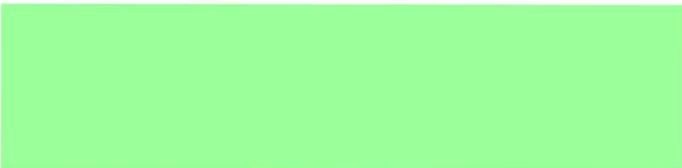




U.S. Citizenship  
and Immigration  
Services

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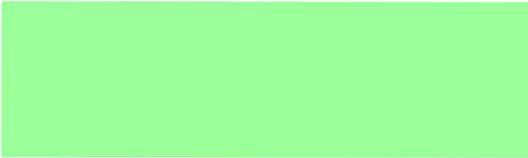
DATE: **NOV 04 2014** OFFICE: CALIFORNIA SERVICE CENTER

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 (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, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to classify 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, operates in the United States as an affiliate of the beneficiary's foreign employer, which sells automotive industry supplies. It seeks to employ the beneficiary in the position of project engineering lead for a period of two years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed abroad and would be employed in the United States in a 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.

### 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.
- (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.

## II. FACTS AND PROCEDURAL BACKGROUND

The record shows that the instant Form I-129 was filed on December 24, 2013, wherein the petitioner sought to change the beneficiary's status from that of an H-1B nonimmigrant worker to that of an L-1A intracompany transferee.<sup>1</sup> In support of the petition, [REDACTED] the petitioner's human resources manager, provided a statement, dated December 16, 2013, in which she listed the beneficiary's job responsibilities in his former and proposed positions with the foreign and petitioning entities, respectively. Both sets of job descriptions have been restated in the director's decision and thus need not be reiterated in this discussion. With regard to the proposed employment, Ms. [REDACTED] indicated that the beneficiary would be charged with

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<sup>1</sup> The beneficiary had been employed by the petitioner in H1B status since August 14, 2002.

overseeing the work of five engineers and two engineering supervisors. She further stated that the beneficiary's position will be at a senior level within the organization such that he would "interface" with other management employees and would have the power to "influence" personnel decisions. With regard to the position abroad, Ms. [REDACTED] stated that the beneficiary managed "major projects" and was charged with overseeing the work of five electrical engineers, whom she described as degreed professionals.

In addition, the petitioner provided evidence of the beneficiary's educational background, showing that the beneficiary obtained the equivalent of a Bachelor of Science degree prior to commencing employment with the foreign entity in 2004

Upon reviewing the record, the director determined that the petitioner failed to provide sufficient evidence establishing the beneficiary's eligibility. Therefore, on December 30, 2013, the director issued a request for evidence (RFE), instructing the petitioner to supplement the record with additional supporting evidence including specific information explaining how the beneficiary executed and would execute his managerial duties and how he controlled and would control his subordinates. The director also advised the petitioner to provide each entity's organizational chart or diagram illustrating the organizational structure and staffing level of the beneficiary's former employer abroad as well as that of his proposed U.S. employer. The director's request pertained specifically to the beneficiary's immediate division, department, or team with the foreign and U.S. entities. The director asked that the petitioner include employee names, job titles, summary of job duties, respective salaries, and educational levels.

The petitioner's response included a statement from counsel, dated March 6, 2014, in which counsel contended that payroll information, which includes employee names, positions, and other details, is confidential and that disclosure of such information would be in violation of the petitioner's policies and obligations it has towards its employees. As such, the petitioner provided the position titles of the beneficiary's direct subordinates along with their respective educational credentials. With regard to the beneficiary's employment abroad, the petitioner provided a letter from the foreign entity's human resources manager, who stated that the beneficiary supervised from two to five electrical engineers, all of whom were degreed professionals.

On March 28, 2014, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. The director observed that the petitioner's response to the RFE did not include either employer's organizational chart or provide the names, job duties, and educational levels of the beneficiary's subordinates with each entity. The director was thus precluded from being able to determine whether the beneficiary and his subordinates had and currently have job duties that correspond with their positions within the foreign and U.S. entities' respective organizations.

The petitioner, through counsel, files an appeal and submits a brief disputing the director's decision. Upon review, and for the reasons stated below, the petitioner has failed to establish that the beneficiary was employed abroad would be employed in the United States in a primarily managerial or executive capacity.

