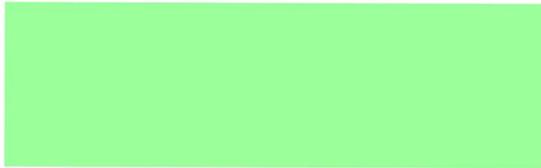
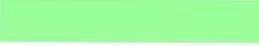


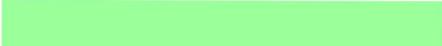


U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **JAN 15 2015** 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 a Form I-129, Petition for a Nonimmigrant Worker, 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, an Oregon corporation established in [REDACTED] states that it develops and sells video surveillance software. The petitioner indicates that it is a wholly owned subsidiary of [REDACTED] located in Denmark. The petitioner seeks to employ the beneficiary as a business development manager for a period of three years.

The director denied the petition, finding the petitioner did not establish that the beneficiary is employed in a qualifying managerial or executive capacity with the foreign employer. Further, the director concluded that the petitioner did not demonstrate that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States.

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, the petitioner contends that the director has misunderstood and misinterpreted the nature of the beneficiary current employment with the foreign entity and his proposed employment capacity in the United States.

#### 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(1)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker (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 (1)(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. MANAGERIAL OR EXECUTIVE CAPACITY (FOREIGN EMPLOYMENT)

The first issue to be addressed is whether the petitioner has established that the beneficiary is employed in a managerial or executive capacity with the foreign employer.

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.

#### A. Facts

The petitioner filed the Form I-129 on May 20, 2014. The petitioner states that the foreign entity "is a world-leading provider of open platform IP video management software." The petitioner indicated that the foreign entity has fifteen international offices, that it employs over 350 employees worldwide, and that it earned over \$55 million in revenue during 2012.

The petitioner provided a support letter from the foreign entity stating that the beneficiary has acted as the "manager, business development for the [REDACTED]" from 2013 to the present. The foreign entity indicated that [REDACTED] is "a video surveillance platform designed to be embedded into hardware devices." It explained that the beneficiary "develops and manages the global business development activities for [REDACTED] embedded solutions," and that he "coordinates with partners, aligns with [foreign entity] sales management and aligns with field sales personnel to drive the sales of embedded [REDACTED] products." The foreign entity stated that the beneficiary was previously employed as a business analyst/developer from 2011 through 2013, and that in this role he provided detailed insight into the dynamics of the key companies in the industry and educated the organization on [REDACTED]. The petitioner indicated that there were "managerial aspects" to this former position, noting that the beneficiary facilitated and drove business development strategy and processes, ensured the alignment of business units, and that he was available to higher level executives for special projects.

The foreign entity explained that the [REDACTED] product accounted for approximately \$144,000 in revenue during 2013 and that it was projected to produce over \$1 million in revenue in 2014, an increase in projected sales resulting from the beneficiary's management of this product line. It also submitted a list of "primary responsibilities" for the beneficiary indicating that he is responsible for reaching [REDACTED] revenue targets, driving business development of [REDACTED] products in the global marketplace, influencing [REDACTED] products and services based on market place knowledge and understanding, and achieving annual sales and quota targets by "evangelizing and directing [foreign entity] go-to market resources." Further, the foreign entity described the beneficiary's current duties as follows:

- Relationship management of existing [foreign entity] [REDACTED] partners (main focus on US, but also globally) to establish commercial partnership success. 15%

- Coordinate joint marketing opportunities with [redacted] partners – collaborate with [foreign entity] (Incubation) product marketing. 10%
- Coordinate, create, and execute on joint opportunities with [foreign entity] internal stakeholders. 5%
- Provide internal and external presentations and demonstration of products and business models. 15%
- Prepare legal reviews and modifications of [foreign entity] [redacted] partnership contracts. 5%
- Participate in industry relevant tradeshows and events to build or grow [redacted] business. 5%
- Analyze financial aspects of [foreign entity] revenue performance and opportunity pipeline. 10%
- Prepare management and executive-level presentations. 10%
- Collect and share [redacted] competitor market data. 5%
- Collaborate with product management and product marketing to elicit partner specific requirements and opportunities. 10%
- Prepare business cases for existing and new initiatives. 5%
- Provide ad hoc business support for Incubation management team. 5%

