



U.S. Citizenship
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Services

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FILE:

SRC 04 212 52051

Office: TEXAS SERVICE CENTER Date:

OCT 04 2006

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

PETITION:

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

ON BEHALF OF PETITIONER:

[REDACTED]

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, Texas Service Center, denied the employment-based visa petition.¹ The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed an immigrant visa petition seeking 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 corporation organized under the laws of the State of Florida that is engaged in the import and export of communications and media recording products, as well as equine equipment and goods. The petitioner seeks to employ the beneficiary as its general manager.

The director denied the petition concluding that the petitioner had not established that the beneficiary had been employed by the foreign entity or would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner contends that the beneficiary's former and present positions entail performing primarily managerial job duties. Counsel submits a brief and documentary evidence in support of the appeal.

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

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

* * *

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

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

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this

¹ In a decision dated July 28, 2005, the director denied the immigrant visa petition based on the petitioner's abandonment of the petition under the regulation at 8 C.F.R. § 103.2(b)(13). The petitioner subsequently demonstrated in a motion to reopen and reconsider its timely response to the director's request for additional evidence, thereby resulting in Citizenship and Immigration Services' (CIS) October 28, 2005 decision withdrawing its original denial. Following his withdrawal of the initial decision, the director issued a second request for evidence and ultimately denied the petition.

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 the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner submitted the instant petition on July 28, 2004, noting that the beneficiary would be employed as the general manager of the three-person United States corporation. In an appended June 21, 2004 letter, the petitioner provided the following statement of the beneficiary's proposed employment:

The [b]eneficiary will serve on a permanent basis on [sic] the position of [g]eneral manager of the American enterprise's import & export operations. The beneficiary will continue to establish and implement the purchase goals and policies of the enterprise, including its purchasing structure, components and functions. The beneficiary will continue implementing and establishing the operation's long-term corporate goals and policies, including its structure, components, investments, and possible franchising of its equine services division. The beneficiary will exercise wide latitude in discretionary decision-making, and shall receive directives and general supervision from the President. The beneficiary will coordinate, manage, and oversee international (Columbia, United States, and Latin America) and national activities involved with buying and procuring goods and services for the company. The beneficiary will oversee the establishment and operations of the company's equine division in the United States. The beneficiary will have and exercise discretion over the day-to-day operations of the American enterprise, and shall directly report the status and functions of the organization directly to the company's [p]resident, to which the beneficiary shall be solely responsible for his acts and discretionary management powers.

The permanent [g]eneral [m]anager, [c]orporate [v]ice-[p]resident, and [t]reasurer position that [the beneficiary] will hold with [the petitioning entity] is executive/managerial in nature. These functions are senior level within [the petitioning entity's] hierarchy. The functions entail, but are not limited to, management of import/export responsibilities, sales, marketing, new developments, and purchases within the organization. The beneficiary will also oversee the department of a corporate equine related division for [the petitioner]. The beneficiary will manage and oversee the work of the company's personnel, and any independent contractors, in the sale, marketing, and distribution of the equine division, and the beneficiary will have the authority to recommend, hire, fire, and promote employees as well as approving leave authorizations for the staff. The beneficiary will exercise discretion over the day-to-day company operations and related managerial and executive responsibilities, and he will respond and report directly to the company's [p]resident.

The petitioner submitted two additional statements with the Form I-140 that included essentially the same job descriptions as that provided above. The petitioner also provided a copy of its organizational chart, on which the beneficiary was identified as the company's vice-president, subordinate to the president. Based on the organizational chart, the beneficiary would supervise a secretary, five vendors, and an independent contractor who rendered shipping and cargo services, as well as two outside attorneys and an accountant.

The director issued a request for evidence on March 31, 2005, however, did not address the beneficiary's proposed employment capacity in the United States. In a second request for evidence, dated October 28, 2005, the director requested that the petitioner submit a "definitive statement" describing the job duties to be performed by the beneficiary and addressing the following: (1) the beneficiary's job title; (2) a comprehensive list of job duties; (3) the managers or supervisors working subordinate to the beneficiary, as well as a brief description of their positions, related job duties, and educational levels; (4) the qualifications necessary for each position; (5) the "level of authority held by the beneficiary"; (6) an explanation of whether

"the beneficiary functions at a senior level within the corporation"; and (7) a description of who performs the services offered by the petitioner. The director also requested evidence of the petitioner's staffing levels, specifically identifying the beneficiary's position in the organization, as well as Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, for each worker employed in 2004.

