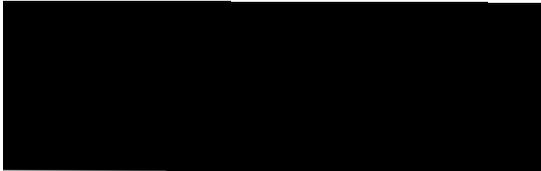




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Office: TEXAS SERVICE CENTER Date: APR 24 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

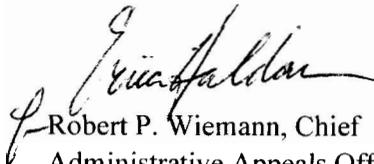
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant visa petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a non-profit corporation organized under the laws of the State of California that is operating as an interdenominational mission that records and distributes Christian audio recordings. The petitioner seeks to employ the beneficiary as its audio quality manager.

The director denied the petition concluding that the petitioner had not demonstrated that: (1) the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity; (2) the beneficiary had been employed abroad by a qualifying organization in a primarily managerial or executive capacity; (3) at the time of filing the petition, the petitioner enjoyed a qualifying relationship with a foreign organization with which the beneficiary was employed overseas; or (4) the petitioner had the ability to pay the beneficiary his proffered annual salary of \$39,000.

On appeal, the petitioner attempts to clarify the beneficiary's eligibility for the requested immigrant visa petition. The petitioner submits a lengthy letter and documentary evidence in support of the appeal.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. – An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives or managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The first issue in the instant proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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), provides:

The term "executive capacity" means 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-140 on November 29, 2005 noting the beneficiary's proposed employment as its audio quality manager. In an appended letter, dated November 22, 2005, the petitioner explained its role in making audio recordings which involved digitally remastering its library of over 10,000 recordings on to compact disc or the internet. The petitioner addressed the beneficiary's role with respect to this process, explaining:

[The beneficiary] will head up a team composed of 3 other full[-]time technicians and several volunteers. He will provide training and organizational structure so that the task can be done. He will then oversee the ongoing work and ensure that the highest practical quality standards are maintained.

[The beneficiary] will give the volunteers basic training to initially work with the recordings and complete those that are simple to remaster, and to be able to identify those requiring special attention. He will help improve the skills of the three technicians as they work on the more difficult recordings. [The beneficiary] will himself work on the most challenging recordings. By being present in our office (instead of in Egypt), [the beneficiary] can oversee the entire project from initial digitizing to the final production of digital media.

Even [w]hen this remastering project is finished, there will still be much work to do as [the beneficiary] will continue to oversee the quality control of new recordings. Trainee recordists often make mistakes that he will be able to detect and provide correctional training. As an exceptional linguist and communicator between the English and Arabic languages, [the beneficiary] will also be able to provide much needed guidance as our organization increases its involvement in the Arab world.

On April 26, 2006, the director issued a request for evidence directing the petitioner to submit a "definitive statement" describing the beneficiary's employment in the United States entity, including: (1) the beneficiary's title; (2) a list of the duties performed by the beneficiary and the percentage of time devoted to each; (3) the managers, supervisors or subordinate employees reporting directly to the beneficiary, and a brief description of each subordinate's position and educational background; (4) the date that the beneficiary began employment with the petitioner; (5) the qualifications required to perform in the beneficiary's proposed position; (6) whether the beneficiary functions at a senior level in the organization, and specification of the beneficiary's position in the organizational hierarchy; and (7) who provides the sales or services of the petitioning organization. The director also requested an organizational chart of the petitioning entity.

The petitioner responded in a letter dated June 12, 2006, outlining the following job responsibilities held by the beneficiary:

1. [The beneficiary] reviews the work of field recordists, foreign technicians and USA office staff, noting mistakes or substandard quality;
2. [The beneficiary] seeks to resolve these problems;
3. [The beneficiary] provides correctional training when necessary to prevent their reoccurrence;
4. [The beneficiary] also manages the quality control of the digitizing process, to ensure the most accurate transfer of our analog audio recordings;
5. In addition he ensures the correct performance of equipment and adherence to procedures; and
6. Functionality of [a]udio CDs which are produced in our office.

