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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: JUL 0 8 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, ("the director") denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Ohio corporation organized on December 24, 2003. The petitioner states on the Form I-140, Immigrant Petition for Alien Worker, that it is engaged in "marketing and sales," employs 10 personnel, and reported a gross annual income of $231,429 when the petition was filed. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

On October 31, 2012, the director denied the petition determining that the petitioner failed to establish: (1) that it has a qualifying relationship with the beneficiary's foreign employer; and (2) that it will employ the beneficiary in a managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the evidence of record is sufficient to satisfy the petitioner's burden of proof.

To establish eligibility for the employment-based immigrant visa classification, the petitioner must meet the criteria outlined in section 203(b) of the Act. 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.

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 language of the statute is specific in limiting this provision to only those

executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

I. The Issues on Appeal

A. Qualifying Relationship

The first issue to be discussed in this matter is whether the petitioner submitted sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. 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 above* 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) provides in pertinent part:

> *Affiliate* means:
>
> *(1)* One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> *(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.
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *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.

Facts and Procedural History

In this matter, the petitioner claims it is a wholly-owned subsidiary of ' now known as ' The petitioner explained that relocated from Italy to the Republic of Cyprus. Incidental to the relocation, the company was renamed Progemasrl Ltd. and incorporated under Cyprus law." The record indicates that the beneficiary was initially granted L-1A nonimmigrant status authorizing his employment with the petitioner in 2004, and that he maintained this status at the time the petition was filed.

The minutes of a general meeting of the shareholders of , held on November 19, 2009, show that the beneficiary signed an agreement on behalf of the company with in October 2009. Under the terms of that agreement, the company's production, research and development activities would relocate to within Italy and Brazilian subsidiary would become a subsidiary of The minutes further reflect that the beneficiary incorporated on November 5, 2009 in Cyprus. On behalf of . and its subsidiary, the petitioner, the marketing and consulting activity would move from Villorba, Italy to Limassol, Cyprus and the petitioner would continue to work under as its subsidiary. The minutes indicate that the beneficiary "decided to move all activities including its subsidiaries" for the best interest of the company.

The minutes are signed by the beneficiary as the president and as the secretary, but do not specifically identify them as shareholders. The petitioner elsewhere identifies the beneficiary as the founder and president of ' The petitioner does not indicate if all or any of employees also transferred from Italy to Cyprus or from to The petitioner did not explain or document the current status of the Italian company but instead treats as essentially the same company, even referring to the company in Cyprus as the beneficiary's last foreign employer despite the fact that it was incorporated more than four years after his transfer to the United States as a nonimmigrant.

The petitioner also submitted a copy of its Articles of Incorporation, which show that it is authorized to issue 1,500 shares. The petitioner provided a photocopy of a stock subscription agreement dated "January ___, 2004" signed by the beneficiary. The stock subscription agreement shows that 100 of the petitioner's shares will be issued to a company located in Italy, for $1 per share. The petitioner provided a copy of its stock certificate number 1 to on "January ___, 2004." The stock certificate is signed by the beneficiary as president and as treasurer/secretary.

The record also includes a report and financial statements of for the 2010 year which identifies its Board of Directors and Company Secretary as On page 9 of the 2010 financial statement, the auditors noted that the principal activities of the company continued to be "holding of investment and the provision of consultancy services." At page 15 of the same report, the auditors indicated that held 100 percent of the petitioner's stock and identified the petitioner's principal activities as "general trading."

In response to the director's RFE, the petitioner re-submitted several documents and also submitted its stock certificate #2. Stock certificate #2 issues 100 shares of the petitioner's stock to and is signed by the beneficiary as president and treasurer/secretary. A share ledger, also provided, showed stock certificate #2 was issued on July 9, 2012, nearly 11 months after the petition was filed. The ledger does not indicate that stock certificate #1 had been cancelled.