### III. THE ISSUES ON APPEAL

As indicated above, the two primary issues to be addressed in this proceeding are whether the beneficiary was employed abroad and whether he would be employed in the United States in a qualifying managerial or executive capacity.

#### A. Qualifying Employment in the United States

When examining the executive or managerial capacity of the beneficiary, we 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.* 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). Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (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 may contribute to a complete understanding of a beneficiary's actual duties and role in a business.

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 operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages 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").

In the instant matter, the HR manager's account of the beneficiary's responsibilities is overly broad and does not convey a meaningful understanding of the actual job duties the beneficiary would perform on a daily basis. Namely, the petitioner did not specify what actual tasks are involved in overseeing the formulation of engineering objectives and strategies, managing risk analysis, directing design activities, or developing and implementing action plans, processes, and procedures to improve design performance. While the items listed, as well as the beneficiary's management of a subordinate staff, convey a sense of the beneficiary's authority and control as the project engineering lead, the record lacks sufficient information about the actual tasks the beneficiary would carry out in an effort to meet these broad job responsibilities.

In addition, the petitioner relies heavily on the beneficiary's oversight of a subordinate staff who the petitioner and counsel both claim is comprised of professional engineers and two supervisory employees. However, the petitioner did not substantiate this claim by providing requested evidence, including an organizational chart,

which would clarify the positions of the beneficiary and his subordinates within the petitioner's organizational hierarchy and establish whether the beneficiary's subordinates with supervisory position titles are truly supervisors with subordinates of their own. Information about the petitioner's organizational hierarchy and the beneficiary's placement therein is highly relevant, as it provides a context and scope within which the beneficiary's position and corresponding job duties can be assessed. Thus, failing to provide this valuable evidence impedes our ability to perform a comprehensive analysis of the factors that contribute to the petitioner's eligibility.

The petitioner also failed to provide job descriptions for any of the beneficiary's subordinates or describe their respective job requirements, which may explain why two of the five project engineers whom the beneficiary manages do not have baccalaureate degrees that three of the engineers possess. Although counsel objected to portions of the RFE, claiming that disclosing confidential information about employees would be in violation of the petitioner's internal policies and obligations to its employees, we note that the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Thus, regardless of company policies or obligations the petitioner has towards its employees, the petitioner's 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). Here, the petitioner's claim – that the beneficiary is employed in a managerial capacity – is largely based on the assertion that the beneficiary would oversee a staff of professional and supervisory employees. However, whether these employees occupy positions that can be deemed professional or supervisory must be determined by their respective job requirements, the job duties they perform, and evidence of the educational credentials they've attained, rather than their position titles. Given that the petitioner failed to provide information about the beneficiary's subordinates, other than stating their educational credentials and position titles, it cannot be concluded that they are professional employees. The very fact that only some of the subordinate employees with the term "engineer" in their position title actually possess baccalaureate degrees indicates that the baccalaureate degree may not be a requirement for these subordinate positions. Given that the petitioner failed to provide a description of the job requirements for the engineering positions that are subordinate to the beneficiary, we are unable to make an affirmative determination regarding the professional nature of these positions in order to conclude that the beneficiary's proposed employment would involve managing professional employees.

We further note that the petitioner failed to establish that the beneficiary's two other subordinates – the program manager and lab supervisor – are actually supervisory employees as their position titles suggest. As the petitioner failed to provide an organizational chart depicting the staffing hierarchy within the beneficiary's department, it is unclear whether the program manager and lab supervisor have subordinates of their own such that they can be deemed as the beneficiary's supervisory subordinates. Alternatively, while the petitioner indicated that the lab supervisor is a certified engineer, it is unclear what educational credentials are required for such a certification such that he/she can be deemed to be a professional employee, regardless of whether the lab supervisor has subordinate employees. Similarly, the petitioner's claim that the beneficiary assumes "a senior role" with respect to the petitioner's design operation cannot be verified, given the petitioner's failure to provide an organizational chart depicting the staffing structure of the petitioning organization.