The foreign entity further noted that the beneficiary does not supervise others, but that "the higher-level and managerial nature of his positions is evident in the team members with whom he works to perform his responsibilities." The petitioner submitted a list of twenty five executives, managers, and professionals he coordinates with and indicated that this interaction reflects "the key function for which the positions is [sic] responsible, as well as the managerial nature of the job." The petitioner provided a matrix of specific decisions made by the beneficiary, including deciding to change the business model to allow companies to sell the combined products via [redacted] sales channels, proposing to foreign entity management the engagement of [redacted] as partners, and deciding to establish a joint steering committee for the ramp up of another partner.

The petitioner also submitted a "Contract of Employment" between the beneficiary and the foreign entity dated July 1, 2013 reflecting the beneficiary's employment as a "business developer." Further, the petitioner provided another employment contract dated January 1, 2011 indicating that the beneficiary had been formerly employed as a "business analyst" with the company as of that date. The petitioner submitted a foreign organizational chart reflecting that the beneficiary works in the [redacted] department reporting to a manager overseeing that component. The chart identifies the beneficiary as a "business developer" and also indicates that he works alongside a "manager, multi-platform business" within the [redacted] department.

In addition, the petitioner provided the beneficiary's year-end performance appraisal from 2013 listing some of his day-to-day duties in his role as "business developer." The review indicated that the beneficiary's "leads start[ed] to be turned into new partnerships," that he would "message the [redacted] statements to internal field sales/stakeholders," and that he provided "overall business support for marketing/events, licensing, etc." The review listed three main objectives for the beneficiary, including "structure and mature lead

pipeline," "existing partnership satisfaction and commercial ramp," and "overall business support for management." The performance review further reflected "supporting activities" the beneficiary performed in pursuit of the aforementioned objectives, consisting of "answering mails/providing information," "weekly interaction with all partners," "push for performance and communicate on builds," and "ad hoc support to ensure business success."

The director later issued a request for evidence (RFE) indicating that the evidence submitted by the petitioner was insufficient to establish that the beneficiary acts in a qualifying managerial capacity. The director requested that the petitioner describe the managerial decisions made by the beneficiary, including how the beneficiary managed his function, how he functioned at a senior level within the foreign entity's organizational hierarchy, how he directed the management of the organization, established goals and policies, exercised wide latitude and/or whether he only received supervision from higher level executives.

In response, the petitioner pointed to the evidence submitted in support of the petition, asserting that it had already provided all the necessary detail regarding the scope of the beneficiary's duties and decisions. The petitioner reiterated that the beneficiary was responsible for the "development and management of [the foreign entity's] global business development for its line, and so the very nature of the position and its goal reflects its importance to the company, and the managerial aspects of it." The petitioner explained that the beneficiary interacts with executive, managerial and other senior personnel, thus indicating that the beneficiary functions at a senior level within the company.

In denying the petition, the director found that the description of the beneficiary's foreign duties reflected that he was an employee primarily performing tasks consistent with the direct provision of goods and services. The director pointed to the beneficiary's lack of subordinates and concluded that the evidence supports a finding that he is more likely than not primarily performing non-managerial duties.

On appeal, the petitioner contends that the director incorrectly focused on only a few of the beneficiary's duties and failed to understand the beneficiary's position in its totality. The petitioner states that the beneficiary is not responsible for the provision of the goods and services, but for the continuous development and execution of a global commercial strategy for the company's software product. The petitioner asserts that the director's RFE was too general and failed to specifically articulate deficiencies in the submitted evidence. The petitioner states that the petitioner has established with a preponderance of the evidence that the beneficiary is primarily engaged in performing qualifying managerial duties pursuant to his oversight of an essential function of the organization. The petitioner again notes that the beneficiary's interaction with executive and managerial colleagues indicates that he acts at a senior level within the organization. The petitioner explains that the foreign entity has hundreds of employees, including operational level employees to relieve the beneficiary from performing non-managerial duties associated with the function he manages.