The petitioner noted that the amount of time devoted by the beneficiary to each task would vary according to the particular project. The petitioner submitted a list of personnel, including supervisors, technicians and

workers that would be supervised by the beneficiary, as well as a corresponding organizational chart identifying the beneficiary as supervising the petitioner's digitizing, mastering, and production departments. The AAO notes that several of the beneficiary's subordinate workers are identified as occupying dual positions in different departments, while approximately fifteen of the named lower-level operators and technicians are not identified on the petitioner's quarterly wage report ending December 31, 2005, the period during which the instant petition was filed. The record does not suggest that these individuals are volunteers of the company, as the petitioner has specifically identified other workers in the category of volunteer. 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).

The petitioner further provided a list of the beneficiary's qualifications for the position of audio quality manager, and copies of letters addressing his past work experience.

In a decision dated August 4, 2006, the director denied the petition concluding that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director noted the limited statements offered by the petitioner with respect to the beneficiary's proposed employment, stating that "[Citizenship and Immigration Services (CIS)] is unable to determine from the petitioner's statement whether the beneficiary will *primarily* [perform] managerial or executive duties or whether the beneficiary will be primarily performing the actual productive and administrative tasks associated within [sic] the operation." (Emphasis in original). The director stated that the petitioner had not clarified whether the beneficiary's subordinates are occupying professional or managerial positions, or whether the beneficiary would be forming the policies, goals and procedures of the organization. Consequently, the director denied the petition.

The petitioner filed a timely appeal on September 5, 2006, acknowledging that its initial filing did not clearly address the beneficiary's eligibility for the requested immigrant visa classification. In a subsequently submitted letter, dated September 26, 2006, the petitioner addressed the beneficiary's proposed employment as the company's audio quality manager, stating that the beneficiary would "spend all of his time in the [s]ound [s]tudio," performing the following "senior level managerial" job duties:

1. 40% of [the beneficiary's] time is spent developing new audio *policies and procedures*, discussing technical issues with supervisors locally and overseas, giving advanced training to on and off[-]site audio workers, being involved in *managerial meetings, planning* for our new studio, and troubleshooting processes.
2. For 35% of his time, [the beneficiary] performs [q]uality [m]anagement work: *technically analyzing and reviewing* 'Master audio files,' 'Digitized from analog' audio files, coming from his subordinate managers, done by all other audio workers in our office and in other centers and bases around the world. He notes mistakes and substandard quality, and requests revision of the work of other subordinate supervisors when necessary. This should be viewed in the same light as an *executive reviewing reports of his subordinate managers, and supervising and controlling their work*.

By the time an audio file has reached the desk of [the beneficiary], it will have passed through no less than three other technical worker's levels, often as many as 6 or 7 workers. His assessment of the master recording is a reflection on the quality and efficiency of the entire worldwide [a]udio process, and it is his responsibility to keep things running correctly, working at the highest senior level in his field within our organization.

3. 25% of his time [the beneficiary] spends on *senior level audio restoration, noise reduction* and corrective editing of challenging damaged recordings.

(Emphasis in original).

The petitioner explained that its approximately 100 field recordists, its center audio technicians, and its operators, technicians and workers for cassettes, compact discs, and mp3 would perform the day-to-day work of the organization.

The petitioner addressed four areas that "closely relate to [the beneficiary's] managerial work" – program mastering, cassette production, compact disc production, and mp3 production – and explained the beneficiary's role in each. With respect to the program mastering, compact disc and mp3 production, the beneficiary is identified as personally performing some of the related day-to-day tasks, depending on the quality of the programs being reproduced and the difficulty in the production.

In support of the appeal, the petitioner resubmitted the petitioner's organizational chart, specifically identifying the beneficiary's direct subordinates, and briefly describing the job responsibilities of each. The petitioner also provided copies of: the beneficiary's curriculum vitae; a March 14, 2005 letter from the petitioner inviting the beneficiary to visit the petitioning entity for Christian conferences and training; and, e-mails between the beneficiary and audio technicians, supervisors, and managers located in various foreign countries.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity 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. § 204.5(j)(5).

