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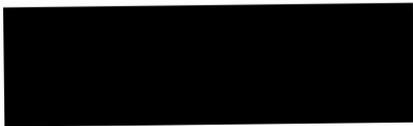
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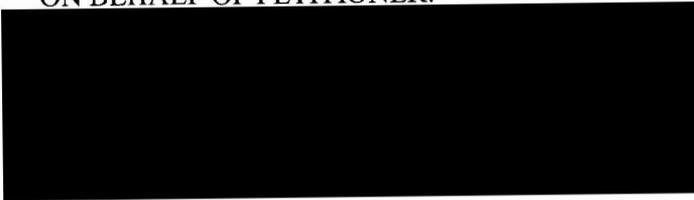
IN RE:

Petitioner:  
Beneficiary:



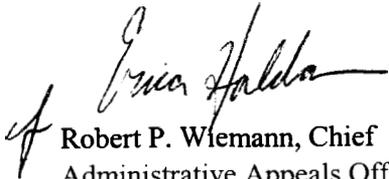
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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, Nebraska 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 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 limited liability company organized under the laws of the State of Michigan that is engaged in the manufacturing and distribution of plastic components. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not demonstrated that: (1) a qualifying relationship existed between the beneficiary's foreign employer and the petitioning entity at the time of filing; (2) the petitioner had been doing business in the United States for at least one year prior to the instant filing; or (3) the beneficiary had been employed by the foreign entity and would be employed by the United States organization in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner disputes the director's findings and submits a brief as well as 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 this proceeding is whether a qualifying relationship existed between the foreign and United States entities at the time of filing the immigrant petition.

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.

The petitioner filed the immigrant petition on June 22, 2005. In an appended letter, dated June 8, 2005, the petitioner stated that the petitioning entity was the product of a joint venture between the beneficiary's foreign employer and ██████████, "a corporation organized under the laws of the State of Michigan. The petitioner submitted a "corporate certificate" signed by the vice-president of finance of both ██████████ and the petitioning entity, in which the companies' vice-president addressed the purported joint venture between the beneficiary's foreign employer and ██████████ noting that each organization "own[s] a 50% ownership interest in [the petitioning entity]."

The director issued a request for evidence on August 1, 2005, asking that the petitioner submit documentary evidence establishing the claimed qualifying relationship, including evidence of "common ownership and/or control," between the petitioning entity and the beneficiary's foreign employer. The director noted that such relevant evidence would include the companies' articles of incorporation, annual reports, financial statements, or stock certificates.

Counsel for the petitioner responded in a letter dated October 19, 2005. Counsel again addressed the existence of the joint venture between the beneficiary's foreign employer and Cascade, yet explained that "legal requirements" dictated that the beneficiary's foreign employer form a separate company in the United States, titled "Dolav US," "to participate in the joint venture." Counsel stated "Dolav US is owned entirely by [the beneficiary's foreign employer] as evidenced by the Dolav US Articles of Incorporation," and claimed, as a result, the existence of the requisite qualifying relationship. Counsel acknowledged that the corporate certificate filed with the petition was "incomplete" as it did not address the existence of Dolav US, and submitted a revised corporate certificate, as well as the articles of organization and incorporation for the petitioner and Dolav US and Dolav US' certificate to transact business in the State of Michigan. Counsel stated:

This evidence confirms that the required 50% ownership of the foreign and US entities exist because [the beneficiary's foreign employer] owns 50% of [the petitioner] through its 100% ownership of Dolav US.

In a decision dated November 29, 2005, the director concluded that the petitioner had not demonstrated the existence of a qualifying relationship between the foreign and petitioning entities. The director recognized that the petitioner's counsel had submitted "organization documents" for the petitioner and Dolav US, but stated "these documents do not address the ownership of either entity." The director addressed the petitioner's initial omission regarding the existence of Dolav US, stating that the petitioner did not provide an explanation of the omission or evidence corroborating the claim that the beneficiary's foreign employer owns 50 percent of the petitioner through its ownership of Dolav US. Consequently, the director denied the petition.