The petitioner's response to the RFE also included copies of the petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, for the 2010 and 2011 tax years. For the 2010 tax year, the petitioner indicated at Schedule K, item 7 that the company is wholly owned by a single Italian shareholder. On Schedule G, the petitioner identified , Italy, as the

entity owning 100% of the company's voting stock, and identified the beneficiary as an individual who owns, directly or indirectly, 100% of the company's voting stock. In an attached Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation, the petitioner identified the beneficiary as the ultimate indirect shareholder of the company. The petitioner's 2011 IRS Form 1120, at Schedule K, also indicated that the company is wholly owned by a single Italian shareholder. However, the attached Schedule G indicated that Cyprus, owns 100% of the petitioner's voting stock. The Form 5472 for 2011 also identifies the beneficiary as the ultimate indirect foreign shareholder of the company.

The petitioner also provided the memorandum of association for the Cyprus company. The memorandum of association stated purposes and listed the name of its sole subscriber as owner of 1,000 shares in The record also included Articles of Association, its Tax Certificate, and Certificate of Registration in Cyprus. The petitioner further provided bank statement from January 6, 2011 to December 6, 2012 showing five credits received from in the total amount of $183,558 and one credit received from in the amount of $17,500. The petitioner included the invoices from and corresponding to the deposits. The invoices listed the services provided as "consulting" and expenses.

Upon review of the evidence in the record, the director found that the petitioner had presented incomplete and inconsistent evidence of the qualifying relationship between the petitioner and The director questioned the issuance of stock certificate #2 to after the petition had been filed.

On appeal, counsel for the petitioner asserts that the following documentation is sufficient to establish the claimed qualifying relationship: stock certificate #2 issued to ; the November 19, 2009 general meeting of shareholders documenting the foreign entity's relocation to Cyprus; Memorandum of Association and Articles of Association dated November 3, 2009; and report and financial statements dated December 31, 2010, identifying the petitioner as 100 percent owned by Counsel explains that the petitioner's stock certificate #2 was issued to address the director's concern that the petitioner's stock had not been properly transferred to the renamed and relocated foreign entity. Counsel contends that the documents submitted demonstrate that is a legal entity, systematically conducting business and that it was the petitioner's parent company at the time the petition was filed.

Analysis

To establish that the foreign entity and the petitioner enjoy a qualifying parent/subsidiary relationship, the petitioner must provide probative consistent evidence establishing the relationship. The director properly determined that the initial record did not include consistent evidence establishing the qualifying relationship. The petitioner's response to the director's RFE also failed to clarify with probative documentary evidence that the petitioner was, in fact, the foreign entity's subsidiary.

At the time the petition was filed, the only documented shareholder of the petitioning company was an Italian company. Despite the minutes of a shareholder meeting indicating that this company divided and transferred its operations and foreign subsidiaries to a separate Italian company, and a new Cypriot company, in 2009, the petitioner identified of Italy as its sole direct shareholder in its 2010 IRS Form 1120, filed with the IRS prior to the instant petition. The record contains no explanation for this inconsistency. In addition, as noted by the director, the petitioner simply issued a new stock certificate to the new foreign entity without cancelling stock certificate #1 in the stock ledger. Further, the AAO finds that the minutes of November 2009 shareholder meeting provide insufficient information regarding the resulting status of the beneficiary's former Italian employer. The petitioner's claim that the company simply relocated to Cyprus is not sufficiently supported by the record.

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).

Thus, the petitioner must establish that the foreign company that employed the beneficiary prior to his entry to admission to the United States in November 2004 as a nonimmigrant continues to exist, do business, and have a qualifying relationship with the petitioning company. The minutes of shareholder meeting indicate that the company split its operations between two separate companies and there is no evidence that the foreign entity that employed the beneficiary, continues to exist and do business in Italy.

Moreover, there is no evidence that the beneficiary was ever employed by , as this company was formed 5 years after his admission to the United States. Nor is there sufficient evidence to support a finding that this is the same employer as , based on the evidence submitted, is a company established in Cyprus and wholly owned by The ownership of has not been documented in the record.

Further, the petitioner does not include evidence that the foreign entity established in Italy was dissolved prior to or contemporaneously with the incorporation of the entity in Cyprus, such that it could be described as a successor company. Likewise, the record did not include evidence that the foreign entity's employees were transferred to Cyprus.