The petitioner has not presented a clear and consistent depiction of the beneficiary's proposed employment as audio quality manager that would support a finding that the beneficiary would be employed in a primarily managerial or executive capacity. The AAO emphasizes the petitioner's obligation to demonstrate the beneficiary's employment in a primarily managerial or executive capacity at the time of filing the immigrant visa petition. A petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Nor can a visa petition be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In the present matter, the initial job description offered by the petitioner in its November 22, 2005 letter does not comport with the petitioner's subsequent representations of the beneficiary's employment. Specifically, the petitioner originally explained that the beneficiary would train and oversee the work of three audio technicians and volunteers, assist in "improv[ing] the skills of the three technicians," and personally perform "the most challenging recordings." However, in response to the director's request for evidence and on appeal, the petitioner appears to expand the beneficiary's purported managerial role in the petitioning entity, identifying the beneficiary as managing approximately thirty workers, including supervisors, operators, technicians, and recordists, as well as numerous unnamed volunteers. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

Similarly, the vague and broadly-cast job descriptions submitted by the petitioner in its subsequent two responses fail to clarify the original position offered to the beneficiary as primarily managerial or executive in nature. The petitioner's June 12, 2006 letter outlined such limited job responsibilities as: reviewing the work of subordinates and noting mistakes; resolving mistakes and "substandard quality"; providing "correctional training"; "manag[ing] the quality control of the digitizing process"; and ensuring the proper function of equipment. The petitioner has not documented why these responsibilities, particularly the tasks of identifying mistakes and substandard quality in audio recordings, training subordinates, or checking equipment should be considered managerial or executive in nature. *See* §§ 101(a)(44)(A) and (B) of the Act. With respect to the beneficiary's purported management of quality control in the digitizing process, the petitioner neglected to expound on the associated day-to-day managerial or executive tasks or how the beneficiary would perform in a primarily managerial or executive capacity. The actual duties themselves 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).

Likewise, the petitioner's appellate brief listed such generalized job responsibilities as developing audio policies and procedures, addressing "technical issues," participating in managerial meetings, troubleshooting, analyzing and reviewing audio files, and performing "senior level audio restoration, noise reduction, and corrective editing." 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 answer a critical question in this case: What will the beneficiary primarily do on a daily basis? *See id.* at 1108. 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. *Id.*

The additional documentary evidence submitted by the petitioner on appeal is not indicative of the beneficiary's claimed employment in a primarily managerial or executive capacity at the time of filing the Form I-140. The petitioner's points to copies of messages sent between the beneficiary and technicians, supervisors or managers via electronic mail as evidence of the beneficiary's managerial role. Of the eleven e-mails offered by the petitioner, one was written during 2005, the year during which the petition was filed.

The rest were drafted during 2006 and are not representative of the capacity in which the beneficiary would be employed at the time of filing. The August 8, 2005 e-mail discusses the beneficiary's role in choosing music equipment and designing the petitioner's music studio project, which, as noted above, do not appear to be managerial or executive in nature. See §§ 101(a)(44)(A) and (B) of the Act. Additionally, a September 4, 2006 e-mail from the petitioner's operations director addresses his intent to modify the beneficiary's duties to include "processing recordings" and to give [the beneficiary] much freedom to direct the work of [the company's] other technicians," thus suggesting that the beneficiary may have been entrusted with managerial authority following his first year of employment with the petitioner but did not occupy a primarily managerial or executive position on the date of filing. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO again notes the unresolved inconsistencies in the staff claimed to be employed subordinate to the beneficiary at the time of filing. Several of the beneficiary's subordinate workers are identified as occupying dual positions in different departments, and approximately fifteen of the named operators and technicians in the three departments are not identified on the petitioner's quarterly wage report for December 31, 2005. The petitioner has not addressed what appears to be a deficiency in the beneficiary's support staff, or clarified who would perform the non-qualifying tasks of producing the recordings. Accordingly, the petitioner's claim that the beneficiary would spend only 25 percent of his time on "senior level audio restoration, noise reduction, and corrective editing," is questionable. 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). The AAO notes that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The second issue in this proceeding is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

In its November 22, 2005 letter submitted with the Form I-140, the petitioner provided the following account of the beneficiary's foreign employment prior to his entrance into the United States on July 19, 2005 as a nonimmigrant:

On August 13, 2004, [the beneficiary] had an initial interview in Egypt with [redacted] who directs our affairs in North Africa and the Middle East. [The beneficiary] had qualifications far beyond any of our existing audio technicians and showed high potential for becoming our [a]udio [q]uality [m]anager. The following day, August 14th, he began work with [sic] as an audio technician. On October 11th he had completed the introductory phase of our work, and moved into the role of [a]udio [q]uality [s]upervisor. He

downloaded audio files, identified and fixed the problems, and wrote how to avoid the problem in the future.