Counsel for the petitioner responded in a letter dated December 26, 2005 and attached the following statement from the petitioner describing the beneficiary's proposed employment as general manager:

The permanent [g]eneral [m]anager position that [the beneficiary] will hold with [the petitioning entity] is executive and managerial in nature, and essentially entails the executive management of the organization in the United States on a long-term basis. Because the [g]eneral [m]anager functions in a senior level position with [the petitioner's] hierarchy, [the beneficiary's] duties and functions will include:

- Overseeing all the investments of the American corporation and other financial and managerial related functions, which will entail 75% of his time, including:
 - Directing and coordinating activities concerned with the pricing, sales, and/or distribution of our goods and products;
 - Reviewing financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement;
 - Determining the products to be sold, and setting prices and credit terms, based on forecasts of customer demand;
 - Overseeing activities directly related to providing products to clients;
 - Establishing and implementing company policies, goals, objectives, and procedures, as well as conferring with board members, organization officials, and sub-contracted staff and advisors, as necessary;
 - Directing and coordinating the organization's financial and budget activities to fund operations, maximize investments, and increase efficiency;
 - An [m]onitoring the business to ensure it efficiently and effectively provides the needed services while staying within budgetary limits.
- [The beneficiary] will also manage and oversee the work of [the petitioner's] subcontracted personnel, and will exercise discretion over the day-to-day operations, which will entail 15% of his time, and will include functions such as:
 - Managing sub-contractors and assigning specific duties;
 - Determining staffing requirements, when needed, and interviewing, hiring, and training new employees, or overseeing those personnel processes, when such employees are needed above and beyond the company's subcontractors.

The petitioner further noted that the beneficiary would spend 10 percent of his time "managing and overseeing the complete integration of the American enterprise." The petitioner listed executive and managerial "attributes" held by the beneficiary, which the petitioner explained the beneficiary would apply during his management of the United States entity. The petitioner did not provide evidence related to its staffing levels. Nor did it address whether it employed anyone other than the beneficiary. Based on the

beneficiary's IRS Form W-2 for the years 2003 and 2004, the beneficiary received an annual salary of \$12,000, which is \$12,000 less than the total amount in salaries reported by the petitioner on its 2004 income statement. It is therefore questionable whether the petitioner employed another worker, and if so, the capacity in which the worker was employed and whether it was on a part-time or full-time basis.

In a decision dated January 10, 2006, 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 noted the responsibilities assigned to the beneficiary, but stated that such job duties as "business marketing, staff recruitment and supervision" comprised "the daily productive tasks of the company." The director noted that the petitioner had failed to demonstrate that "lower-level productive tasks" would not be a "primary component" of the beneficiary's position. Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on February 13, 2006, contending that Citizenship and Immigration Services (CIS) failed to understand the beneficiary's job duties and his qualification as a manager or executive. In an attached appellate brief, dated February 9, 2006, counsel claims that the beneficiary's proposed job duties qualify as being primarily managerial and executive in nature, as he would "plan, manage, supervise, organize, direct, and control an organization or its major functions." In his brief, counsel summarized the responsibilities previously noted by the petitioner for the record, and stated that "[t]hese specific duties, along with the others contained in [the] [p]etitioner's statement, prove that the proffered position includes planning for the organization or its major functions," as well as "managing and controlling [the United States] organization or its major functions." Counsel restates portions of the beneficiary's job responsibilities as evidence of his "supervisory duties" and "organizational functions." Counsel further states that the beneficiary's "control over the organization or its major functions is inherent in the proffered position." Counsel states:

[T]he proffered position entails the executive management of the organization in the United States on a long-term basis. Exhibit 2 at page 1. Furthermore, control is inherent in the proffered position given that [the] [b]eneficiary will be responsible for '[e]stablishing and implementing company policies, goals, objectives, and procedures.' Furthermore, [the] [p]etitioner's statement that [the] [b]eneficiary confer[s] with board members and organization officials, 'as necessary,' attests that [the] [b]eneficiary is not required to obtain approval for his managerial and executive acts, and need only seek the board's advice as [the] [b]eneficiary deems necessary.

