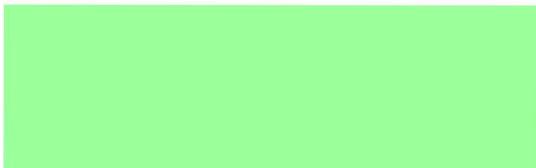




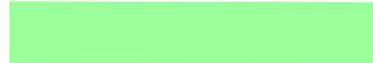
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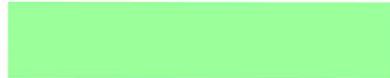


DATE: **JAN 16 2014**

Office: VERMONT SERVICE CENTER

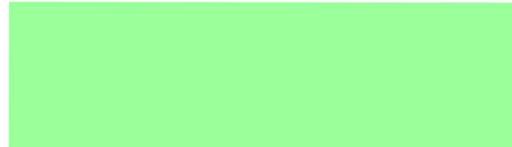


IN RE: Petitioner:
Beneficiary:



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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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 extend the beneficiary's status 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 is a Delaware corporation, incorporated in 1996, that is engaged in software development and other information technology professional services. The petitioner is the parent company of [REDACTED] located in China. The petitioner currently employs the beneficiary in the position of manager, business consulting and seeks to extend his status for two additional years.¹

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in a qualifying managerial or executive capacity.

On appeal, counsel asserts that the director ignored certain relevant evidence on the record establishing that the beneficiary would be employed in a qualifying managerial or executive capacity. Counsel stated that he would submit a brief within thirty (30) days of filing the appeal, but the record reflects that no brief has been submitted to date. As such, the record will be considered complete as currently constituted.

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(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.

¹ The petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that the beneficiary's proposed job title is "Quality Assurance Manager." The petitioner refers to the beneficiary's position as "Manager, Business Consulting" in all other instances and this title is designated on the beneficiary's U.S. payroll records.

- (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.

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.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

II. The Issue on Appeal

The sole issue to be addressed on appeal is whether the petitioner has established that the beneficiary will be employed in a qualifying executive or managerial capacity.

In denying the petition, the director noted that the beneficiary would act as a supervisor of a team of software programmers and developers providing project services at a client's office location in New Jersey. The director found the evidence insufficient to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. Specifically, the director found that the petitioner failed to establish that the beneficiary would supervise other supervisory, managerial or professional employees or that he would be primarily engaged in qualifying managerial or executive duties. The director further found that the evidence supported a conclusion that the beneficiary would be primarily engaged in the performance of non-qualifying operational duties related to the provision of services to a client.

On appeal, counsel contends that the director ignored a support letter from the petitioner's human resources department submitted in response to the director's request for evidence (RFE) which establishes that the beneficiary acts as a manager. Counsel states that the director's conclusion that the beneficiary did not qualify as a manager or executive because of his provision of services at a client site "has no basis in fact or law." Counsel contends that the evidence clearly establishes that the beneficiary manages an essential function for the company by managing a team of three onsite and thirteen offsite professionals engaged in customizing information technology solutions for the client, [REDACTED] at their business location in New Jersey. Counsel asserts that the beneficiary's performance of some operational duties at the client site should not disqualify him since he is primarily engaged in managing the team assigned to support the client.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In the current matter, the petitioner has submitted conflicting duty descriptions, thereby leaving question as to the actual duties to be performed by the beneficiary. For instance, in a letter submitted in support of the petition the petitioner provided a list of duties the beneficiary "performs on any given project," including

those in the United States. Many of the duties listed in this description are operational non-qualifying duties such as customizing client deliverables, interacting with clients to gather and understand requirements, resolving technical challenges, helping the team resolve technical challenges, designing, developing and maintaining solutions, performing unit testing as well as integration and deployment of applications. However, in the same support letter and later in response to the director's RFE, the petitioner did not include any of these operational duties in the beneficiary's U.S. duty description, despite claiming that the duties listed therein comprise 100% of the beneficiary's time. For this reason, the AAO cannot determine if the breakdown of the beneficiary's duties was complete.

Further, the subsequent duty descriptions include many operational duties as well, such as developing implementation plans, monitoring and maintaining these plans, developing, monitoring and maintaining implementation and delivery efforts, managing customer satisfaction, reporting and tracking the status of the project and communicating this to stakeholders, tracking key metrics and statistics, and implementing tools and templates. While such duties are undoubtedly necessary to the petitioner's successful delivery of client projects, several of these duties are administrative rather than managerial in nature. Therefore, the prevalence of non-qualifying duties in the beneficiary's duty description, particularly when combined with operational duties referenced elsewhere on the record, such as those the beneficiary is noted to perform on "any given project," leaves question as to whether the beneficiary is primarily performing qualifying managerial duties as asserted. 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, many of the duties submitted in the beneficiary's duty descriptions are vague and provide little insight into the beneficiary's actual day-to-day activities. For instance, the petitioner vaguely states that the beneficiary will develop, monitor and maintain implementation plans, manage relationships with key customers and stakeholders, manage customer expectations, identify probable risks to project completion, prepare strategies to mitigate risks to project completion, and analyze, report and make recommendations. In each case, the petition has provided little specificity as to these vague tasks, such as describing actual implementation plans that were developed by the beneficiary, relationships that were managed, expectations met or not met, risks identified and overcome, or recommendations that were made. It is reasonable to expect that the beneficiary would provide more specificity regarding the actual actions and accomplishments of the beneficiary given that he has been working in this capacity in the United States for over two years. 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 sufficient 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).

