessary, at the end of each assignment. This report must be complete with financial (personal expenses, equipment purchases, hours worked) and technical aspects (inspection results, analysis of malfunctions, recommendations, required parts, problems relevant to design or manufacturing) according to the procedures and forms provided by Field Service Administration.
- Cleans, maintains, rectifies and takes inventory of material resources belonging to the Field Service Group.
- Actively participates in the improvements of procedures, of human and material resources and operational standards of the Field Service Group by means of realistic suggestions and concrete actions from past experiences or development opportunities.

- Performs other duties useful to the accomplishments of the functions previously mentioned, in such a way is considered necessary to the proper function of the Field Service Group by the Director of Services.

According to the petitioner's description, the position requires three years of experience as an assembler, machinist or millwright involving industrial equipment, and previous field service experience. The petitioner submitted as supporting evidence a copy of a Field Service Report prepared by the beneficiary upon completion of a customer installation, repair and start-up project for a Minnesota-based customer in 2007. The beneficiary is identified in the report as a "service representative."

Finally, the petitioner submitted an organizational chart for the U.S. company. The chart indicates that the beneficiary reports to a contract administrator and supervises the foreign entity's "resource pool." Other employees of the U.S. company are depicted as a project manager, and "US 3<sup>rd</sup> party manpower" including subcontractors hired from three U.S. companies, as well as individual direct hires.

The director denied the petition on March 13, 2008, concluding that the petitioner failed to establish that the beneficiary has been or would be employed in a primarily managerial or executive capacity. The director observed that the beneficiary has been acting in a leadership role, but no evidence was provided to establish that the beneficiary has the authority to hire and fire personnel or recommend these and other personnel actions, or to establish that he will function at a senior level within an organizational hierarchy. The director found that, even though requested, the petitioner submitted nothing to show the company's management structure, the types of individuals it employs, their functions, or other evidence to put into perspective the employees who work under the beneficiary's supervision.

On appeal, the petitioner asserts that, due to the nature of the petitioner's business, most of the company's work takes place at customer locations, and, as such "the Field Manager's opinion on all aspects of a job from safety, work conditions, time allotment to manpower" is relied upon and "generally rules the day." The petitioner emphasizes the service manager position is one of only three positions that reports to the owners of the company. The petitioner further states:

The hiring and firing of employees although not solely the responsibility of [the beneficiary] is one of the significant functions he does perform. He is responsible for the success of the assignments he is given including financial and customer satisfaction. In order for this to carry weight he must be able to hire/fire as required.

When we are using 3<sup>rd</sup> party manpower, [the beneficiary] in his managerial position determines just what manpower we will need and once we have used them he will determine whether we use them again on the next job. If for some reason they do not or cannot perform the tasks required of them then it is up to [the beneficiary] to provide corrective action including dismissal of the individual involved as required. Employee dismissal from a job site is certainly an option that rests solely with [the beneficiary].

The petitioner submits a new organizational chart which depicts the beneficiary's positions in Canada and the United States. In the United States, the beneficiary supervises unidentified foremen, millwrights, welders, machinists who are employed by JLM Services, Versa Corp., and O'Meara Services as well as a portion of the Canadian entity's "resource pool." In Canada, the beneficiary supervises the same types of workers who are directly employed by Canadian firms.

Upon review, the petitioner has not established that the beneficiary has been or will be employed in a primarily managerial capacity.

When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed 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 that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.* The AAO will then consider this information in light of the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

Here, the petitioner initially stated that the beneficiary is and will continue to be responsible to direct, supervise and coordinate the technical services group; "direct and supervise" the planning of equipment installations through subordinate staff; "direct the service and repair of installed equipment"; "develop, coordinate and implement" training programs; "perform project management functions"; oversee Field Service Engineers who, in turn, oversee onsite employees; and review and appraise the work performance of department personnel through subordinate managers and supervisors. These general responsibilities suggest that the beneficiary has at least a supervisory level of authority within the technical services function, but the description was lacking in specificity with respect to the beneficiary's actual day-to-day duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In addition, the petitioner's initial submission did not contain evidence to corroborate the existence of the "technical services group," field service engineers, managers or supervisory personnel claimed to be supervised by the beneficiary in the United States and Canada. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In response to the director's request for a complete description of the beneficiary's duties and the amount of time he allocates to managerial and non-managerial duties, the petitioner largely restated the initial job description and provided little additional explanation as to what the beneficiary primarily does on a day-to-day basis. The petitioner reiterated that the beneficiary manages supervisory employees such as foremen, field service supervisors, lead welders, lead millwrights and specialty machinists, has authority to evaluate their performance, and has authority for determining the correct course of action on assigned projects from both a technical point of view and from a manpower position. The petitioner stated that the beneficiary would

devote nearly 100% of his time to "managerial/technical duties" but failed to specify in its letter which duties it considers "managerial," which duties it considers "technical" and how the beneficiary's time is divided between the two categories. Any 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). 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 has 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. at 1108.