Upon review, the petitioner has submitted inconsistent evidence regarding the actual ownership of the petitioning company. The petitioner although claiming it issued a stock certificate (#2) to ' in November 2009 continued to identify of Italy as its sole direct shareholder in its 2010 IRS Form 1120, filed with the IRS prior to the instant petition, as well as presenting inconsistent information regarding its ownership in its 2011 IRS Form 1120. Additionally, the record lacks evidence that the specific foreign employer that employed the beneficiary still exists

and is doing business in Italy. As observed above, the record does not establish that the entity in Cyprus is a successor company to the Italian company or that the beneficiary was ever employed by the Cypriot company. The record lacks sufficient probative evidence documenting the "relocation" of the company. 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)). Upon review of the inconsistent evidence and the omission of probative documentary evidence, it cannot be concluded that the petitioner established that the foreign parent company is a qualifying organization as required by the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). For this reason, the petition may not be approved.

B. Managerial or Executive Capacity

The next issue in this proceeding is whether the petitioner submitted sufficient evidence to establish that the beneficiary would be employed 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.

Facts and Procedural History

With regard to the proffered position of president, the petitioner stated the beneficiary directs all aspects of the petitioner's business as described below:

- Direct and manage [the petitioner's] personnel depicted on [the petitioner's organizational chart] (20% of time).
  - Determine the scope and responsibility of the job/position
  - Interview candidates recruited and screened by external recruiters
  - Exercise final decision as to hiring of employees/engagement of contractors
  - Establish salary and bonuses for employees and rates for contractors
  - Authorize the discipline of employees
  - Communicate preferences with referral agency for placement of contractors
  - Meet with project managers regarding performance and conduct of team members
- Direct product development activities (70% of time).
  - Meet with large producers such as Kraft, Coke and Pepsi to learn their product, distribution and management needs, and specifications for same
  - Interface with international technical team regarding capabilities
  - Prioritize development opportunities and assign staffing
  - Negotiate major contracts for purchase of component parts
  - Oversee adaptation by [the petitioner's] project teams of internationally developed concept for implementation in the United States
  - Supervise [the petitioner's] employees who work with ad agencies and producer's brand managers to introduce new vending product to the market.
- Prepare for and represent [the petitioner] at trade shows and trade association events (5% of time).
- Visit key customers and key potential customers (5% of time).

The petitioner's organizational chart identified three departments reporting directly to the beneficiary as president. The marketing, sales, and customer service department listed a digital marketing manager, a sales/customer service clerk, and a digital graphic designer. The petitioner noted that the sales/customer service clerk was not its employee. The engineering and new product development department listed an engineering manager, a programming engineer, two programmers, an electrical

engineer, a mechanical engineer, a software architect, and one engineering support position. The petitioner noted that the engineering manager, one of the programmers, the electrical engineer and the engineering support position were not individuals employed by the petitioner. The IT, graphic design department listed a project manager, a graphic designer, an IT support position, two graphics/data assistants, and a part-time photographer. The petitioner noted that the project manager, the graphic designer and one of the graphics/data assistants were not individuals employed by the petitioner. The petitioner explained that the individuals listed on the organizational chart that it did not employ were temporarily assigned to the petitioner and were compensated by the assigning entity.

The petitioner provided copies of IRS Forms W-2 issued to eleven individuals for the 2010 year. The Forms W-2 included wages that ranged from $1,656 to the beneficiary's wage of $52,000.

In response to the director's RFE, the petitioner expanded upon the beneficiary's duties. The petitioner continued to indicate that the beneficiary spent only 20 percent of his time directing and managing the petitioner's personnel. The petitioner noted again that the beneficiary spends the majority of his time, 70 percent, directing product development activities. Some of the clarifying duties included researching potential vending machine clients, providing input on presentations, traveling to meet with the clients, and informing project managers for implementation.[1] The petitioner also indicated that the beneficiary will travel to meet with an international technical team to obtain their input and resolution to clients' challenges and to contact the customer with the resolution/compromise. The petitioner stated further that the beneficiary will prioritize development opportunities and assign staffing by reviewing the project manager's report, discussing employee and contractor capabilities, and communicating same to the project manager. The petitioner also noted that the beneficiary will negotiate major contracts for component parts by researching, making contacts, calculating cost, conveying cost to customers, and continuing to negotiate cost as necessary. The petitioner also indicated that the beneficiary will obtain information regarding adaptions of the product and authorize the project manager to make the adaption. The petitioner stated that the beneficiary will meet with the employee working with the ad agencies and producers for a report and to share ideas and comments with the employee. The petitioner reiterated that the beneficiary will spend five percent of his time preparing and representing the petitioner at trade shows and five percent of his time visiting key customers and key potential customers.

