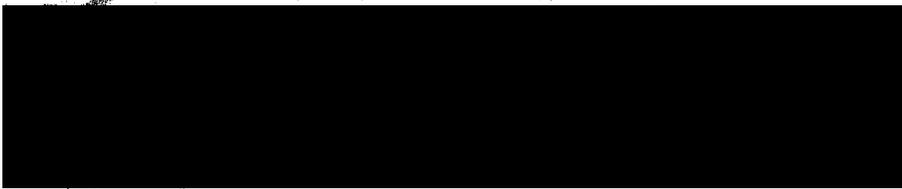


D 7

U.S. Department of Homeland Security  
20 Mass. Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536



U.S. Citizenship  
and Immigration  
Services

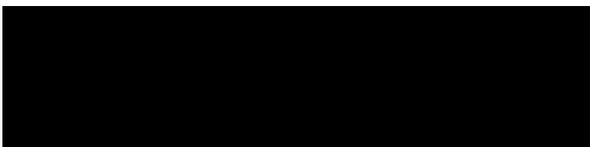


FILE: SRC 02 118 54871 Office: TEXAS SERVICE CENTER Date: JUN 01 2004

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:



**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

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, Director  
Administrative Appeals Office

PUBLIC COPY

**DISCUSSION:** The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is engaged in the procurement of building materials, and the building and development of residential property. The petitioner seeks to extend the temporary employment of the beneficiary as president of the company, and filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee.

The director denied the petition concluding that: (1) the U.S. and foreign entities are not qualifying organizations, as the two entities do not possess the requisite qualifying relationship, and they are not doing business in both the United States and one other country; and (2) the beneficiary has not and will not be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion to reopen or reconsider, and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director made the following erroneous conclusions: (1) that the U.S. and foreign entities failed to meet the criteria for a qualifying organization; and, (2) that the petitioner did not establish that the beneficiary has been, or will continue to be, employed in a primarily managerial or executive capacity. Counsel further contends that the director failed to consider evidence, or misunderstood the evidence presented. Counsel submits a brief in support of the allegations.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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) further 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 (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.

The first issue in this proceeding is whether the U.S. and foreign entities possess a qualifying relationship pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G)(1).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term “qualifying organization” and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien’s stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *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.

(L) *Affiliate* means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) 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.

In the petition, the petitioner identified the U.S. company as a wholly owned subsidiary of the foreign entity. The director subsequently requested that the petitioner provide further documentation regarding the ownership and control of the U.S. corporation, including: stock certificates, corporate by-laws, corporate constitution, published annual reports, or any other documentation that clearly indicates stock ownership.

In response, the petitioner provided a front and back photocopy of the stock certificate, a copy of the petitioning organization's declaration as a legal corporation in the State of Florida, and a copy of the petitioner's Articles of Incorporation. The Articles of Incorporation indicate that the petitioning organization may issue 500 shares of stock. Ownership of the common stock was evidenced on a submitted stock certificate, which reflected that the foreign company possessed 500 shares of the U.S. company's stock. Additionally, the back of the stock certificate was provided as evidence that the foreign company had not transferred the shares to another owner.

In her decision, the director determined that the petitioner had not provided evidence that the U.S. and foreign companies met exactly one of the qualifying relationships outlined in the above-cited regulations.

On appeal, counsel contends that the documentation previously submitted establishes a qualifying relationship between the two entities. Specifically, counsel asserts that the stock certificate, in conjunction with the Articles of Incorporation, which authorize 500 shares of stock, "evidences the parent/subsidiary relationship between the [foreign] company and the US company." In support of this relationship, counsel submits a copy of the corporate "share journal," in which the foreign company is identified as the assignee of 500 shares of common stock on October 5, 1998.

On review, the petitioner has demonstrated the existence of a qualifying relationship between the U.S. entity and the beneficiary's foreign employer. As evidenced by the stock certificate, the petitioner has accounted for the 500 shares of stock authorized in the Articles of Incorporation to be issued by the corporation. Additionally, the company's stock ledger confirms that the amount of stock has been assigned to only one owner, the foreign company. Moreover, the petitioner's U.S. Corporation Income Tax returns for the years 2000 and 2001 confirm that the U.S. entity is wholly owned by a foreign corporation. The record contains sufficient evidence of a parent-subsiary relationship between the two organizations. Therefore, the director's decision on this issue will be withdrawn.