Further, the petitioner submits an additional support letter from the foreign entity's "vice president, incubation & ventures," in which he states "the beneficiary does not perform daily non-managerial tasks" and that he is supported by a network of administrative personnel who handle day-to-day tasks, including "preparing presentations, analyzing data, obtaining background materials, contacting business partners and

customers, preparing documents, making phone calls, and similar activities." In addition, the petitioner provides the names and job titles of eighteen employees with the foreign entity and claims they perform these day-to-day support tasks for the beneficiary.

#### B. Analysis

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

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(1)(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).

Beyond the required description of the job duties, United States Citizenship and Immigration Service (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company'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 business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

The petitioner consistently asserts that the beneficiary, who has no subordinates, qualifies as a function manager through his oversight of the development and sale of the foreign entity's software product. 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 detailed position description that explains the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(1)(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 the present matter, the petitioner has submitted duty descriptions reflecting that the beneficiary has been primarily engaged in the performance of non-managerial duties. The beneficiary's position description indicates that he performs a significant number of duties which do not fall directly under traditional managerial or executive duties as defined in the statute, including providing presentations and demonstrations of products and business models, preparing legal reviews of partnership contracts, participating in tradeshows and events, analyzing financial performance, collecting competitor data, preparing business cases for existing and new initiatives, and providing ad hoc business support. Contrary to the petitioner's assertions on appeal, these duties do not represent only a few of the beneficiary's tasks, but at least half of his responsibilities, thereby leaving question as to whether the beneficiary is primarily engaged in qualifying managerial tasks. 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'r 1988).

On appeal, the petitioner states that the beneficiary is relieved from performing these tasks by various administrative support personnel within the foreign entity's organizational hierarchy and that the beneficiary is wholly devoted to managerial tasks. However, this assertion runs counter to the petitioner's previous assertions which indicated that the beneficiary is significantly engaged in non-qualifying tasks. Further, the petitioner has not provided supporting evidence to substantiate the assertion that the beneficiary is relieved from performing non-qualifying tasks by supporting administrative personnel. 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)). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Beyond the petitioner's description of the beneficiary's duties, other evidence in the record further supports a conclusion that the beneficiary is not primarily engaged in qualifying managerial tasks. For instance, the foreign entity organizational chart indicates that the beneficiary reports to a manager of the Arcus product line, thereby suggesting that the beneficiary does not have discretionary authority over, nor that he is the most senior member of, this function or component of the business.

Furthermore, the petitioner contends that the beneficiary was promoted to the position of business development manager for the [REDACTED] platform in 2013 from his former position as a "business analyst/developer" from 2011 through 2013. However, in contradiction, the petitioner submits employment agreements reflecting that the beneficiary was initially hired as a business analyst in January 2011, and was offered the position of business developer in the "Multiplatform Business" team as of July 2013. The petitioner has not submitted any supporting documentation that identifies the beneficiary as a business development manager, nor has it specifically articulated when in 2013 he was promoted to the claimed managerial position. In fact, the petitioner submitted a year-end performance review for 2013 and the beneficiary's pay statements for the first four months of 2014 which identify his position title as "business developer." These discrepancies leave question as whether the beneficiary has acted in a qualifying

managerial capacity for the last year as asserted. *See* 8 C.F.R. § 214.2(l)(3)(iv). 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).

In addition, the petitioner provides specific examples of decisions made by the beneficiary reflecting that he does not have the required discretionary authority over his claimed essential function. The beneficiary's specific decisions include "proposing to foreign entity management" partnerships with certain vendors. However, these examples do not demonstrate that the beneficiary is negotiating these partnerships independently or that he has discretionary authority over the [REDACTED] platform. Indeed, the beneficiary's duty description states that he does not negotiate contracts with these parties, but merely provides legal mark-ups for management review. In addition, the beneficiary's 2013 performance appraisal reflects that he is performing duties more consistent with an experienced sales professional rather than a senior manager overseeing an essential function. The beneficiary's appraisal states that he is engaged in various non-qualifying operational duties, including generating leads for partnerships, drafting internal messaging on the [REDACTED] product, attending marketing events, attending to partner satisfaction, monitoring the ramp up of the [REDACTED] product, and providing support to [REDACTED] management. The petitioner also asserts that the beneficiary's interaction with executive and managerial level employees within the organization is suggestive of the essential managerial nature of his position. However, mere interaction with managers and executives does not qualify an employee as a function manager.