As correctly observed by counsel, the performance of some non-qualifying operational duties does not disqualify a beneficiary from acting in a qualifying managerial or executive capacity, provided that a majority of the beneficiary's duties are qualifying managerial or executive duties. However, due to discrepancies in the provided duty descriptions, the overall prevalence of non-qualifying duties included in

the various duty descriptions, and the vague nature of many of the duties provided, the petitioner has not established that the beneficiary would primarily perform qualifying executive or managerial duties.

However, 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.

In the RFE, the director requested that the petitioner provide complete positions descriptions for the beneficiary's subordinates, including a breakdown of the number of hours these subordinates would spend on their tasks. Further, the director asked that the beneficiary indicate whether a college degree is required for each subordinate position, and if so, asked the petitioner to submit documentation to substantiate the education level of these employees.

In response to the director's RFE, the petitioner stated that the beneficiary would manage a team of fifteen software professionals. Three of his subordinates - associate manager-business consulting, senior consultant - business consulting, and consultant-business consultant - are located in the United States and support the provision of professional services to the client. Further, counsel asserted that the beneficiary manages twelve offshore [REDACTED]. The petitioner indicated that all employees working under the beneficiary's supervision have at least a bachelor's degree. With respect to the beneficiary's subordinates in the United States, the beneficiary provided degree information for the senior consultant, confirming his receipt of a Bachelor's degree in mechanical engineering in India and a masters degree in business administration from the [REDACTED]. The petitioner did not provide evidence of educational credentials for the beneficiary's other U.S.-based subordinates, but instead provided resumes indicating that both employees have degrees in computer and engineering fields.

Counsel contends on appeal that the beneficiary qualifies as a personnel manager through his management of software professionals. The statutory definition of "managerial capacity" allows for both "personnel managers" and a "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). The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

In this matter, the petitioner has provided insufficient evidence to establish that the beneficiary would qualify as a personnel manager. The petitioner provided an incomplete response to the director's RFE with respect to his subordinates. The petitioner only submitted supporting documentation to demonstrate that one of his subordinates holds a baccalaureate degree, but failed to provide supporting documentation to demonstrate that any of his other fifteen asserted subordinates hold baccalaureate degrees. Although the beneficiary claims that two of his subordinates in the United States hold masters level educations, no documentation is submitted to substantiate this assertion. Further, the petitioner failed to provide probative evidence relevant to the educational credentials of his subordinates located abroad. As such, the petitioner failed to provide any documentation to support its assertion that the beneficiary's subordinates abroad hold baccalaureate degrees. The petitioner also did not submit the percentage of time each subordinate spends on their duties, as 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). 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Based on the petitioner's failure to sufficiently respond to the RFE, the petitioner has not submitted sufficient evidence to establish that the beneficiary will primarily supervise and control the work of other supervisory or managerial employees. In fact, in response to the RFE, the petitioner notes that all sixteen of his subordinates report directly to him and that he performs performance assessments and other first line managerial duties with respect to each of these subordinates. As such, the petitioner states directly on the record that the beneficiary will not oversee and control other supervisors and managers.

Likewise, the petitioner has not supported with sufficient evidence that the beneficiary supervises professionals, as that term is defined by the regulations. Although the petitioner's associate manager of human resources asserts that all "professional positions at [the company] require at least a bachelor's degree," the petitioner has not sufficiently corroborated this with supporting evidence. Regardless, even if the petitioner established that the beneficiary allocates some portion of his time to supervising professionals, it has not established that the beneficiary primarily performs these duties. As discussed above, the petitioner indicated that the beneficiary performs a number of non-qualifying operational and administrative duties associated with the petitioner's provision of services.

Based on the foregoing, the beneficiary has not demonstrated that the beneficiary primarily manages and controls subordinate managers, supervisors or professionals as necessary to qualify him as a personnel manager.

On appeal, counsel also contends that "the evidence clearly establishes that the beneficiary manages an essential function of the organization," thereby suggesting that the beneficiary qualifies as a function 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 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* *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

In this matter, the petitioner has not provided sufficient evidence to demonstrate that the beneficiary manages an essential function. In fact, beyond the beneficiary's duty description, the petitioner has provided few specifics related to the beneficiary's asserted management of a team at the [REDACTED] client site, provided a copy of the client contract, or provided the anticipated dates for the project or project objectives. Furthermore, it cannot be determined whether the beneficiary's duties are primarily managerial or executive in nature, as the petitioner has not supported this assertion with a sufficient duty description or other supporting evidence with respect to the beneficiary's subordinates to demonstrate that he actually primarily performs managerial duties. In sum, the petitioner has not sufficiently articulated the nature of the essential function managed by the beneficiary or corroborated its claims with adequate supporting evidence.

In conclusion, the petitioner has submitted conflicting duty descriptions for the beneficiary with predominantly non-qualifying and vaguely stated duties. Further, the petitioner has submitted insufficient evidence in response to the director's RFE with respect to the beneficiary's subordinates to demonstrate that he is primarily engaged in overseeing managers, supervisors, or professionals, or that he manages an essential function. For this reason, the appeal must be dismissed.

III. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.