The petitioner recognized that the beneficiary worked abroad for the petitioning entity for only eleven months prior to his entrance into the United States as a nonimmigrant, and stated that "only 9 months would be counted if the date of his effective managerial role was used." In an attempt to demonstrate the beneficiary's "high value for the [petitioning] organization," the petitioner submitted a description of the beneficiary's involvement as a music director with a Presbyterian church in Cairo, Egypt and his work as a senior editor proofing Arabic translations prior to his employment as an audio quality technician for the petitioner.

In the request for evidence, the director asked that the petitioner submit a "definitive statement" describing the beneficiary's foreign employment, including: (1) the beneficiary's title; (2) a list of the duties performed by the beneficiary and the percentage of time devoted to each; (3) the managers, supervisors or subordinate employees who reported directly to the beneficiary, and a brief description of each subordinate's position and educational background; (4) the date on which the beneficiary's foreign employment began and ended; (5) the qualifications required to perform in the beneficiary's position abroad; (6) whether the beneficiary functioned at a senior level in the organization, and specification of the beneficiary's position in the organizational hierarchy; and (7) who provided the sales or services of the foreign business. The director also requested an organizational chart of the foreign organization and copies of its years 2003 through 2006 payroll records.

In its June 12, 2006 response, the petitioner stated that the beneficiary was not employed by a foreign entity, as one did not and does not exist. The petitioner explained that the network to which it belongs "is a formal fellowship of 23 international, fully recognized and incorporated [c]enters" that exist to share Christian audio recordings. The petitioner noted, in particular, its "Ishmael Project," intended to expand its involvement in the Islamic world, and stated that the beneficiary had been chosen in August 2004 for his ability to assist with the project as well as the projects of the United States entity. The petitioner explained: "Through nothing more than email and secure internet file transfers, [the beneficiary] was able to begin work in the vital function of [a]udio [q]uality [m]anager . . . while maintaining residency in Egypt. . ." The petitioner conceded that it "in effect contracted [the beneficiary's] self-employed business in Egypt for full-time work through our USA center." The petitioner submitted copies of payroll receipts evidencing payments made to the beneficiary from the petitioner beginning on October 21, 2004 and continuing intermittently through his transfer to the United States.

As additional evidence, the petitioner offered copies of letters from unrelated organizations, including churches, a seminary, and a foreign business, addressing the beneficiary's work in translating and restoring audio, text, and films. In these letters, the beneficiary is referenced as a private contractor and as being paid on a fee for service basis.

In her August 4, 2006 decision, the director noted that the petitioner neglected to submit "a broadened description of the beneficiary's foreign assignment and its related duties." Noting that the petitioner does not have a foreign subsidiary or affiliate, the director concluded that the petitioner had failed to demonstrate "that the beneficiary has been employed abroad in the three years immediately preceding the filing of the petitioner for at least one year in a managerial or executive capacity." Accordingly, the director denied the petition.

In its appellate brief, the petitioner provided the following explanation of the beneficiary foreign employment in a purported managerial or executive capacity:

When [the beneficiary] entered the work we already had a fair collection of bad recordings that no [c]enter [t]echnician could properly deal with. We promptly sent these to [the beneficiary] for his analysis, correction and explanation as to how to avoid this kind of trouble again. At this point one could reasonable [sic] argue that he was not performing 'managerial' work since a large percentage of his time was spent repairing otherwise unusable recordings. The [d]enial [l]etter states, "A manager or executive need not supervise any employees as long as he or she functions at a senior level within the organizational hierarchy or with respect to the function managed." What could be more true of [the beneficiary], than being at a senior level of the organizational hierarchy! As the final authority in audio quality for our entire global recordings digital archive he effectively occupied the most prominent position possible within this field which involves nearly 100 individuals. Yet to say that he did not supervise any individuals is not correct since he did provide direct corrective instruction to our USA [c]enter [t]echnicians that filtered down to the individual field recordists. His direct link to our server gave him access to all our audio files and allowed him to begin the refinement of our digital archive and set in motion better guidelines, standards and procedures for our entire process.