Counsel for the petitioner filed a timely appeal on December 27, 2005. In an attached appellate brief, dated December 23, 2005, counsel challenges the director's reference to the petitioner's omission of evidence, and contends that the petitioner "submitted sufficient documentation of the required corporate relationship." Counsel addresses the corporate certificate offered by the petitioner in its response to the director's request for evidence, in which the petitioner identified Dolav US as the "intermediary joint venture partner with [the beneficiary's foreign employer]," which counsel again identified as the "ultimate owner of [the petitioning entity] and joint venture partner in [the petitioner]." Counsel notes that the director's request for evidence identified the articles of incorporation and financial documentation "as appropriate evidence" of a qualifying relationship. As additional evidence of the purported qualifying relationship, counsel submits the October 13, 1999 joint venture agreement between Cascade and Dulav US noting the companies' intent to establish the petitioning entity, as well as subsequent amendments. Counsel claims that the record establishes a qualifying relationship as a result of the 50 percent ownership of the petitioning entity on the part of Dolav US, which is entirely owned by the beneficiary's foreign employer.

Upon review, the record does not establish the existence of a qualifying relationship between the petitioning entity and the beneficiary's foreign employer.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 364-365. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In the instant matter, the qualifying relationship is based on the claim that the beneficiary's foreign employer owns and controls Dolav US, which is a party to the joint venture agreement establishing the existence of the petitioning entity. The petitioner, however, has not submitted sufficient evidence corroborating the claim of a parent-subsidiary relationship between the foreign entity and Dolav US. While the articles of incorporation demonstrate the existence of Dolav US and the certificate of authority authorizes Dolav US to do business in Michigan, neither document addresses its ownership. As explained above, in addition to documentation confirming the existence of the corporation, evidence relevant to Dolav US' ownership and control includes stock certificates, a stock transfer ledger, a stock certificate registry, and the minutes from organizational meetings addressing the company's ownership. The limited documentation offered by the petitioner fails to establish that the foreign entity owns and controls Dolav US. Incidentally, the amended corporate certificate does not substantiate the claim of a qualifying relationship as it merely addresses the foreign entity's ownership of the petitioner through Dolav US, yet does not confirm that Dolav US is owned and controlled by the foreign entity. 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)).

Counsel notes on appeal that the joint venture agreement and the related amendments establish the existence of a joint venture between Cascade, Dolav US, and the foreign entity, and thereby demonstrate the requisite qualifying relationship. Counsel references the use of the term "corporate relationship," stating that the Fifth Amendment to the joint venture agreement "confirms" that the three previously mentioned companies are parties to the agreement. Contrary to counsel's claim, the original joint venture agreement to form the petitioning entity is between Cascade and Dolav US. The foreign entity is not identified as a party to the agreement. As the petitioner has not satisfied the crucial requirement of a parent-subsidiary relationship between Dolav US and the foreign entity, the AAO cannot conclude the existence of the requisite qualifying relationship between the petitioner and the foreign entity. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The AAO also notes an inconsistency in the claimed relationship between Dolav US and the foreign entity, in that Article 2, section 2.7 identifies the beneficiary's foreign employer as an "affiliate" of Dolav US, rather than the claimed parent corporation. 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). Based on the foregoing discussion, the petitioner has not demonstrated the existence of a qualifying relationship between the petitioning and foreign entities. Accordingly, the appeal will be dismissed.

The AAO will next address the issue of whether the petitioner had been doing business in the United States for at least one year prior to the filing of the immigrant petition.

The regulation at 8 C.F.R. § 204.5(j)(2) defines "doing business" as:

[T]he regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

The petitioner indicated in its June 8, 2005 letter that it "manufactures and distributes . . . bulk-bin structural foam container products" used for shipping agricultural, food processing, industrial and general materials. In

an appended letter, dated June 6, 2005, the petitioner's vice-president of finance/chief financial officer noted that in the business' fiscal year 2005 the petitioner realized gross income in the amount of \$3.2 million.