The second issue in this proceeding is whether the U.S. and foreign entities have been doing business in the United States and in one other country.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines the term "doing business" as:

The regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner asserted in its petition and in an appended letter that, since its incorporation in October 1998, the petitioning organization has been engaged in the construction and development of real estate in the United States. During this time, the U.S. organization began "its own investment of commercial and residential sites for construction, marketing, promotion and sale," and has received such recognition as the Tallahassee Builders Association's 2001 Parade of Homes Silver Award.

In the request for evidence issued on May 10, 2002, the director noted that several of the sales contracts submitted by the petitioner were not signed or witnessed. The director requested that the petitioner submit additional contracts with supporting documentation that the work contracted for has been performed and that the petitioner received payment. Additionally, the director asked that the petitioner provide the following

documentation: (1) copies of the petitioner's corporate tax returns for the years 2000 and 2001; (2) state and federal quarterly tax returns for the years 2000, 2001, and the quarter ending March 2002; and, (3) invoices, bills of lading, shipping receipts, orders, and U.S. customs forms as evidence of the business conducted by the petitioner.

In response, the petitioner provided its corporate income tax returns for the years 2000 and 2001, and the requested quarterly tax returns. In support of the petitioning organization doing business in the United States, the petitioner submitted the following: (1) the 2002 Parade of Homes Awards Ceremony pamphlet, in which the petitioner was named as a recipient of a Gold Award; (2) copies of five signed construction contracts; (3) documentation supporting the contracts, such as a bank contract, a bank withdrawal schedule, a construction loan agreement, an inspection sheet, a public records land survey, a bank inspection sheet, a certificate of occupancy, a City of Tallahassee building permit, and a contractor's and owner's final affidavit; (4) a buyer's commitment letter for proposed construction; (5) the petitioner's summary of construction projects completed and proposed for the years 2000, 2001, and 2002; and (6) a letter indicating the petitioner's acceptance into the Bonded Builders Home Warranty Association.

The submitted project summary indicated that the petitioner had completed the construction of seven single-family homes from March 2000 through October 2002, and noted that an additional four properties would be finished by December 2002. It also referenced a renovation project completed by the petitioner in the amount of \$90,000. Additionally, a notation on the project summary indicates that the petitioner is presently building a new apartment complex comprised of eight townhouses, which would be completed in August 2002.

In her decision, the director concluded that the evidence did not support a finding that the petitioner has been continuously, regularly, and systematically doing business in the United States. The director stated that of the five construction contracts submitted as evidence of doing business, three were executed in August 2001. The remaining contracts were entered into in the year 2002. Additionally, the purchasers' loan approvals were dated in 2002. The director also noted that the salaries paid in 2000 and 2001 were \$3,905 and \$9,500, respectively. The director concluded that the minimal amount paid in salaries proves "that the [four] employees could not have been employed for the full year." Consequently, the director determined that the petitioning organization had not been doing business in the United States.

On appeal, counsel contends that the petitioner has been conducting ongoing business in the United States as evidenced by the submitted sales contracts, tax returns, bids on new projects, bank payment schedules, and the petitioner's project summary for the years 2000 through 2002.

On review, the record establishes that the petitioning organization has been doing business in the United States. The petitioner has provided substantial evidence that the U.S. entity has been engaged in the construction of residential properties, and does not exist merely as a shell company in the United States. This supporting evidence includes construction contracts for five homes, building permits, and supply invoices. Additionally, the petitioner submitted evidence that it has been recognized by the community. The 2000 and 2001 U.S. Corporate Income Tax Returns also demonstrate that the petitioner has received compensation for the service it is providing.

The director is holding the petitioner to an improper standard by concluding that the employees' small salaries are evidence that the petitioner has not been doing business for the entire year. The size of the salaries alone does not support such a conclusion. When considered in conjunction with the entire record, it is apparent that

the company has been conducting business, albeit not at a substantial profit. While the company's gross profit may be a consideration in whether the beneficiary will receive a prevailing wage in his employment as a manager or executive, it is not appropriate in the present analysis. The director's decision that the U.S. corporation is not doing business will be withdrawn.

With regard to whether the foreign company is doing business, the petitioner stated that since its establishment in 1979, the foreign company has completed construction projects "with estimated values of over 12 million dollars," including designing and developing many single-family residences and commercial buildings. The petitioner also noted that the foreign company "establish[ed] a U.S. based company [in order] to research and facilitate exports of materials needed for construction in Lebanon."