Counsel claims that the petitioner has established by a preponderance of the evidence "that the proffered position in the United States entails the planning, managing, supervising, organizing, direction, and control of [the] [p]etitioner's organization or its major functions." Counsel resubmits on appeal the petitioner's December 26, 2005 statement outlining the job duties related to the beneficiary's position of general manager.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5).

The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of

the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Here, the petitioner initially presented three different positions that the beneficiary would occupy – general manager, corporate vice-president, and treasurer – and stated that all are "executive/managerial in nature." The petitioner's subsequent responses to the director's request for evidence and on appeal are equally indistinct, identifying the beneficiary's employment as being both "executive and managerial in nature" and as comprising "duties [that] are executive and managerial." The petitioner failed to specifically aver or establish the particular capacity in which the beneficiary would be employed. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. As discussed below, the petitioner has not demonstrated the beneficiary's eligibility for classification as a manager or executive.

The petitioner did not provide a sufficient description detailing the managerial or executive job duties to be performed by the beneficiary as the company's general manager. The regulation at 8 C.F.R. § 204.5(j)(5) requires a petitioner to "clearly describe the duties to be performed by the [beneficiary]," such that his employment would be characterized as managerial or executive in nature. In the instant matter, the petitioner's statement, while lengthy, contains limited detail as to the specific managerial or executive tasks to be performed by the beneficiary. For example, the petitioner's initial letter stated generally that the beneficiary would: (1) establish the goals and policies of the corporation's purchasing, "structure, components, [and] investments"; (2) "exercise wide latitude in discretionary decision-making; (3) manage and oversee purchases nationally and internationally; (4) "exercise discretion over the day-to-day operations of the American enterprise"; and (5) perform "senior-level functions" such as managing the company's imports and exports, "sales, marketing, new developments, and purchases." Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner also noted the beneficiary's supervision over the petitioner's equine division, but failed to specifically address the beneficiary's role in this division or identify the managerial or executive job duties related to this responsibility. The actual duties themselves reveal the true nature of the employment. *Id.* at 1108. 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)).

Similarly, the petitioner's response to the director's request for evidence failed to identify a primarily managerial or executive position to be held by the beneficiary. The seven responsibilities identified by the petitioner as consuming 75 percent of the beneficiary's time are broadly presented, and do not detail the related managerial or executive job duties. The petitioner's vague claims included: directing pricing, sales and distribution, "[r]eviewing financial statements, sales and activity reports," "[d]etermining the products to be sold" and the corresponding prices, overseeing customer service "activities," directing "financial and budget activities," and ensuring efficient and effective business operations. These overly broad statements are not sufficient to corroborate the claim that the beneficiary would be primarily performing managerial or executive job duties. Additionally, the additional job description does not clarify that initially offered by the petitioner, but merely incorporates new responsibilities that are equally unclear. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978) (finding that the petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position).

Moreover, the majority of counsel's brief on appeal relies on restating the vague job duties already reviewed and considered by the director. 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). Also, despite counsel's suggestion, a beneficiary's "control," management or direction over a company cannot be assumed or considered "inherent" to his position merely on the basis of broadly-cast job responsibilities. The AAO is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. 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.

Furthermore, other than identifying the beneficiary as a manager, the petitioner has not documented the beneficiary's purported managerial or executive authority over the named outside vendors or independent contractor. In fact, based on the petitioner's December 26, 2006 statement, in which it explains that the beneficiary "must maintain constant contact with [] manufacturers and/or distributors" to monitor inventory levels, the beneficiary would not occupy a managerial or executive position with respect to the outside vendors, but would instead act as a service representative of the United States company. There is no evidence that the beneficiary personally directs or manages the company's vendors or those professionals rendering services to the petitioner. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The record also fails to demonstrate that the petitioner maintains a staff sufficient to employ the beneficiary in a primarily managerial or executive capacity. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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.