In his August 1, 2005 request for evidence, the director asked that the petitioner submit evidence that it had been conducting the regular, systematic, and continuous provision of goods and/or services during the year preceding the instant filing.

In her October 19, 2005 response, counsel provided copies of the petitioner's financial statements for the fiscal year ending August 31, 2005. Counsel recognized the petitioner's loss in net income of approximately \$210,000, but noted "the joint venture partners continue to support the start-up operations through capital contributions." Counsel also addressed the petitioner's computer-generated sales reports for two of its "key customers" in 2004 and 2005, noting that the petitioner has been doing business with each since its inception. Counsel contended that the financial and sales documentation establishes that the petitioner has been doing business for the requisite period.

The director concluded in his November 29, 2005 decision that the petitioner had not been doing business in the United States for at least one year prior to the filing of the immigrant petition. The director noted that the financial documents offered by the petitioner had not been audited and that the sales reports were "internally produced" and "not supported by documentary evidence such as invoices or contracts." The director stated that the record did not contain sufficient documentary evidence establishing the petitioner's business operations for the requisite time period. Consequently, the director denied the petition.

On appeal, counsel for the petitioner addresses the director's findings, explaining that as a privately-held company, the petitioner has not had its financial statements audited. Counsel notes, however, that the petitioner's financial statement complied with generally accepted accounting principles and should therefore be accepted as evidence of the petitioner's business operations. Counsel challenges the director's reference to "internally produced" sales documents, noting the "use of technology" and stating that the company's "sales information and receipts are held in [the petitioner's] computer system." Counsel contends that Citizenship and Immigration Services (CIS) imposed improper requirements on the petitioner for demonstrating its business activity in the United States, noting that the regulations do not require financial statements to be audited or sales information to be derived from an outside source. Counsel references the amendments to the joint venture agreement as additional evidence of the petitioner's business in the United States.

Upon review, the petitioner demonstrated that it has been doing business in the United States for at least one year prior to the filing of the immigrant petition. Regardless of the source of the sales reports, the documents reflect sales transactions performed by the petitioner during January 2004 through October 2005. Additionally, as noted by counsel on appeal, the amendments to the joint venture agreement, particularly those dated November 2003 and December 10, 2004, corroborate the claim that the petitioner had been doing business in the United States during the year prior to the instant filing. Accordingly, the director's decision with regard to this issue is withdrawn.

The final issues in this proceeding are whether the beneficiary had been employed by the foreign entity and would be employed in the United States in a primarily managerial or executive capacity. The AAO will first address the beneficiary's employment in the foreign entity.

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.

In its June 8, 2005 letter, the petitioner stated that since the year 1997 until the beneficiary's transfer to the United States in February 2005, the beneficiary was employed as the foreign entity's marketing director, and explained the position as follows:

[The beneficiary] conducted market research, analyzed potential markets and developed marketing strategies and plans. He then implemented the marketing plans, coordinated with distributors and joint ventures, and utilized product and customer information gathered through the marketing and sales activities to lead product development. In addition, [the beneficiary's] executive position at [the foreign entity] required him to be intimately involved in [the company's] continued growth and expansion, specifically into the U.S. market through

the initiation of the [petitioning entity] as a joint venture. He helped to shape the direction of [the foreign entity's] and [the petitioner's] policies and practices.

In an appended letter from the foreign entity, dated September 24, 2003<sup>1</sup>, the company's chief executive officer "confirm[ed]" the beneficiary's former position as marketing director, during which he "[was] responsible for worldwide marketing and sales, management of distributors and joint ventures and new product development and launch for [the foreign entity's] plastic bulk-bin container products." The chief executive officer further provided a description of the beneficiary's position that was essentially the same as that outlined above.