Upon review, the petitioner has not demonstrated that the beneficiary was employed overseas in a primarily managerial or executive capacity for at least one year during the three years prior to his entrance into the United States as a nonimmigrant.

As correctly noted by the director, in order to satisfy the statutory requirements of a multinational manager or executive, the petitioner must demonstrate that the beneficiary was employed by a firm, corporation, or other legal entity or an affiliate or subsidiary of the United States entity in a primarily managerial or executive capacity for at least one year in the three years preceding his entrance into the United States as a nonimmigrant. *See* § 203(b)(1)(C). As will be subsequently discussed in greater detail, regardless of the nature of the beneficiary's employment overseas, the petitioner has not demonstrated that the beneficiary worked overseas for a firm, corporation, affiliate, subsidiary or other legal entity of the United States company. The petitioner conceded that the beneficiary's foreign employment was essentially on a contractual basis as a self-employed translator, and that a foreign entity from which to employ the beneficiary did not exist. Moreover, as acknowledged by the petitioner, the beneficiary does not satisfy the requisite period of foreign employment in a managerial or executive position *for at least one year*. For these reason alone, the petitioner has failed to demonstrate that the beneficiary's foreign employment satisfied the statutory requirements.

Even if the AAO were to consider the nature of the beneficiary's employment, the record does not demonstrate that the beneficiary was employed in a primarily managerial or executive capacity. The beneficiary's limited job descriptions confirm that the beneficiary performed non-managerial and non-executive tasks of the petitioning entity, including downloading audio files, analyzing "bad recordings," and fixing "problems." The AAO again notes that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

In establishing the beneficiary's purported employment in a primarily managerial or executive capacity, the petitioner cannot rely solely on the claim that the beneficiary functions at a senior level within the organizational hierarchy. 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). The petitioner has not identified any high-level managerial or executive responsibilities performed by the beneficiary in the position of audio quality manager.

Accordingly, based on the above discussion, the petitioner has not demonstrated that the beneficiary was employed by a qualifying overseas organization in a primarily managerial or executive capacity for at least one year during the three years prior to his entrance into the United States as a nonimmigrant. For this additional reason, the appeal will be dismissed.

The third issue in this proceeding is whether at the time of filing the immigrant visa petition the petitioner enjoyed a qualifying relationship with a foreign organization in which the beneficiary was employed prior to transferring to the United States.

To establish a qualifying relationship under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer *are the same employer* (i.e. a United States entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

As previously noted, the petitioner conceded in its June 12, 2006 response to the director's request for evidence that a foreign entity did not exist. As a result, in her August 4, 2006 decision, the director concluded

that the petitioner had failed to demonstrate proof of a qualifying relationship with a foreign organization, or its classification as a "multinational" company.

On appeal, the petitioner cites the regulations at 8 C.F.R. § 204.5(j)(3)(i)(C) and (D), contending:

- a. The [] statements indicate quite strongly that the [beneficiary] can have been employed *directly* by the petitioner.
- b. The same statements make a clear distinction between the *petitioner* and all other entities (parent, branch, affiliate, etc.), indicating that the occasion of employment by the petitioner, cannot be accomplished through another entity but is indeed, direct.
- c. This employment by the petitioner cannot be done in the USA, since the one year minimum employment must have been *outside* [the] USA.
- d. Finally, *only* a USA organization may file this petition.

It must be concluded then that the natural meaning of the words in the instructions for filing the I-140 petition leave open the possibility for a USA organization to petition the immigrant visa for a *directly employed* overseas worker.

(Emphasis in original).

The petitioner further claims that the regulatory definition of "multinational" indicates that the petitioner may be considered a single entity conducting business in both the United States and another country, in this case, Egypt. The petitioner states that the director's instruction in her August 4, 2006 decision as to "Required Evidence" "enumerate that the [beneficiary] may indeed have been employed by the *same employer*, and additionally give the *option* to have been employed by a subsidiary or affiliate." (Emphasis in original).

The petitioner addresses the "multinational" nature of its work, explaining:

In response [to] the request for more evidence, I included detailed information regarding the official 'Centers, Bases and Agents' that are partners in our multinational organization (Only a Center would qualify as a 'formal entity'). It is reasonable to conclude that if it is the common practice for us to establish Centers in order to accomplish our work in overseas countries, then such an organization should have existed in Egypt, and [the beneficiary] should have worked under it.