The petitioner has not presented a clear illustration of its staffing levels. On Form I-140, the petitioner claimed to employ a staff of three, however, identified only the beneficiary and a secretary as employees on its organizational chart. The remaining parties noted on the organizational chart are outside vendors and professionals or independent contractors. As noted previously, the petitioner provided for the record only one 2004 IRS Form W-2, which had been issued to the beneficiary. However, based on the wages reflected on the beneficiary's Form W-2 and the amount in salaries reported on the petitioner's 2004 income statement, the petitioner employs at least one other employee. The petitioner has failed to clarify its true staffing levels and those workers supervised by the beneficiary. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner has also failed to document its use of outside vendors and an independent contractor, despite its claim in its December 26, 2005 statement that it "usually operates through sub-contractors." The record is devoid of documentary evidence, such as IRS Form 1099 or payments reflected on the petitioner's income statement for outside services, that the petitioner utilizes outside contractors to perform its non-qualifying functions. The AAO notes that the petitioner provided an incomplete copy of its 2004 federal income tax

return, submitting only the first page of the tax return for the record. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In light of these discrepancies, the limited evidence suggests that the petitioner's two-person staff would not meet the reasonable needs of the petitioning entity. As the petitioner's primary function is to import and export goods, it is reasonable for the AAO to expect the petitioner to account for the performance of any related non-qualifying tasks, including document preparation, shipping, receiving, and tax and duty payments, as well as those regular, administrative tasks pertaining to functions necessary to maintain business operations, such as banking, purchasing and personnel matters. In fact, the job description provided on the beneficiary's resume suggests that the beneficiary would personally perform the company's purchasing and price negotiations for products. Also, although the beneficiary is claimed to manage the company's marketing activities, the petitioner has not identified any lower-level employees engaged in the associated tasks that the beneficiary would manage. Moreover, the petitioner neglected to explain its relationship with the named vendors, particularly how the work of the vendors would support the beneficiary in a primarily managerial or executive capacity. Absent a clear description of the petitioner's staffing levels and evidence of its employment of lower-level employees and use of outside workers to perform the administrative and operational tasks of the business, the AAO cannot conclude that the reasonable needs of the petitioning organization may plausibly be met through the services of the beneficiary and a secretary. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

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

The AAO will next address the issue of whether the beneficiary was employed by the overseas company in a primarily managerial or executive capacity.

In its initial filing, the petitioner identified the beneficiary as occupying the position of administrator in the foreign entity. In the beneficiary's attached resume, the job responsibilities associated with his former position were identified as: "overseeing and coordinating the sales and distribution of American made goods for the communications and media recording industry in Colombia." While the petitioner submitted an organizational chart of the foreign organization, the titles of the positions were not translated. The AAO notes that the positions reflected on the organizational chart are manager ("gerente"), sub-manager ("subgerente"), administrative manager ("gerente administrativo"), accountant ("contador"), and sales manager ("gerente de ventas"), as well as a sales department ("departamento de ventas").

In his October 28, 2005 request for evidence, the director asked that the petitioner submit a "definitive statement" addressing the job duties performed by the beneficiary as administrator, as well as the following: (1) the beneficiary's job title; (2) a comprehensive list of his job duties in the foreign entity; (3) the managers or supervisors who worked subordinate to the beneficiary, as well as a brief description of their positions,

related job duties, and educational levels; (4) the qualifications necessary for each position; (5) the "level of authority held by the beneficiary"; (6) an explanation of whether "the beneficiary function[ed] at a senior level within the [foreign] corporation"; and (7) a description of who provided the products or services offered by the foreign entity. The director also requested evidence of the foreign entity's staffing levels, specifically identifying the beneficiary's position in the organization.

In his December 26, 2005 response, counsel attached a statement from the foreign entity, dated December 26, 2005, explaining that the beneficiary's former positions of administrator and vice-president were executive and managerial in nature, and that 80 percent of the beneficiary's time was spent performing the following "main duties":

- Directing and coordinating activities concerned with the pricing, sales, and/or distribution of the [products] and goods our company sold, and sells;
- Overseeing activities directly related to providing products to clients;
- Determining the products to be sold, and setting prices and credit terms, based on forecasts of customer demand;
- Reviewing financial statements, sales and activity reports, and other performance data to measure productivity and goals achievement, and to determine areas needing cost reduction and program improvement;
- Directing and coordinating the organization's financial and budget activities to fund operations, maximize investments, and increase efficiency;
- Monitoring the business to ensure it [is] efficiently and effectively providing the needed services while staying within budgetary limits;
- And establishing and implementing company policies, goals, objectives, and procedures related to his specific duties, and accordingly, conferring with board members and company officials as necessary and when was required.