In his August 1, 2005 request for evidence, the director noted the petitioner's use of "generalized terminology" in its description of the beneficiary's overseas position, and asked that the petitioner submit a comprehensive job description identifying the job duties performed by the beneficiary as marketing director of the foreign entity, as well as the amount of time devoted to each. The director asked that the petitioner address the organizational structure of the foreign entity, including naming the workers subordinate to the beneficiary and identifying their job titles, job duties, and the minimum qualifications for the position. The director also requested documentation, such as tax forms or payroll records, confirming the employment of its workers.

Counsel addressed the beneficiary's former position in her October 19, 2005 letter, in which she outlined the statutory criteria for "managerial capacity." As counsel's letter is already part of the record, it will not be entirely repeated herein. In an attached statement, the beneficiary's position as marketing director was described as follows:

Summary Responsibilities: Manage and direct worldwide marketing and sales, management of distributors and joint ventures and new product development and launch for [the foreign entity's] plastic bulk-bin container products.

Primary Duties:

- Use knowledge of business dynamics and processes as well as in-depth knowledge of products and customer base to formulate marketing business objectives, policies, and strategic plans to contribute growth and expansion. (15% of time)
  - Research and develop marketing objectives
  - Prepare marketing department budget
  - Assess and report marketing performance to [g]eneral [m]anager
  - Revise objectives to meet changing business environment, operations or opportunities
- Provide leadership in the administration and operations of the Department including market research and analysis and development of marketing strategies and plans. (35% of time)
  - Supervise direct reports in their responsibilities
  - Conduct marketing research through staff

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<sup>1</sup> The information contained in the letter indicates that it was submitted as the beneficiary's work verification, presumably in connection with the proceeding for the beneficiary's nonimmigrant visa petition.

- Analyze research to strategize marketing policies and plans
- Facilitate resources required for direct reports to complete marketing operations
- Ensure effective implementation and execution of policies and practices through training and directing distributors and joint ventures and making direct contact with prospective customers. (10% of time)
  - Develop training plans for distributors and joint ventures
  - Conduct training presentation and provide expertise concerning marketing plans and practices
  - Contact prospective customers to promote products
- Coordinates with distributors and joint ventures concerning product availability, customer service and product design and modification issues. (25% of time)
  - Regularly communicate with distributors and joint ventures
  - Maintain knowledge of product availability, customer service and product design and modification issues
  - Provide knowledge to and troubleshoot with distributors and joint venture to address customer needs and issues
- Utilizes product and customer information gathered through the marketing and sales activities to lead product development. (15% of time)
  - Gather product and customer information from direct reports and customer interaction
  - Recommend product development and revisions to address customer needs
  - Manage and direct research and development to formulate and develop new and revised products

The petitioner noted that the positions subordinate to the beneficiary include the logistics and orders manager, the European desk manager, the marketing assistant, the United States desk manager, the "other countries" desk manager, and a research and development marketing support person. The petitioner provided a brief job description for the responsibilities held by each subordinate worker. An attached organizational chart reflected the beneficiary's role as marketing director supervising the six employees.

In the November 29, 2005 decision, the director concluded that the petitioner had not demonstrated that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity. The director recognized the petitioner's compliance with the request for additional evidence, but noted that the petitioner again used "broad, undefined language" to describe the beneficiary's position as marketing director. The director further concluded that the beneficiary's job duties "appear to [have been] functional sales and marketing duties, not managerial or executive duties, such as conducting training sessions, communication with distributors, or direct contact with customers." The director also noted that the record did not confirm whether the beneficiary's subordinate staff was professional, managerial or supervisory in nature. Consequently, the director denied the petition.

In her December 23, 2005 letter on appeal, counsel contends that CIS abused its discretion in determining that the beneficiary was not employed abroad in a primarily managerial or executive capacity. Counsel claims that the "detailed job descriptions, organizations charts, payroll records, and [ ] letter from [the foreign

entity's] [g]eneral [m]anager/[c]hief [e]xecutive [o]fficer" establish that the beneficiary was performing "senior level management responsibilities" as the foreign company's marketing director. Counsel also contends that the evidence demonstrates that the beneficiary was managing professional employees in his former overseas position. Counsel contends that the record outlines the beneficiary's executive job duties in the foreign company, which, by their very nature, are "general and supervisory."

