

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D7



DATE: NOV 17 2011 Office: CALIFORNIA SERVICE CENTER FILE: 

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:

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

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 a 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 is incorporated in the State of Delaware. It claims to be an affiliate of [REDACTED] located in Haryana, India. The beneficiary was previously granted L-1B status for a period of three years. The petitioner now seeks to employ the beneficiary in L-1A status as Manager, Technology for an additional period of two years.

The director denied the petition on the sole ground that the petitioner did not establish that the beneficiary would be working in a managerial capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the director's decision was based on errors of law and errors of fact and should be overturned. Counsel submits a brief and additional evidence.

I. The Law

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(I)(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 (I)(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.

II. The Issues on Appeal

A. *Employment in a Managerial or Executive Capacity*

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed by the United States entity in a managerial 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.

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

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

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

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on June 18, 2009. The petitioner indicated on the Form I-129 that it is operating a business and technology consulting firm with 6,500 employees and gross annual income of \$662.4 million. The petitioner stated that the beneficiary performs the following duties:

- **Supervise a team of professional individuals** and be responsible for the development and deployment of a specific component in a larger project for delivery.
- Oversee development processes and drive compliance to ensure quality.
- **Create plan for team, manage client expectations**, ensure timely delivery and estimate effort.
- Responsible for **overseeing the design and architecture** of the technology solution on a project.
- **Serve as lead technologist** on smaller consultative information technology strategy engagements.
- **Manage and drive** the estimation process.
- **Manage and drive** all technology-related process throughout the lifecycle of a project.
- **Serve as senior most technical person** on a project or on a large subset of a project.
- **Manage performance reviews, promotions, mentoring, and growth feedback for team.**
- **Facilitate recruitment and staffing of team.**

The petitioner submitted an organizational chart identifying the beneficiary as Manager, Technology, supervising a team of 23 employees. Five of those U.S. employees on the chart are located in the United States. The subordinate U.S. employees were identified as either [REDACTED]

[REDACTED] The U.S. subordinate employees, in turn, supervised a team of 18 employees located in India. Those employees were identified as: [REDACTED]

The director issued a request for additional evidence ("RFE") on June 25, 2009 in which she instructed the petitioner to submit, *inter alia*, the following: (1) A more detailed description of the beneficiary's duties in the U.S. including percentage of time spent in each of the listed duties, (2) A copy of a line and block organizational chart describing the petitioner's managerial hierarchy and staffing levels at the location where the beneficiary will work, and (3) Copies of contracts, statements of work, or other documents between the petitioner and the client for services to be provided by the employees the beneficiary will be supervising.

In a response dated July 15, 2009, the petitioner stated that "From February 2004 to December 2006, Beneficiary was employed as a [REDACTED] In December 2006, Beneficiary entered the United States and began work with Petitioner in the same role. Beneficiary continues his role as a [REDACTED] [REDACTED] to date." The petitioner specified seven job duties the beneficiary performed in the past, including: [REDACTED] integration team," "Managed the expectations of key stakeholders," "Oversaw project scope and estimation process," and "Supervised and controlled the work of five professionals under

her [sic] management,” “Encouraged clients and team members to use S | A tools and processes,” “Made personnel decisions such as participating in the employees’ career management, hiring, training, and performance reviews,” and “Ensured quality assurance of the deliverables under her [sic] project management.”

The petitioner also provided a percentage breakdown of how the beneficiary’s time was allocated during his prior managerial experience as follows: “60% of the Beneficiary’s time was devoted to managing her [sic] data integration team,” “30% of Beneficiary’s time was devoted to supervising and controlling the work of five professional workers under her [sic] management,” “10% of Beneficiary’s time was devoted to making personnel decisions such as participating in the employee’s career management,” and “10% of Beneficiary’s time was devoted to quality assurance of the deliverables.” Next, the petitioner provided a list of managerial skills required for the position broken up into two categories, “task management” and “team management.” The task management skill section included a list of nine skills. The team management skill section included a list of 11 skills.

With regard to the organizational chart and the petitioner’s managerial hierarchy, the petitioner provided a list of 23 employees reporting to the beneficiary. The petitioner also provided an organizational pyramid, showing that the beneficiary has authority over five tiers of workers. The beneficiary’s position is shown as reporting to the “Director” who in turn reports to the “VP.” Attached to the petitioner’s RFE response statement is the same organizational chart provided with the initial filing.