In her request for evidence, the director asked that the petitioner provide evidence that the foreign business is currently engaged in the regular, systematic, and continuous provision of goods and services. The director noted that this evidence should include invoices, bills of sale, product brochures of goods sold or produced by the foreign company, a check register, a statement of cash flow, and insurance policies. In addition, the director requested the position titles and job duties of each of the employees in the foreign business, and the quarterly payroll tax returns for the year 2001 and for the period ending March 2002.

As evidence of the foreign company's current organizational hierarchy, the petitioner submitted an organizational chart, which identified: (1) a general manager, who was acting in the place of the beneficiary; (2) "monthly employees," including an office administrator, a sales and rental administrator, an apartment keeper, an on-site manager, and an accountant; and (3) "daily employees" who were described as electrician, cleaning, maintenance, carpenter, and two workers. Additionally, the petitioner provided a payroll chart for the months of January through April 2002, identifying the salaries paid to the monthly employees. The petitioner explained that the employees identified on the chart as "daily employees" are paid on "an hourly/daily service basis." The petitioner did not provide any evidence that such payments were made.

Additionally, the petitioner submitted the foreign company's cash flow statement for the years 1999 through 2001, a copy of a letter from the foreign company's insurance provider noting that the company held fire, workmen's compensation, and public liability insurance policies, a yearly rent schedule for one of the company's resorts, copies of receipts of rent payments, an invoice of work completed at the resort, and a resort brochure. The petitioner contended that these documents "establish that the parent company . . . continues to do business on a regular basis in Lebanon."

The director determined in her decision that the petitioner had not established that the foreign company was doing business. The director acknowledged that the petitioner submitted a resort brochure, but stated that "there was no documentation that showed that [the foreign company] was doing business as this resort or for this resort." The director also noted that the record contained insufficient evidence that the foreign company sold a product or service, and concluded that the petitioning organization was not operating "in at least one other country." *See* 8 C.F.R. § 214.2(l)(1)(ii)(G)(2).

On appeal, counsel asserts that the letter submitted with the petition establishes that the foreign company is doing business as the above-referenced resort. Additionally, counsel contends that the petitioner previously provided evidence, such as the organizational chart and payroll records, that the foreign business employs individuals who manage and operate the company's "three project locations," including the resort's health club, storage facility, and the apartment and condominium rental and sales offices. Counsel claims that the

additional documentation, such as rental agreements, a schedule of rentals, invoices, and a letter addressing the foreign business' insurance policies, "evidence[s] the current and ongoing business activities of [the beneficiary's foreign employer]." Counsel also submits on appeal: (1) copies of registered documents from the company's board of directors, which identify the foreign company's ownership and payment of taxes; (2) a letter from the company's auditor stating that the foreign business "is the owner, builder, and managing operator of the Greenside Resort Hotel (48 rooms), Health Club, and additional condominiums for lease or sale (72 apartments)," and that it continues to maintain offices at two other project sites; and (3) an additional letter from the company's insurance company describing the company's current insurance policies, which are valid through December 31, 2002.

On review, the record demonstrates that the beneficiary's foreign employer is continuing to do business while the beneficiary is employed abroad. Although the resort brochure submitted by the petitioner does not specifically identify the name of the foreign company, the surrounding evidence establishes that the foreign employer is doing business as such. Specifically, the petitioner provided monthly payroll records evidencing the employment of "monthly employees," who are responsible for the sales, rentals, and maintenance at the resort. In addition, the petitioner submitted documentation linking the foreign company to the resort. Such evidence includes an income and expense statement, which identifies sales and operating expenses at the resort, a letter from an insurance account executive referencing the foreign company's insurance policies for the resort, and a rent schedule and receipts of rental payments. The petitioner also provided a letter from the foreign company's auditor verifying the operation of the company as "owner, builder, and managing owner operator" of the resort, as well as a separate apartment complex. Therefore, the director's decision on this issue is withdrawn.

The AAO will next consider whether the beneficiary has been or would be employed in the United States 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) 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), 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 stated in the petition that the beneficiary would be employed in the United States as president and chief executive officer. In an attached letter dated February 21, 2002, the petitioner provided the following job description:

As President, [the beneficiary] will continue to take all the preliminary steps needed to implement operations. So far, he has hired an engineer, a marketing administrator, an architect, investigated and found multiple prime real estate investments, acquired the requisite capital investment from [the] parent company to purchase parcels of land, and set-up the new office space including furniture and office equipment, establish general office procedures and systems, and orient the locally hired personnel.