However, this is *not* the only way or even the primary way in which we operate. From its inception, our work has required travel to many countries to obtain, check and revise the language audio recordings that are the central part of our organization. 'Bases' and 'Agents' exist to perform the work of [the petitioner's network] within countries where no formal entity exists that could be called a Center. A base is usually a group of employees whereas an Agent is one to three individuals.

The petitioner explains that in the instant matter, the beneficiary's work "required nothing more than the office he had in his own home, high speed Internet connectivity, his high-tech audio equipment that he already owned, and a bank account through which to transfer funds, and of course his special skills and abilities."

Upon review, the petitioner has not demonstrated the existence of a qualifying relationship between the United States company and a foreign organization.

In order to establish eligibility for classification as a multinational manager or executive for immigrant visa purposes, the petitioner must establish that it maintains a qualifying relationship with the beneficiary's foreign employer; the foreign corporation or other legal entity that employed the beneficiary must continue to exist and have a qualifying relationship with the petitioner at the time the immigrant petition is filed. 8 C.F.R. § 204.5(j)(3)(i)(C). A multinational executive or manager is one who "seeks to enter the United States in order to *continue* to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive." Section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C).

Here, the petitioner has conceded that it does not maintain a foreign office in Egypt. Instead, based on the record, it appears that the beneficiary was in effect an independent contractor or freelancer working for the petitioner out of his home office in Egypt. The constitution adopted by the "network" of which the petitioner is a member, Global Recordings Network, further undermines the petitioner's claim of a qualifying relationship, stating instead that it "is a worldwide Mission of *autonomous National Centres*. . . ." (emphasis added). There is no evidence that the beneficiary was employed in Egypt by a foreign office of the petitioner, or by an Egyptian subsidiary or affiliate of the petitioner. 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. As a result, the petitioner has not demonstrated that the requisite qualifying relationship between the United States entity and a foreign affiliate, subsidiary or office existed at the time the petition was filed. Accordingly, for this additional reason, the appeal will be dismissed.

The final issue in this proceeding is whether the petitioner demonstrated its ability to pay the beneficiary's proffered annual salary of \$39,000 at the time of filing the petition.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

Any petition filed by or for any employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The director noted in her August 4, 2006 decision that the petitioner submitted copies of the beneficiary's payroll receipts for various months during October 2004 through May 2006, and indicated that the petitioner had not provided evidence of compensation paid to the beneficiary in November 2004, or January, April and June 2005. The director concluded that the record failed to establish that the petitioner had the ability to pay the beneficiary's proffered weekly wages of \$750. Accordingly, the director denied the petition.

On appeal, the petitioner summarized the wages paid to the beneficiary while working overseas in Egypt and upon his arrival in the United States. The petitioner stated:

We were cautious not to pay the proffered wages until we receive you approval of his work in [the] USA, since [the beneficiary] was still considered a visiting [a]udio [q]uality

[m]anager from Egypt. So when he received the extension of stay in March 2006, and we knew about the possibility of concurrent application for [a]djustment of status and work authorization, we felt right about paying him then the proffered wages. He has been receiving the proffered wages since April 2006.

The petitioner contends that the "progression of wages" paid to the beneficiary while in Egypt until the present appeal demonstrates its ability to pay the beneficiary his weekly wages of \$750. The petitioner notes its willingness to pay for the beneficiary's "family to live here, as well as the extra expense of immigration fees."

Upon review, the petitioner has demonstrated its ability at the time of filing the immigrant visa petition to pay the beneficiary his proposed annual salary of \$39,000.

Citizenship and Immigration Services (CIS) may consider the petitioner's audited financial statements as evidence of the company's ability to pay the beneficiary's proffered wages. *See* 8 C.F.R. § 204.5(g)(2). Specifically, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage. Here, the petitioner's audited December 31, 2005 financial statement demonstrates that the company's net current assets for 2005, the year during which the instant petition was filed, are sufficient to compensate the beneficiary's proposed annual salary of \$39,000. Accordingly, the director's decision with respect to this issue only will be withdrawn.

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

ORDER: The appeal is dismissed.