The petitioner also described the duties of those individuals listed on its organizational chart. The description of duties of the petitioner's employees included: (1) the digital marketing manager who developed and implemented web, social, and creative branding, conducted market research, and indirectly supervised the digital graphic designer; (2) the digital graphic designer who delivered original graphic design and interactive media using computer software; (3) the programming engineer who led projects, provided project updates to the president, planned, designed and developed applications using computer languages; (4) the programmer who planned, designed and developed applications using computer languages; (5) the mechanical engineer who developed mechanical solutions to reform legacy components for new technology, designed mechanical components, communicated with suppliers, interpreted engineering drawings and specifications, developed and tested models of alternative design, and investigated equipment failures, monitored and coordinated

[1] The only project manager listed on the petitioner's organizational chart is not employed by the petitioner.

production; (6) the software architect who communicated with an international technical design team to understand system requirements, defined and analyzed objectives, and designed, developed and debugged software; (7) IT support who supported, monitored, tested and will troubleshoot hardware and software problems, install software, configure workstations and install upgrades, and provide technical assistance; (8) the graphics/data assistant who designed and altered screens on equipment and assisted with website updates; and (9) the part-time photographer who edited project videos, including instructional how-tos, and marketing.

Upon review of the totality of the record, the director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts the director's decision is in error. Counsel asserts that 70 percent of the beneficiary's time is spent directing product development activities. Counsel notes that the beneficiary does not develop products or perform the daily tasks necessary to develop the product, but rather the beneficiary interacts with the petitioner's technical team. Counsel adds that the beneficiary does not perform the creative tasks necessary to bring a product to market but rather relies on the petitioner's employees who work with ad agencies and producer's brand managers. Counsel concludes that the beneficiary will perform in a primarily executive position. Counsel also references the beneficiary's oversight of the petitioner's personnel and asserts that all of the petitioner's employees hold or are working toward degrees and that two-thirds of the degrees held by its employees are bachelor's degrees or higher. Counsel also references the beneficiary's involvement in engaging and terminating the work of contractors. Counsel concludes that the beneficiary's responsibilities in this area are consistent with the definition of a "personnel manager." Counsel concludes that the petitioner has provided sufficient documentation to establish by a preponderance of the evidence that the beneficiary will be employed in a primarily managerial or executive capacity.

Analysis

Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as 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); *see also* 8 C.F.R. § 204.5(j)(5). That being said, however, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

As the director observed, 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 statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act. If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Section 101(a)(44)(A)(iii) of the Act. The petitioner does not claim that the beneficiary is primarily a function manager.

The petitioner initially provided a broad overview of the beneficiary's duties. The petitioner indicated that the beneficiary would spend 70 percent of his time directing product development activities, including meeting with large producers and negotiating major contracts, duties that are not clearly defined and appear non-qualifying. The petitioner also indicated that directing product development activities included the beneficiary's interface with an international technical team and overseeing the adaption of an international concept for implementation in the United States. The petitioner, however, did not provide detail regarding the employment of the international technical team or describe the actual duties involved in the oversight of the adaptation of a product for the United States. Likewise, the petitioner did not describe the claimed development opportunities and did not provide evidence of employee(s) working with ad agencies. As the petitioner claimed that the beneficiary spent 70 percent of his time directing product development, and the initial description provided did not include detailed information of the actual duties involved in directing product development, the petitioner did not establish that the beneficiary will perform in either a managerial or executive capacity.

In response to the director's RFE, the petitioner provided further detail regarding the beneficiary's actual duties for the petitioner. Again, the petitioner indicated that the beneficiary spends 70 percent of his time directing product development. The petitioner also listed the duties of the individuals subordinate to the beneficiary's position of president. Upon review, the petitioner described the beneficiary as the individual who conducts research on major producers, meets with producers, and conveys meeting outcomes to project managers for implementation. Although the petitioner indicated that the beneficiary meets with its employees regarding presentations to the producers, the

petitioner does not include information in its description of duties of the beneficiary's subordinates that supports a claim that other employees engage in preparing or making presentations. Similarly, the petitioner's indication that the beneficiary meets with the employee(s) who works with ad agencies and brand managers is not supported by a description of duties for a subordinate employee who performs these tasks. Although the petitioner employs a digital marketing manager, her duties involve web, social, and creative branding and the description of duties does not involve working with ad agencies. Accordingly, the additional information provided regarding these two general headings does not support the petitioner's claim that the beneficiary is performing primarily executive duties. The beneficiary's stated responsibility for negotiating contracts for components is also a duty that would be considered operational rather than managerial in nature.