\* \* \*

[In addition, the beneficiary] will make all day-to-day executive decisions and will have full authority to hire, terminate, promote and demote the U.S. personnel, as he currently holds this authority at the parent company. His responsibilities include not only executive duties in the U.S. office, but also executive duties in the Lebanese office. [The beneficiary] will continue to oversee the negotiation of contracts, review and evaluate procurement requests, and review and analyze the Architect's, engineer's, and On-Site Project Manager's proposed needs and requirements for each project, on an as-needed basis.

The petitioner further noted that the "secondary responsibilities" of the beneficiary will be obtaining and delivering equipment and materials for overseas use by the parent company, as well as "directing and managing the business operations of the main functionaries of the business: the architect(s), engineer(s), marketing administrator and the business manager." The petitioner also explained that the "main functionaries" would supervise other personnel, including the draftsman, office administrator, and project manager.

The petitioner submitted an organizational chart of the U.S. corporation in which the beneficiary was named as president, and his subordinates included: a treasurer, an architect, an engineer, and a sales employee. Subordinate to the engineer was an onsite manager, who the petitioner identified as manager of nine subcontractors. The petitioner also noted that the architect will oversee five companies contracted by the U.S. company for such work as HVAC, cabinetry, electrical, plumbing, and septic systems. The petitioner stated that both the architect and the engineer have a bachelor's degree.

The petitioner also submitted employee records for the months of July through September 2000, and October 2001 through January 2002. The most recent record, January 2002, indicated that the company employed the beneficiary, an architect, and an engineer, while the employee records for the previous month, December 2001, identified the petitioner's employees as the beneficiary, an architect, and a salesperson.

Although not specifically addressed by the director in her request for evidence, some of the documentation submitted by the petitioner in its response to other issues included information regarding the petitioning organization's personnel. Specifically, the Employer's Quarterly Federal Tax Return for the period ending December 31, 2001 identified four employees: the beneficiary, architect, engineer, and salesperson. In addition, the quarterly tax return for the period ending on June 30, 2002 listed three employees of the company: the beneficiary, architect and engineer.

In her decision, the director concluded that the beneficiary had not been and would not be employed in the United States in a primarily managerial or executive position. Focusing on the employee records and tax returns submitted by the petitioner, the director stated that the amount of wages and compensation paid to the beneficiary during the years 2000 and 2001 "do not allow [CIS] to conclude that the beneficiary has been employed by the US company in any capacity for the whole of 2000 and 2001." Additionally, the director noted that the petitioner failed to provide any evidence that the U.S. organization hired subcontractors for such work as construction, carpentry, and general labor. The director determined that "the beneficiary is engaged primarily in the day-to-day operations of the business itself," and therefore is not functioning as an executive or manager.

On appeal, counsel states that the director erroneously concluded that the beneficiary has not been, and will not be, acting primarily in a managerial or executive capacity. Specifically, counsel notes that since May 1999, the beneficiary has been functioning in a position that could be classified as both managerial and executive. In his executive capacity, counsel claims that the beneficiary:

has both directed the management of the entire US corporation and establishes all goals and policies of the organization. He also exercises wide latitude in discretionary decision-making and receives only general supervision from the Board of Directors and the parent company.

In his role as a manager, counsel states that the beneficiary "manages the organization," supervises employees and subcontractors, "has direct authority to hire and fire," and "exercises discretion over day-to-day operations." Counsel asserts that because the beneficiary supervises both professional employees, and subcontractors, he cannot be considered a first-line supervisor. Counsel submits on appeal a list of subcontractors and the job performed by each.

Additionally, counsel contends that the director failed to understand or recognize the reasonable needs of the petitioning organization when determining the capacity in which the beneficiary is employed. Counsel noted

that as a construction company, "the organization itself must use subcontracted help both from professionals . . . as well as from general contract supervisors and laborers." Citing section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), counsel claims that the reasonable needs of the organization "require primarily the use of subcontracted individuals, rather than in-house employees." Counsel further asserts that the beneficiary should not be deemed to be performing the day-to-day functions of the business simply because the company has a small subordinate staff.

Finally, counsel contends that if the director had additional questions regarding the executive or managerial status of the beneficiary, she should have requested additional documentation in her request for evidence. Counsel argues that "it is unacceptable that [CIS] can deny a petition for a business . . . without requesting information pertaining to the business, the reasonable needs of the business, or the individuals hired by the business."