The petitioner explained that an additional five percent of the beneficiary's time was spent managing the foreign entity's personnel and contracted workers, and exercising discretion over their day-to-day activities, while the remaining 15 percent of the beneficiary's time was spent determining expenditures, obtaining and providing information, developing working relationships, maintaining contact with distributors and manufacturers, handling complaints and disputes, and problem-solving. The foreign entity noted that while employed in the foreign entity, the beneficiary managed the company's legal representative-general supervisor, accountant, economist-general sales manager, storage manager, and contracted salespersons. The foreign entity provided a brief job description for each of the positions.

In the January 10, 2006 decision, the director concluded that the petitioner had not demonstrated that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The director stated that the job description offered by the petitioner indicated that the beneficiary performed the "daily productive tasks" of the foreign entity. The director stated that without additional information, the beneficiary's employment abroad could not be deemed to be primarily managerial or executive in nature. Consequently, the director denied the petition.

On appeal, counsel for the petitioner contends that while employed by the foreign entity, the beneficiary was performing primarily managerial and executive job duties, which "entailed the executive management of the foreign company, with focus on the sale and distribution of the media products and goods the company sold."

Counsel claims that contrary to the director's finding, the beneficiary's foreign employment "clearly entailed planning, managing, supervising, organizing, directing, and controlling the foreign organization or its major functions." Counsel states that the beneficiary was engaged in planning the products sold by the foreign entity, the appropriate offering prices, and credit terms, as well as determining "cost reduction and program improvement, and establishing and implementing company policies, goals, objectives, and procedures." Counsel explains that the beneficiary also managed the company's sales and distribution activities, its personnel and contracted workers, and exercised his authority to supervise the company by directing the company's "financial and budget activities to fund operations, maximize investments, and increase efficiency," monitoring the company's budget and maintaining appropriate staffing. Counsel contends that as the foreign entity's administrator, the beneficiary organized, directed and controlled major functions of the company in that he organized its sales, promotions, marketing strategies, "sales techniques, and sales control systems," and was not required to obtain approval from the foreign company prior to determining and implementing policies, goals and objectives. Counsel further states:

As a manager, the foreign company expected [the beneficiary] to have knowledge of principles and procedures for personnel recruitment, selection, training, compensation and benefits, labor relations and negotiation, and personnel information systems. To effectively perform his role as the foreign company's vice-president, [the beneficiary] was to determine [sic] how money would be spent to get the work done, and accounting for these expenditures, and to consider the relative costs and benefits of potential actions to choose the most appropriate one. As an executive, [the beneficiary] was expected to develop constructive and cooperative working relationships with others, and maintain them over time, especially with the manufacturers and distributors who provided the foreign company with the products that it sold And [the beneficiary] was expected to use relevant information and individual judgment to determine whether events or processes complied with applicable laws, regulations, or industry and/or government standards, a function that can hardly be expected of first-line or non-managerial personnel.

Counsel again submits on appeal the foreign entity's job statement describing the beneficiary's job duties.

Upon review, the petitioner has not demonstrated that the beneficiary was employed by the foreign organization in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

The AAO notes that the job duties identified by the foreign entity as having occupied 80 percent of the beneficiary's time as the organization's administrator and vice-president are essentially the same as those job responsibilities attributed to the beneficiary as the petitioner's general manager. Additionally, in each position, the beneficiary was identified as spending a small portion of his time managing personnel and subcontracted workers, and exercising discretion over each business' day-to-day operations. The fact that the job duties associated with the beneficiary's former and present positions, which, the AAO again notes, bear different job titles, are ultimately the same raises doubt as to the reliability and authenticity of the evidence offered. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Additionally, based on the job descriptions offered subsequent to the initial filing, the petitioner appears to have expanded the beneficiary's foreign job responsibilities, suggesting that the beneficiary managed and directed functions of the organization rather than performed the non-qualifying functions himself. The information contained on the beneficiary's resume, which was submitted with the Form I-140, limits the beneficiary's role in the foreign company to its sales and distribution functions. Alternatively, latter job descriptions incorporate such job duties as directing the company's finances and investments, determining the organization's budget, and overseeing staffing, including hiring and firing. When responding to a request for evidence or filing an appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or 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).