The petitioner provided a Statement of Work for [REDACTED] for the period of January 26th, 2009 to December 5th, 2009. The Statement of Work does not provide terms for an extended work period beyond December 5th, 2009. There are three personnel listed on the Statement of Work including the beneficiary who is listed as [REDACTED]. Exhibit A, entitled “Additional Staffing Request,” was left blank. The SOW states that the work will be performed at the Customer’s offices located in Denver, CO. The SOW states with respect to deliverables that “Consultant is not providing any specific deliverables, but rather personnel to perform services at the direction of the Customer.”

On appeal, counsel for the petitioner asserts that the director erred both as a matter of fact and a matter of law in making her decision. The petitioner states that the two main errors were with respect to the director’s conclusions as follows: (1) the beneficiary would not be working in a managerial capacity because only one of his subordinates was in the Denver, CO work location and (2) the Statement of Work submitted by the petitioner is inconsistent with the claimed managerial role of the beneficiary.

With respect to the work location of the beneficiary’s subordinates, counsel states that the “main question when determining whether a foreign national possesses managerial authority is whether they ‘possess some significant degree of control or authority over the employment of subordinates.’” Counsel cites to an unpublished decision of the AAO in support of his assertion. Counsel asserts that the beneficiary exercises “a significant degree of control and authority over his subordinates” and that there is “no requirement under the regulations that it also verify that Beneficiary and all of his subordinates be at the same worksite.” The petitioner includes with the brief three examples of the beneficiary’s managerial capacity: (1) an e-mail sent

to managers of the petitioner's organization, requesting recommendations on a project team, (2) e-mail communication between the beneficiary and another manager discussing the transfer of an employee between projects and, (3) performance review for three of the beneficiary's subordinates located in Gurgaon, India.

With respect to the director's conclusion regarding the inconsistencies in the Statement of Work provided by the petitioner, counsel asserts that the "CIS's interpretation of the SOW distorts the plain language and intent of the document." Specifically, the director found that the beneficiary was listed on the SOW as [REDACTED] while the "Project Manager" appears to be an employee of the client. Counsel for the petitioner argues that the implication of this document is only to indicate the points of contact between the petitioner and the client's organization. Counsel states that "[n]one of this diminishes or eliminates the fact that Beneficiary is still working within a managerial capacity *relative to his own organization*. Again, the USCIS does not deny that Beneficiary has authority with regards to his subordinates (except insofar as it claims he cannot have managerial authority over personnel not present at his same location)." Furthermore, counsel states that the "SOW referred to by the CIS does not establish Western Union's authority over Beneficiary. Most importantly, it does not constitute evidence that Beneficiary's managerial authority with respect to his own subordinates is eradicated or diminished."

Upon review, and for the reasons discussed below, the petitioner has not established that the beneficiary would be employed in the United States 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(i)(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 each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show 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). The fact that the beneficiary manages a business, or part of a business, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive"). Here, the petitioner has failed to show that his actual day-to-day duties will be primarily managerial in nature.

The petitioner's initial description of the job duties included a number of duties that, without further explanation, do not appear to fall under the statutory definitions of managerial or executive capacity, and such duties do not appear to be incidental to any qualifying managerial or executive duties the beneficiary performs. For example, the petitioner states that the beneficiary will serve "as senior most technical person on a project or on a large subset of a project." In addition he will serve "as lead technologist on smaller consultative information technology strategy engagements." The beneficiary will also "oversee development

processes and drive compliance to ensure quality.” The petitioner did not describe the specific tasks the beneficiary would perform or otherwise describe what this area of responsibility entails or who would perform administrative tasks associated with these compliance functions. These duties appear to relate to the actual production work of the company. An employee who primarily performs the tasks necessary to produce a product or to provide a service, rather than managerial or executive duties, is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In response to the RFE, the petitioner submits another set of job duties. While the petitioner has submitted a revised job description on appeal, the AAO notes that it diverges significantly from the prior description provided. The initial description appeared to have the beneficiary doing more of the actual work, while the second iteration of the job has the beneficiary managing more of the actual work done in the petitioner's operation. 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).

In the RFE response, the petitioner states job duties that the beneficiary performed from December 2006 to the time of filing the petition. The petitioner fails to clarify what duties the beneficiary will continue to do after approval of the current petition. The petitioner provided a breakdown of the time that the beneficiary spent on specific duties. The duties and breakdown of time is broadly described including 60 percent of the time devoted to “managing the data integration team,” 30 percent of the time devoted to “supervising and controlling the work of five professional workers,” and 10 percent of the time devoted to making personnel decisions. The percentage breakdown of time spent on each of the duty areas adds up to over 100 per cent, so it is impossible to ascertain the actual percentage breakdown of time.

While such responsibilities generally suggest that the beneficiary is responsible for oversight of the company, it provides little insight into how he would actually allocate his tasks on a day-to-day basis. 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).