On appeal, counsel contends that the director's decision is erroneous, asserting that the petitioner's HR manager's statement was "unambiguous" in terms of describing the roles of the beneficiary and his subordinates. However, the above discussion indicates that there is sufficient ambiguity surrounding the

beneficiary's position such that precludes us from being able to affirmatively conclude that the beneficiary would be employed in a qualifying managerial capacity as claimed. As previously noted, the petitioner provided a deficient job description that lacked an account of the beneficiary's specific day-to-day tasks and it failed to provide sufficient evidence pertaining to its staffing hierarchy and the beneficiary's subordinates such that would demonstrate that the beneficiary manages a staff of managerial, supervisory, or professional employees. As indicated above, the petitioner cannot rely primarily on position titles as the primary means of establishing that an employee occupies a position that is professional or supervisory.

Lastly, counsel's assertion that the beneficiary assumes the role of a function manager is not persuasive in light of the petitioner's competing claim that the beneficiary simultaneously oversees the work of professional and supervisory employees. 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)). Thus, while some indirect employee oversight may be required of a function manager to the extent that he/she coordinates and oversees the activities of employees who carry out the underlying job duties of the essential function, personnel management is not the function manager's primary purpose. Furthermore, given the petitioner's submission of a deficient job description, the petitioner failed to specify which of the beneficiary's daily job duties are indicative of managing an essential function.

In light of the deficiencies discussed above, the petitioner has failed to establish that the beneficiary would assume the role of either a personnel or a function manager. Therefore, we cannot affirmatively conclude that the beneficiary would be employed in the United States in a qualifying managerial capacity

#### B. Qualifying Employment Abroad

The other issue to be addressed in this proceeding is the beneficiary's managerial or executive capacity during his employment with the petitioner's affiliate in Mexico.

Similar to the analysis of the beneficiary's proposed employment with the petitioning entity, our initial focus in this discussion is on the beneficiary's job duties with the foreign entity. The job description that was included in the foreign entity's HR manager's statement, dated January 28, 2014, contains a list of broad job responsibilities similar to the list provided with regard to the beneficiary's proposed employment. Both lists are similarly deficient in their lack of a detailed account of the beneficiary's specific daily tasks. Namely,

while the foreign HR manager broadly stated that the beneficiary was in charge of formulating engineering objectives and strategies, development and hardware design, conceptual work and analytical studies, and risk analysis, he failed to specify actual daily tasks associated with these broad categories.

In addition, while the HR manager stated that the beneficiary "managed and coordinated the work of between two (2) and five (5) electrical engineers" who he claimed were degreed professionals, he provided no information identifying the tasks they performed, the specific degrees they held, or the specific requirements of their respective positions. The petitioner also failed to provide an organizational chart illustrating the beneficiary's position and the positions of his subordinates within the foreign entity's organizational hierarchy. In addition, while the HR manager's claim – that the beneficiary was "managerially accountable for the success and profitability of hardware design" of the foreign entity's products – indicates that the beneficiary assumed a significant role within the organization, the claim fails to establish that the beneficiary allocated his time primarily to the performance of qualifying managerial tasks. As indicated above, in order to make such a determination, we look for a detailed job description and corresponding illustration of the beneficiary's placement within the foreign entity's organizational hierarchy. Given the petitioner's failure to provide the necessary supporting evidence, the record lacks a sufficient basis upon which to conclude that the beneficiary was employed abroad in a qualifying managerial capacity. While counsel objects to the director's findings, asserting that sufficient evidence has been submitted in support of the petition, counsel's disagreement with the director's reasoning is not sufficient to overcome the adverse findings. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Lastly, we do not find that the director raised the petitioner's burden of proof by requesting the submission of a detailed job description, which is an express regulatory requirement, or evidence of the foreign entity's staffing as it pertained directly to the beneficiary's former employment. Both elements are highly relevant and often necessary in order to gain an understanding of the nature of the duties the beneficiary performed and to distinguish the beneficiary's role in what is alleged to have been a managerial capacity from the role of subordinates and other employees tasked with carrying out the foreign entity's daily operational tasks. In light of the petitioner's failure to provide the necessary supporting evidence, we cannot conclude that the beneficiary was more likely than not employed in a managerial or executive capacity during his employment abroad and on the basis of this second adverse conclusion the instant petition must be denied.

#### IV. 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.