As discussed previously, the job description offered for the beneficiary's position as administrator of the foreign entity does not sufficiently identify the managerial or executive tasks performed by the beneficiary. The foreign organization's vague statements that the beneficiary directed pricing, sales and distribution, "[r]eview[ed] financial statements, sales and activity reports," "[d]etermin[ed] the products to be sold" and the corresponding prices, oversaw customer service "activities," directed "financial and budget activities," and ensured efficient and effective business operations do not detail the beneficiary's specific managerial or executive job duties. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Case law dictates that a petitioner's blanket claim of employing the beneficiary as a manager or executive without a description of how, when, where and with whom the beneficiary's job duties occurred is insufficient for establishing employment in a primarily managerial or executive capacity. *Id.* Without a comprehensive statement documenting the specific managerial or executive job duties associated with the beneficiary's position of administrator, the record fails to corroborate the petitioner's claim that the beneficiary was employed overseas in a primarily qualifying capacity.

The claims made by counsel on appeal are equally vague, as they do not clarify what managerial or executive tasks the beneficiary performed on a daily basis. It is unclear what "financial and budget activities" the beneficiary oversaw, what "policies, goals, objectives, and procedures" the beneficiary established and implemented, or what managerial or executive tasks were incorporated in the beneficiary's responsibilities of organizing the company's "marketing strategy and tactics, product demonstration, sales techniques, and sales control systems." This is particularly questionable as the foreign entity claimed to employ a general sales manager subordinate to the beneficiary, who, presumably, would have been in charge of devising the business' marketing and sales strategies. 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.

Furthermore, the record does not corroborate the foreign entity's claimed staffing levels. The foreign entity claimed in its December 26, 2005 letter that while employed abroad the beneficiary managed a legal representative-general supervisor, accountant, economist-general sales manager, storage manager, and contracted salespersons. The foreign entity's organizational chart, however, does not specifically identify the beneficiary's position of administrator and notes instead the positions of manager, sub-manager, administrative manager, accountant, and sales manager, as well as a sales department. The petitioner has

failed to clarify the beneficiary's true position in the foreign entity or the employees supervised by the beneficiary. As a result, the AAO cannot conclude that the beneficiary occupied a primarily managerial or executive position in the foreign organization. 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. at 591-92.

Based on the above discussion, the petitioner has not established that the beneficiary was employed by the foreign organization in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether a qualifying relationship existed between the foreign and United States entities at the time of filing the immigrant visa petition as required in the Act at section 203(b)(1)(C). To establish a qualifying relationship under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e. a United States entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." See generally § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); see also 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation 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.

The petitioner presented an April 28, 2004 certification with its initial filing in which the foreign entity claimed that the foreign and United States entities possessed an affiliate relationship in that each organization was owned by the same two shareholders. The foreign organization stated in the notarized document that the beneficiary and a second individual own equal shares of the two organizations. The petitioner did not submit documentary evidence, such as stock certificates, stock transfer ledgers, or corporate documentation, corroborating the claimed affiliate relationship. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO notes that the director neglected to issue a notice requesting additional evidence from the petitioner with respect to the purported qualifying relationship between the foreign and United States entities. The regulation at 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the director to deny the petition without a request for evidence. However, as in the instant matter, where the record was missing documentation demonstrating eligibility, a request for additional evidence would have been appropriate. Regardless of the director's procedural error, the Act and regulations clearly define the

petitioner's obligation at the filing of the instant immigrant visa petition of establishing that the United States entity is a subsidiary or affiliate of the beneficiary's foreign employer. *See* 8 C.F.R. § 204.5(j)(3)(i)(C); *see also* § 203(b)(1)(C) of the Act.

The petitioner has not demonstrated the existence of a qualifying relationship between the foreign and United States organizations. 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 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.