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

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). Therefore, 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.

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. As counsel correctly notes on appeal, the actual physical work location of the employees is not a determining factor. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *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)). Here, the petitioner failed to demonstrate that the beneficiary exercises a significant degree of control or authority over the claimed subordinates.

As an initial matter, there are inconsistencies in the record regarding the number of employees supervised by the beneficiary. In the initial filing, the petitioner claims that the beneficiary will supervise 23 professional employees. As stated by the petitioner in a letter dated June 15, 2009: "Beneficiary directly supervises **23 professional capacity** subordinates who occupy the positions of [REDACTED]"

[REDACTED] In response to the RFE, the petitioner claims that the beneficiary will supervise only five professional employees. As stated by the petitioner in a letter dated July 15, 2009 "30% of Beneficiary's time was devoted to supervising and controlling the work of five professional workers under her [*sic*] management," and further that "Petitioner [*sic*] occupies the role of Manager, Technology, and supervises 23 employees."

In the RFE, the director requested contracts or other evidence between the petitioner and the client for the "services or products to be provided by the employees the beneficiary has been or will be supervising at the location where the work will be performed." In response to the request, the petitioner submitted a Statement of Work. The SOW listed the beneficiary and two other employees to whom the beneficiary appears to report. There were no other subordinates or employees reporting to the beneficiary specified on the SOW. Attached to the SOW is an "Exhibit A" entitled "ADDITIONAL STAFFING REQUEST." This request allows for the customer to add additional employees to the SOW. This section is blank. Therefore, the petitioner failed to provide any evidence of the employees the beneficiary has been, or will be, supervising at the location where the work will be performed. 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). 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).

On appeal, the petitioner provides two PowerPoint presentations that counsel claims to evidence the "Petitioner's role with respect to the Western Union organization as well as Petitioner's organization." The PowerPoint presentations show the beneficiary heading one team of nine unnamed employees and another team of seven unnamed employees depending on the project. The petitioner also provided on appeal performance reviews for three employees located in India evidencing that the beneficiary exercises control over his subordinates. In either case, the petitioner failed to provide evidence that either the 5 or the 23 employees actually exist *and* that the beneficiary exercises a significant degree of control or authority over the employees. The petitioner claimed both five and 23 subordinates, thus, the record is inconsistent with respect to the number of employees supervised. On appeal, the petitioner fails to substantiate its claim of supervisory authority over either five or 23 subordinates. 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).

Furthermore, the petitioner did not give an explanation as to why the performance reviews were not provided in the initial filing or in response to the RFE. The director put the petitioner on notice that the initial filing contained "insufficient evidence concerning the location where the beneficiary will work, the employees the beneficiary will supervise, and the conditions of their employment." As such, it was incumbent on the petitioner to provide evidence clarifying the employees that the beneficiary will supervise.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

As a secondary matter, the record contains conflicting evidence on whether the beneficiary exercises the appropriate degree of control over the claimed subordinate employees. The SOW states that "Consultant is not providing any specific deliverables, but rather personnel to perform services at the direction of the Customer." While the beneficiary may exercise some supervisory authority within the petitioner's organization, the contract indicates that any of the beneficiary's work performed pursuant to the SOW would be at "the direction of the Customer." This statement casts doubt on the significant degree of control or authority required for the beneficiary to exercise over his subordinates. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

On appeal counsel states that "The SOW referred to by the CIS does not establish Western Union's authority over Beneficiary. Most importantly, it does not constitute evidence that the Beneficiary's managerial

authority with respect to his own subordinates is eradicated or diminished.” Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The only evidence submitted by the petitioner with respect to the supervisory authority of the beneficiary are three performance evaluations submitted on appeal. Furthermore, there is no evidence demonstrating that these employees work on the SOW the petitioner claims relates to the beneficiary's work location. This evidence is insufficient to support that claim that the beneficiary exercises supervisory control over any additional employees assigned to the Western Union SOW.

Finally, assuming *arguendo* that the beneficiary does in fact supervise a team of employees, the petitioner failed to provide evidence that the positions are professional or managerial level positions as required by section 101(a)(44)(A)(ii) of the Act. The petitioner stated with the initial filing that the supervised positions require a bachelor's degree. The petitioner did not provide a position description or any other evidence demonstrating that the positions supervised are professional level positions. Nor has the petitioner provided evidence, other than an organizational chart, that any of the employees supervised by the beneficiary in turn supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. 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.

The petitioner has not submitted evidence on appeal to overcome the director's determination that the beneficiary will not be employed in a managerial capacity. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.