In the present matter, the petitioner has submitted insufficient and contradictory evidence that fails to demonstrate that the beneficiary is primarily engaged in the management of an essential function. The petitioner has provided no supporting evidence of the beneficiary's performance of his asserted qualifying tasks such as evidence of his independent establishment of key partnerships or his direction of development and marketing efforts for the [REDACTED] product line. In fact, the evidence submitted indicates that the beneficiary is primarily taking direction from other managers, responding to their goals, sales quotas, direction, and collecting data and information for the benefit of their decisions. The petitioner has provided little or no evidence to corroborate that the beneficiary is independently responsible for setting goals and policies or for making senior level decisions with respect to the [REDACTED] product line. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). While we do not doubt that the beneficiary provides critical business support and services with respect to the [REDACTED] product, the record does not support that a finding that he qualifies as a function manager.

For the foregoing reasons, the petitioner has not established that the beneficiary is employed in a qualifying managerial capacity with the foreign entity. For this reason, the appeal will be dismissed.

#### B. MANAGERIAL OR EXECUTIVE CAPACITY (UNITED STATES EMPLOYMENT)

The next issue to be addressed is whether the petitioner has demonstrated that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States.

1. Facts

The petitioner states that the beneficiary's position in the United States will be identical to his current position with the foreign entity. The petitioner provides the same duties for the beneficiary's proposed U.S. employment as were submitted for his current foreign employment. In response to the director's RFE, the petitioner's stated "the position in Denmark is essentially the same position as the one offered in the U.S." and indicated that the same assertions with respect to the foreign position apply to the proposed U.S. employment. The only asserted difference between the foreign and U.S. employment is that the beneficiary will report to a manager of business development and operations in the United States.

2. Analysis

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, we 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).

Beyond the required description of the job duties, United States Citizenship and Immigration Service (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company'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 business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

The petitioner has provided an identical duty description and responsibilities relevant to the beneficiary's proposed employment in the United States. Therefore, consistent with the analysis already provided in the previous section, the petitioner has not established that the beneficiary will act as a function manager in the United States. As stated, the beneficiary's proposed duties reflect that he will devote at least of his time to non-qualifying operational duties. Further, the petitioner has submitted no evidence to overcome the presumption that the beneficiary will act in an identical non-qualifying capacity in the United States. As previously discussed, the evidence specific to the beneficiary's foreign employment indicates that he has been, and therefore likely will continue to be, engaged in the primary performance of duties consistent with a sales or business development professional without significant discretionary authority over the asserted product line. In sum, the petitioner has provided insufficient supporting evidence to substantiate that the beneficiary will primarily perform qualifying managerial duties. 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'r 1988).

Although the petitioner provides various qualifying duties for the beneficiary in his proposed U.S. employment, it fails to provide specifics or supporting documentation to support that the beneficiary will primarily perform these duties. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

On appeal, the petitioner primarily asserts that the beneficiary qualifies as a function manager. As noted, 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 petitioner has not demonstrated that the beneficiary will act as a function manager. As previously discussed, the beneficiary's duty description indicates that he will likely be primarily engaged in the performance of non-qualifying operational duties. Indeed, the petitioner has modified the beneficiary's employment on appeal to reflect that he is not responsible for various administrative tasks previously set forth on the record. Again, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The petitioner has not submitted evidence to substantiate that the beneficiary will be relieved from performing non-qualifying tasks by direct or indirect subordinates or administrative staff. As indicated above, 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).

For the foregoing reasons, the record does not support a finding that the beneficiary will be employed in a qualifying managerial capacity with the petitioner. For this reason, the appeal will be dismissed.

### III. CONCLUSION

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, 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.