Upon review, the petitioner has not demonstrated that the beneficiary was employed by the foreign 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). As noted by the director, the generalizations used by the petitioner in its description of the beneficiary's position fail to demonstrate his employment by the foreign entity in a primarily managerial or executive capacity. For example, the petitioner stated that, among other responsibilities, the beneficiary "coordinated with distributors and joint ventures," "utilized product and customer information . . . to lead product development," "formulate[d] marketing business objectives, policies and strategic plans," revised objectives, "[s]upervise[d] direct reports in their responsibilities," "[f]acilitate[d] resources . . . to complete marketing operations," and led the department's administration and operations and the company's product development. The petitioner has not explained the beneficiary's managerial or executive tasks with regard to the previously-named responsibilities. 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 does the beneficiary primarily do on a daily basis? The actual duties themselves will 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).

The AAO notes an inconsistency in the job descriptions offered by the petitioner that ultimately raises the question of whether the beneficiary is *managing* the marketing department. 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). In the petitioner's June 8, 2005 letter and the September 24, 2003 letter from the foreign entity's chief executive officer, the beneficiary is represented as conducting the company's market research, analyzing consumer markets, developing marketing strategies, training distributors, directly contacting customers, and working with the distributors to determine product availability, customer service, and product design. Based on these representations, it appears that the beneficiary was primarily responsible for performing the tasks of the marketing department, and was not managing the performance of these tasks by lower-level employees. In contrast, in its October 19, 2005 response, the petitioner stated that the beneficiary "conduct[ed] market research through staff." When responding to a request for evidence, 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 its 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).

The AAO further notes that the petitioner did not identify any staff members who were responsible for the company's market research. Incidentally, the petitioner failed to respond to the director's request for the

names of the foreign entity's employees and its payroll records. It is questionable whether the foreign entity actually employed a staff who would relieve the beneficiary from performing this non-qualifying task, which, according to the petitioner, encompassed 35 percent of the beneficiary's time. 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. Also, the petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In addition to the suggestion that the beneficiary was performing market research, the petitioner noted that the beneficiary analyzed research, developed and conducted training for distributors, contacted prospective customers, identified customer needs and issues, "gather[ed] product and customer information from direct reports and customer interaction," determined product availability, and revised product development. The petitioner has not explained how these tasks, which collectively consumed approximately 85 percent of the beneficiary's time, are considered managerial or executive in nature. *See* sections 101(a)(44)(A) and (B) of the Act. Again, based on the petitioner's representations, it appears that the beneficiary was primarily responsible for personally performing specific tasks of the foreign company's marketing, sales and product development functions, rather than managing the functions. 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).

Counsel contends in her October 19, 2005 letter that the beneficiary managed an essential function of the foreign company in that he "managed and directed the entire marketing department and function at [the foreign entity] dedicated to research and development of marketing strategies." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. As discussed above, the record demonstrates that the beneficiary was performing the non-managerial tasks related to several of the foreign company's functions. Counsel's blanket claim that the beneficiary managed the marketing department is not sufficient to overcome this finding. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based on the foregoing discussion, the petitioner has not provided sufficient evidence to corroborate the claim that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

Lastly, the AAO will address the related issue of whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

The petitioner noted on the Form I-140 that the beneficiary would occupy the position of president-chief executive officer of the petitioner's five-person company. In its attached June 8, 2005 letter, the petitioner provided the following description of the beneficiary's proposed position:

As President and CEO, [the beneficiary] will have overall administrative responsibility for the day-to-day operations. He will assign duties to personnel to ensure efficient operations, audit their performance, receive reports regarding financial and manufacturing performance, and compile required reports on operations and functions for strategic management. He will conduct staff meetings to discuss strategic corporate goals and implementation of strategies to achieve those goals.