The petitioner also describes the beneficiary's duties interfacing with the international technical team as traveling and meeting with the unidentified individuals to listen to challenges, review customer information regarding the product, and find acceptable compromises between the technical team and customers and convey the compromise to the customers. The information provided in relation to interfacing with the international technical team is insufficient to establish that the beneficiary's role is directing the petitioner's management; rather it appears the beneficiary is the individual acting as a liaison between the product developer and customers. Likewise, the petitioner's indication that the beneficiary will prioritize development opportunities and oversee the adaption of the product for implementation in the United States does not include sufficient information to ascertain that it is the beneficiary who is directing the petitioner's management in this regard.

Although the petitioner indicates the beneficiary devotes only ten percent of his time to preparing for and representing the petitioner at trade shows and visiting current and potential customers, these duties include the operational tasks of marketing and selling the petitioner's services. Such duties are non-qualifying.

As observed above, the definition for executive capacity requires the organization to have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. In this matter, the petitioner has not provided probative evidence that the beneficiary's role is to focus primarily on the petitioner's broad goals and policies, except in the most general way; rather the beneficiary is the individual who appears to work collaboratively between the foreign entity and the users of the foreign entity's product performing the actual daily operational tasks of the petitioner's consulting and trading business.

On appeal, counsel also references the beneficiary's time spent directing and managing personnel and asserts that the beneficiary's duties are indicative of an individual who is also a personnel manager. However, the petitioner allocates only 20 percent of the beneficiary's time to managing personnel and thus, this is not the beneficiary's primary duty. Moreover, upon review of the expanded version of the petitioner's description of the beneficiary's duties managing personnel, it appears the beneficiary offers input and authorizes final decisions on hiring and firing employees. It is not clear from the description provided that the beneficiary is the individual who actually supervises the petitioner's technical or other employees. 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)).

In summary, based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988). The record does not include sufficient evidence to establish that the beneficiary primarily performs in the capacity of an executive or of a personnel manager as those terms are defined in the statute.

We acknowledge counsel's concern that the director improperly considered the size of the petitioner and recognize that 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, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive 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*, *supra*. The petitioner in this matter has not provided sufficient probative evidence that the current reasonable needs of the petitioner require the services of a manager or executive as those terms are defined in the statute. Accordingly, the appeal will be dismissed.

C. The Beneficiary's Qualifying Year of Employment Abroad

Beyond the decision of the director, the record includes additional inconsistencies regarding the beneficiary's employment abroad. Not only does the record fail to provide consistent evidence regarding the beneficiary's work for a qualifying organization as discussed above, the beneficiary's Form G-325A, Biographical Information statement filed in conjunction with the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, also casts doubt on the beneficiary's one year of qualifying employment. The beneficiary specifies on the Form G-325A that he lived in Israel from 1958 to October 2004. This information is inconsistent with the petitioner's claim that the beneficiary was employed by the Italian company from 2001 until 2004. 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). Accordingly, the record does not include probative consistent evidence establishing the beneficiary's employment with the Italian company in one of the three years prior to his entry to admission to the United States in November 2004 as a nonimmigrant. For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

II. Prior Approval

The AAO acknowledges that USCIS previously approved several L-1A nonimmigrant petitions filed on behalf of the beneficiary, a classification which also requires the petitioner to establish a qualifying relationship with the beneficiary's foreign employer and to establish the position as primarily managerial or executive. However, it must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, *supra*. Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Moreover, in making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). In the present matter, the director articulated the objective statutory and regulatory requirements and applied them to the matter at hand. If the previous nonimmigrant petitions were approved based on the same evidence of the qualifying relationship and managerial/executive capacity as submitted in this matter, the previous approvals would constitute gross error on the part of the director. Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

III. Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 the petitioner has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.