On review, the record does not support a finding that the beneficiary has been or will be functioning in a primarily managerial or executive capacity in the United States.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.* Moreover, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

In the present matter, although the petitioner claims that the beneficiary's position as president should be considered managerial and executive, the petitioner has not provided specific evidence as to how the beneficiary's job responsibilities amount to his employment in both a primarily managerial or executive capacity. The AAO acknowledges that the beneficiary is supervising professionals. *See* 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). However, when describing the beneficiary's job duties, both the petitioner and counsel repeatedly restate the regulations, in which the terms managerial and executive capacity are defined. *See* 8 C.F.R. § 214.2(l)(1)(ii)(B) and (C). Specifically, in her brief on appeal, counsel asserts that the beneficiary's position should be considered executive in nature as the beneficiary "has both directed the management of the entire US corporation and establishes all goals and policies of the organization," "exercises wide latitude in discretionary decision-making" and "receives only general supervision." Counsel also contends that the beneficiary is a manager as he "manages the organization," supervises employees and subcontractors, "has direct authority to hire and fire," and "exercises discretion over day-to-day operations." Additionally, the petitioner stated that the beneficiary "will have full authority to hire, terminate, promote and demote office personnel." Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). Furthermore, the petitioner claimed employment of the beneficiary as a hybrid executive/manager, yet failed to demonstrate that the beneficiary's position in the U.S. satisfies the four requirements of both managerial capacity and executive capacity.

In addition, the record does not conclusively demonstrate that the beneficiary's assignment in the United States will consist primarily of managerial and executive duties. On appeal, counsel asserts that "the company maintains a core group of professionals on its payroll: an architect, an engineer, and a sales manager." The employee records, however, indicate that the petitioner, at the time of filing, did not employ a sales manager. An additional quarterly tax return filed in June 2002 also identifies only three employees: the beneficiary, an architect and an engineer. The petitioner has not accounted for the employment of the sales manager. Although the petitioner includes on its list of subcontractors an individual titled "real estate sales," counsel has not specifically explained whether this person will assume the role of sales manager for the company; nor has counsel identified how the beneficiary will be relieved from performing this function in the business.

Moreover, additional evidence in the record demonstrates that the beneficiary will be performing other non-qualifying functions. In a letter from a prospective buyer, the buyer writes to the beneficiary that he is encouraged from their meeting that the beneficiary "will be an advocate for good ideas and good design and not just another builder." Additionally, the buyer expressed his agreement with the architectural changes proposed by the beneficiary. In an accompanying newspaper article submitted by the petitioner, the beneficiary is identified as a "builder/architect" for the petitioning organization. The petitioner is also shown at a Parade of Homes tour, and is said to be discussing with visitors one of the homes that he designed. This documentation, as well as the petitioner's failure to account for a sales manager or representative, implies that the beneficiary is in fact selling the services of the company, as well as creating design plans for prospective buyers.<sup>1</sup> While the petitioner and counsel claim that the petitioning organization employs individuals to perform these functions, the record supports a different finding. The petitioner is obligated to clarify inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* Also, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Although the director based her decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. At the time of filing, the petitioner employed the beneficiary as president, as well as an architect and an engineer. Counsel asserts that these three employees, in addition to the subcontractors used by the petitioning organization, satisfy the reasonable needs of the business. As previously addressed, the petitioner and counsel have not identified who is responsible for the sales of the petitioner. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary and two subordinates.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections

---

<sup>1</sup> It should be noted that the beneficiary holds a bachelor's degree in Architectural Studies, which he received from Texas A&M.

101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Finally, counsel asserts that CIS should have previously addressed this issue in the request for evidence, and that doing so now "is unacceptable." This assertion has no merit. In the instant case, the petitioner is granted an automatic right to appeal the decision of the service center. *See* 8 C.F.R. § 103.3. Therefore, the petitioner is given an opportunity to establish eligibility in the appropriate forum, that being the AAO. The fact that the director did not indicate in the request for additional evidence that he would later address the issue of the managerial or executive capacity in the denial in no way precludes the petitioner from establishing eligibility for the desired immigration benefit. Although CIS often issues a notice requesting additional evidence prior to denying a petition, there are no statutes, regulations, or case law precedents that guarantee the petitioner that the only issues in a potential denial will be those that were previously addressed in the request for additional evidence. Consequently, it is concluded that the petitioner has failed to establish that the beneficiary is employed in a primarily managerial or executive capacity. For this reason, the petition cannot be approved.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.