[The beneficiary] will have ultimate responsibility for the administration and coordination of several functions, including purchasing, manufacturing, quality control, distribution, maintenance, accounting, and human resources. He will participate in formulating and administering company policies and developing long-range goals and objectives for [the petitioning entity]. He will direct and coordinate activities of the company and delegate responsibility for further attainment of goals and objectives to appropriate personnel. He will be responsible for the initial review and analysis of activities, cost operations, and forecast data to determine progress towards stated corporate goals and objectives. He will meet with our strategic management team and other administrative personnel on a regular basis to review achievements and discuss required changes and goals and objectives resulting from current status and conditions.

Overall, [the beneficiary] will undertake executive responsibilities and will report directly to strategic management.

In his subsequent request for evidence, the director noted that the general job description for the beneficiary failed to clearly identify his proposed job duties. The director asked that the petitioner provide a comprehensive description of the job duties to be performed by the beneficiary in the United States company, including the amount of time the beneficiary would devote to each. The director requested that the petitioner also provide an organizational chart of the United States entity and identify the job titles, job duties, and minimum requirements for each of the lower-level positions in the company. The director further requested sample work schedules for each of the petitioner's workers, as well as documentary evidence of their employment.

In her October 19, 2005 response, counsel for the petitioner outlined the statutory requirements for "managerial capacity," and addressed the manner in which the beneficiary satisfied each. As counsel's letter is part of the record, it will not be entirely repeated herein. As evidence of the beneficiary's employment in a qualifying capacity, counsel referenced the following job description provided by the petitioner in its response:

Role Summary:

Overall administrative responsibility for day-to-day operations including purchasing, manufacturing, quality control, distribution, maintenance, accounting, and human resources to achieve both short and long term objectives.

General Responsibilities:

- Participate in formulating company policies and develops company goals and objectives (10% of time)
  - Reviews company, industry and market data concerning performance and opportunities
  - Develops short and long term plans and programs for manufacturing, engineering, quality, human resources, sales and other staff functions
  - Prepares and submits annual operating plan to the Board of Directors
  - Coordinates with Board to finalize company goals and objectives
  
- Directs and coordinates company day-to-day activities (65% of time)
  - Delegates responsibilities to staff to perform purchasing, manufacturing, quality control, engineering, sales and distribution, accounting and human resources duties:
    - Supervises Supply Chain Management Specialist to assure purchasing function effectively supports manufacturing process
    - Directs business development, sales and distribution of products through sales team to achieve customer satisfaction and growth of the company
    - Plans and operates the company to ensure appropriate financial soundness, with the support of controller and accounts staff through Accounts Shared Service and Controller Shared Service
    - Directs Engineering Support Shared Service in the development of new and improved products and markets
    - Manages the Manufacturing and Quality Shared Services and Tool Maintenance Shared Service in the effective and quality manufacture of company products to meet market requirements and company requirements for quality, delivery, cost and profitability
    - Directs Human Resources Shared Services on personnel issues and to maintain and support prescribed programs of employee relations, health and safety, learning and development, compensation and benefits for employees
  
  - Plans and directs activities related to company meetings to discuss strategic corporate goals and implementation of strategies to achieve those goals
  - Provides personal leadership that encourages employee productivity and responsiveness
  - Assures compliance with all legal and regulatory requirements
  - Develops the appropriate organization for the market sectors in accordance with approved operational plans
  - Represents the company to customers and the general public
  
- Evaluates performance towards corporate goals (15% of time)
  - Reviews activities, operation costs, forecast data and reports concerning financial and manufacturing performance
  - Investigates and develops performance improvement plans for departments
  - Coordinates with departments to review and improve department operations and implement performance improvement plans

- Coordinates with and report to strategic management team (10%)
  - Advises senior management and the board of directors concerning company achievements
  - Participates in strategic planning with Board
  - Discusses required changes to goals and objectives due to current status and conditions
  - Incorporates planning into company goal and objectives and implements with staff