The only detailed description of the beneficiary's position is the separate position description submitted in response to the RFE, which appears to be the formal company job description for the position. While the formal description indicates that the position is responsible to plan, prepare, coordinate and supervise equipment installations, troubleshooting and inspections, the AAO notes that the description also includes numerous technical duties which do not fall under the statutory definition of managerial capacity, and which were conspicuously absent from the position descriptions contained in the petitioner's letters. For example, the petitioner's formal job description indicates that its service managers: analyze and solve operational and maintenance problems experienced by customers; provide technical assistance to customers; participate in inspections of defective equipment and provide analysis of malfunctions; select and prepare materials for projects; load and prepare "mobilized units"; and clean, maintain, rectify and take inventory of material resources. Thus, it appears that the beneficiary is also responsible for performing numerous non-qualifying duties, including directly providing the petitioner's services to customers. 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).

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). Again, the petitioner's statement that the beneficiary devotes nearly 100 percent of his time to "managerial/technical duties," was non-responsive to the petitioner's request for a clear indication as to how the beneficiary's time is divided between qualifying and non-qualifying tasks.

As noted above, when examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. Here, the petitioner claims that the beneficiary serves in a managerial capacity based on his supervision of subordinate staff and his authority to exercise discretion over the company's day-to-day field service operations.

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 has submitted conflicting statements regarding the types of employees the beneficiary supervises and his level of authority with respect to personnel actions. The petitioner stated in its initial letter that the beneficiary oversees Field Service Engineers, who in turn oversee on-site employees. The petitioner further stated that the beneficiary reviews and appraises department personnel through subordinate managers and supervisors, with responsibility for reviewing and approving performance appraisals, promotions and other personnel matters.

In response to the RFE, the petitioner referred to "engineers, supervisors, foremen and workers" working under the beneficiary's supervision, but failed to provide the complete job descriptions requested by the director. The petitioner noted that the positions the beneficiary supervises on a particular assignment may include a shift foreman, field service supervisor, lead welder, lead millwright or specialty machinist, all of which may supervise a small crew of their own. However, the initial organizational chart provided by the petitioner showed that the beneficiary supervises an unidentified "resource pool," with no indication as to the actual positions he supervises and no apparent subordinate supervisors working under his supervision. Therefore, the director correctly determined that the petitioner failed to establish that the beneficiary has been and would be directing and controlling a subordinate staff of supervisors, managers or professionals.

Furthermore, the petitioner's standard position description for the field service manager position indicates that the position "supervises a skilled team of welder-assemblers and laborers." There is no reference to subordinate supervisors or engineers. In addition, while the description indicates that the service manager position "participates in the improvements of procedures of human and material resources and operational standards of the Field Service Group by means of making realistic suggestions," there is nothing in the description to suggest that the beneficiary is responsible for making hiring and firing decisions or recommending these and other personnel actions.

Finally, on appeal, the petitioner states for the first time that hiring and firing employees is one of the functions the beneficiary performs, and notes that the beneficiary is able to dismiss third-party manpower from a job site. The petitioner submits a new organizational chart indicating once again that the beneficiary supervises the petitioner's "resource pool" and foremen, millwrights, welders, machinists provided by contractors. The petitioner still has not clearly indicated whether the beneficiary supervises any direct employees of the petitioning organization, nor submitted documentation to corroborate any of its conflicting claims. There are no engineers or field service supervisors listed on either organizational chart, although the petitioner indicates that the beneficiary supervises such employees. While the AAO does not doubt that the

petitioner relies on third-party contractors for manpower, the evidence of record is insufficient to establish the extent of the beneficiary's supervisory authority over such workers. An employee will not be considered to be a supervisor simply because of a job title or because he or she supervises daily work activities and assignments. 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)).

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).

Overall, the petitioner has not established that the beneficiary has been or will be more than a first-line supervisor of non-professional employees. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *See* 101(a)(44) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Therefore, the petitioner has not established that the beneficiary qualifies for the benefit sought as a personnel manager.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description 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. Here, the petitioner has not clearly articulated a claim that the beneficiary manages an essential function of the petitioning organization. As discussed above, the petitioner has not provided a detailed description of the beneficiary's duties sufficient to establish that the beneficiary performs primarily managerial duties. This evidence is critical, as the evidence submitted indicates that the beneficiary is directly involved in providing the services of the company in addition to any supervisory or managerial functions he may hold. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The beneficiary may have the ability to assign workers and make technical decisions regarding specific customer installation or repair projects, but the petitioner has not established that his role rises to the level of a function manager.

In sum, the petitioner's failure to clearly identify the amount of time the beneficiary devotes to qualifying versus non-qualifying duties, and its failure to provide a consistent and corroborated account of his supervisory and personnel management duties, prohibits a determination that the beneficiary has been employed in Canada, and would be employed in the United States, in a primarily managerial or executive capacity.

The AAO acknowledges that USCIS previously approved one or more L-1A nonimmigrant petitions filed on behalf of the beneficiary. The prior approval does not preclude USCIS from denying an extension of the original visa based on reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Each nonimmigrant petition filing is a separate proceeding with a separate record of proceeding and a separate burden of proof. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

If other nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. Neither the director nor the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988).

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

**ORDER:** The appeal is dismissed.