Counsel submitted an organizational chart of the petitioning entity identifying the beneficiary as the president, as well as four sales managers, a supply chain management specialist, and a customer service supply chain lead management. **The AAO notes that one "manager" position was identified as being vacant.** The petitioner's organizational chart also reflected the following departments subordinate to the beneficiary, which were comprised of shared services between Cascade and the beneficiary's foreign employer: accounts, engineering support, manufacturing & quality, controller, tool maintenance, and human resources. Counsel also attached job descriptions for the positions of sales manager, supply chain management specialist, and customer service supply chain lead management, and noted the qualifications necessary to hold each position.

In his November 29, 2005 decision, the director concluded 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 recognized the additional evidence provided by the petitioner following his request, but noted that the job description "still relied on broad, undefined language." The director specifically noted the petitioner's failure to clarify the specific job duties related to the beneficiary's responsibilities of directing the company's day-to-day operations or supervising its activities, which, as noted by the director, occupied 65 percent of the beneficiary's time. Consequently, the director denied the immigrant petition.

On appeal, counsel contends that CIS abused its discretion in disregarding the documentary evidence submitted by the petitioner with regard to the beneficiary's proposed employment. Counsel references the job descriptions, organizational chart, and payroll records submitted in support of the beneficiary's proposed employment as a manager or executive, claiming that the documentary evidence demonstrates the beneficiary's eligibility for the requested immigrant classification. Counsel contends that the record outlines the job duties to be performed by the beneficiary in a position that, by its very nature, is "general and supervisory." Counsel also claims that the record demonstrates that the beneficiary would be supervising professionals employed by the petitioning entity.

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). Despite the lengthy job description offered by both counsel and the petitioner, the beneficiary's job duties, particularly with respect to how he would spend the majority of his time, remain inadequately explained. Based on the petitioner's representations, the beneficiary would devote 65 percent of his time to directing the day-to-day activities of the petitioner's purchasing, manufacturing, quality control, engineering, sales and distribution, accounting and human resources functions. The beneficiary's specific role with respect to these activities, however, remains unclear. The lengthy yet vague job description offered by the petitioner indicates only that the beneficiary would "direct" or "manage" each. Counsel's supplemental statement in her October 19, 2005 letter that the beneficiary exercises overall administrative responsibility and "delegates the authority to complete [these]

functions" is equally insufficient. Other than naming the company's sales team, the petitioner does not identify whom the beneficiary would direct or manage with respect to these functions, except to note that each is a shared service of the foreign entity and Cascade. Nor did the petitioner clarify what specific job duties of the beneficiary's would qualify him as a manager or executive. The petitioner essentially noted the beneficiary's *responsibility* of managing each, without clarifying the specific managerial or executive job duties to be performed by the beneficiary with respect to each particular function. 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 does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Additionally, the petitioner has not demonstrated that its staffing levels are sufficient to support the beneficiary in a primarily managerial or executive capacity. 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**. 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.

At the time of filing, the petitioner was a six-year-old manufacturer and distributor that employed the beneficiary, as well as a three-person sales force and a supply chain management specialist. The AAO notes that the managerial position for the company's sales in the western United States was unoccupied at the time of filing, as well as the position of customer service supply chain lead, which appears to have been filled two months after the instant filing<sup>2</sup>. Based on the petitioner's representations, it does not appear that its reasonable needs would be met by the services of the beneficiary and its four employees. The petitioner has not accounted for the performance of the company's western-State sales or its supply chain customer service functions at the time of filing. The lack of evidence suggests that the beneficiary would be responsible for personally performing the non-qualifying administrative and operational job duties associated with each. Also, as addressed above, the additional departments of the petitioning entity and the related functions remain unclear. As a result, the AAO cannot determine whether the company's reasonable needs are met by the organizational staff presented by 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.

The limited job description also raises questions as to the extent of the tasks to be performed by the beneficiary with respect to the outlined responsibilities. For example, the petitioner stated that the beneficiary would assure the company's regulatory compliance, develop the organization according to its market sectors and "[represent] the company to customers and the general public." It is not clear from the beneficiary's job description whether he would be performing the marketing tasks of the business. The AAO recognizes that each sales manager is identified as *assisting* in market research, yet it is not clear who they are assisting, particularly since the petitioner has not identified a marketing department. The limited record again raises the

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<sup>2</sup> The job description for the customer service supply chain lead reflects a date of April 25, 2005. In contrast, her "payment register" identifies a beginning issuance date of August 1, 2005, thereby suggesting that the worker did not begin employment until that time. This conclusion is in agreement with the information contained on the Form I-140, which indicates a staff of only five workers at the time of filing.

question as to the amount of time the beneficiary would devote to performing such non-qualifying tasks as the sales for the western region, as discussed previously, as well as the company's marketing and regulatory compliance. 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).

The AAO addresses counsel's claim in her October 19, 2005 letter that the beneficiary would manage an essential function of the company. As discussed previously, the term "function manager," which is not defined by statute or regulation, applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). Additionally, the petitioner must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. Here, counsel makes a blanket claim that "[the beneficiary's] President position at [the petitioning entity] is the chief executive position so that his performance of his responsibilities will determine the success of the business operations." Counsel essentially maintains that the beneficiary's title alone is sufficient to demonstrate his employment as a function manager. A beneficiary's managerial or executive title, without additional clarification of the specific function to be managed by the beneficiary, is not sufficient to corroborate counsel's claim that the beneficiary would be managing an essential function of the petitioning organization. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534.

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

Beyond the decision of the director, an additional issue is whether at the time the priority date was established, the petitioner had the ability to pay the beneficiary his proffered wage.

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.

On the Form I-140, the petitioner noted the beneficiary's proposed annual salary of approximately \$103,500. As evidence of its ability to pay the proffered wage, the petitioner submitted a letter, dated June 6, 2005, in which its vice-president of finance/chief financial officer claimed that the company maintained "more than sufficient funds to pay the \$103,500 annual salary offered to the [beneficiary]." The company's vice-president

noted the petitioner's realization of gross income in the amount of \$3.2 million in the fiscal year 2005, and indicated that the petitioner receives financial support from its joint partners.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner did not establish that it had previously employed the beneficiary at the proposed salary.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. The AAO notes that the record does not contain the petitioner's 2005 income tax return, or the income tax return for the previous year. In response to a separate request made by the director, the petitioner provided its unaudited financial statement for the period ending August 31, 2005. This documentation, however, cannot be accepted in support of the petitioner's ability to pay. *See* 8 C.F.R. § 204.5(g)(2) (requiring that evidence of the petitioner's ability to pay be in the form of "copies of annual reports, federal tax returns, or audited financial statements"). The statement from the company's vice-president of finance is also insufficient to establish the petitioner's ability to pay the beneficiary's proposed salary, as the petitioner is a five-person company. *See id.* (noting that "where the prospective United States employer employs 100 or more workers, [CIS] may accept a statement from a financial officer of the organization which established the prospective employer's ability to pay the proffered wage"). Even if the AAO were to accept the petitioner's unaudited financial statement, the petitioner has reflected a loss in net income in the amount of approximately \$210,000. The record does not reflect whether the beneficiary's salary was included as an expense of the petitioner's in its financial statement, and if so, the amount of compensation considered. For this additional reason, the petition will be denied.

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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The AAO recognizes the beneficiary's previously approved L-1A nonimmigrant petition. It must be noted that many I-140 immigrant petitions are denied after CIS 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*, 724 F. Supp. 1103 (E.D.N.Y. 1989). 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 CIS 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). Furthermore, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate

burden of proof; each petition must stand on its own individual merits. The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. Based on the lack of evidence of eligibility in the current record, the director was justified in departing from the prior nonimmigrant petition approvals and denying the immigrant petition.

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.