

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



B4

FILE:



Office: TEXAS SERVICE CENTER

Date:

NOV 06

SRC 06 267 52471

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

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 corporation organized under the laws of the State of Delaware that is engaged in the marketing and sales of proprietary video content and delivery solutions developed by its subsidiary, BitBand Technologies Ltd., located in Israel. The petitioner seeks to employ the beneficiary as its managing director.

The director denied the petition on November 29, 2006. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States company.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that a review of the director's decision suggests that the petitioner's evidence was not reviewed thoroughly. Counsel asserts that the evidence clearly establishes that the beneficiary will be functioning in both an executive and managerial capacity, as he will be solely responsible for directing the U.S. entity's activities. Counsel submits a brief and additional 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 and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a managerial or executive capacity for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

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

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as 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 immigrant petition was filed September 8, 2006. The petitioner stated on Form I-140 that the beneficiary would be employed as managing director of the U.S. company, and indicated that the company has three

employees. In a letter dated August 28, 2006, the petitioner stated that the beneficiary will be employed in a primarily managerial capacity as he manages a "division, department, subdivision, component, function of [the petitioner]; he directs the entity's U.S. operations." The petitioner emphasized that the beneficiary is the highest-level U.S. employee and reports directly to the Chief Executive Officer of the foreign entity. The petitioner further described the beneficiary's role as follows:

[The beneficiary] is responsible for managing and overseeing all of the company's U.S. operations; [the beneficiary] ensures the successful growth of [the petitioner] in the United States. Specifically, [the beneficiary] plans, directs and coordinates the company's activities in the United States to ensure all of the company's objectives are accomplished within prescribed time and funding parameters.

Specifically, [the beneficiary] is responsible for the following: (i) the management and coordination of the [U.S. petitioner]; (ii) supervision and control of professional employees (iii) recruitment and termination of sales and technical support employees and (iv) discretion over the day-to-day operations of sales, marketing and technical support teams. . . .

[The beneficiary] is responsible for the following job duties in his position as Managing Director:

- Direct and lead the work of the U.S. team in an effort to increase revenue and gross margin in the U.S.;
- Direct the development and manage an individual book of business and quota to sell and manage [sic] point solution and loan staff services related to business risk services, ERP selection and implementation, cash management and other key accounting initiatives;
- Mentor, review and track the business organization through daily, weekly, monthly metrics;
- Develop annual business plan and budget for the office;
- Set objectives for U.S. office with sales personnel and recruiters;
- Establish metrics which assess individual performance against objectives;
- Direct and manage sales staff with regards to business development, sales objectives, etc;
- Lead strategic and tactical product management of [the petitioner's] server division's 3<sup>rd</sup> party and OEM products;
- Direct and manage customer support to ensure product requirements are satisfied;
- Direct and oversee the development of product roadmaps and ensure timeline is met;
- Manage and prioritize product requirements and product release schedule in coordination with Engineering team in Israel;
- Oversee and manage sales, business development, engineering, QA, manufacturing and technical support throughout entire life cycle of products;
- Formulate strategies for new applications and markets based on core internal and 3<sup>rd</sup> party platforms;
- Direct development of competitive product analysis, define competitive strategy to support sales to capture and/or increase market share;

- Manage implementation of pricing and product positioning strategy and sales guidelines;
- Play key role in defining company, product OEM and branding strategies;
- Oversee production and maintenance of product collaterals (product specifications, datasheet, application notes, white papers, sales, customer presentations and training materials);
- Direct and oversee sales and pre-sales support. This includes creating and maintaining sales and pre-sales supporting documents for relevant market segments including product briefs, data sheets, presentations, technology, white papers and competitive reviews;
- Define pricing structure and sales strategies for the Network Management Systems and software products in coordination with solution market segment managers.
- Strategic planning and execution to enhance profitability, productivity, efficiency for U.S. operations;
- Direct company's internal financial review, operational cash management and fiscal budgeting and reporting;
- Monitor and supervise technical performance metrics and facilitate relationships with the vendors responsible for the company's technology infrastructure.
- Recommending new business development and expansion initiatives;
- Developing new techniques and operating procedures to improve US sales process and customer satisfaction;
- Responsible for recruiting key sales hires for the U.S. entity.
- Evaluation of team work output.
- Responsible for employee reviews, terminations of subordinates.

The petitioner stated that in addition to these duties, the beneficiary supervises and manages the work of several professionals. The petitioner identified the beneficiary's subordinates as:

- Director of Project Management, B.A. in Computer Science;
- Professional Services, B.S. in Computer Science;
- R&D Support Engineer, B.A. in Computer Science, M.B.A.;
- Director, Director of Pre-Sales, B.S. in Computer Science; and
- Vice President of Research & Development, B.Sc. in Engineering, M.B.A.;

The petitioner provided position descriptions for each claimed subordinate employee and noted that the beneficiary has the authority to hire and fire the aforementioned employees and make other personnel decisions.

The petitioner submitted an organizational chart ostensibly representing the structure of the U.S. company as of August 2006. The chart depicts the beneficiary as managing director over sales, finance and support departments. The sales department includes "inside sales" and "marketing/business development," the finance department includes "accounting" and the support department includes "pre-sales" and "help desk." No subordinate employees are identified by name, although it appears that "Ink Communications" provides marketing and business development, while pre-sales support is assigned to "R&D Israel."

The petitioner submitted a second organizational chart, which includes the Israeli company's employees. The beneficiary is depicted as the managing director, North American office, reporting to the "VP Business" in Israel, who in turn reports to the chief executive officer of the foreign entity. Of the five claimed subordinate employees named above, only two appear on the organizational chart, and neither of these employees is identified as being a subordinate of the beneficiary. The chart shows that [REDACTED] is "CS Team Leader" reporting to a sales operation manager position, while [REDACTED] is "Server Team Leader" reporting to the Vice President, Research & Development. [REDACTED] do not appear on the company chart.

The petitioner's supporting documentation included a business plan for the United States office, which suggested that the company is still in its early stages of development, although it was incorporated in 2000. The business plan includes, beginning at page 19, short and medium-term targets for the U.S. operations beginning with the second quarter of 2005, and shows that by the second quarter of 2006, the company had anticipated operating with an organization of five to eight people, with a support organization of three to four engineers anticipated by the end of 2006.

The director issued a request for additional evidence on October 12, 2006, in which she instructed the petitioner to submit the following documentation: (1) a more detailed organizational chart for the U.S. entity to include the names, job titles and specific job duties for the beneficiary and his subordinates; (2) the U.S. entity's federal income tax returns for 2004 and 2005; (3) copies of IRS Form W-2, Wage and Tax Statement, for all U.S. employees for 2004 and 2005; and (4) copies of the U.S. company's state quarterly wage reports.

In a response dated October 23, 2006, the petitioner clarified that although the U.S. company was incorporated in 2000, its U.S. office was opened in June 2005 and the beneficiary has been responsible for opening and managing the office. The petitioner stated that the company plans to have at least ten full-time employees by the second quarter of 2007.

The petitioner's letter included a description for the beneficiary's position that is identical to that included in the company's letter dated August 28, 2006. The petitioner stated that the beneficiary supervises and manages the work of professionals in the United States and Israel, and identified these employees as the following:

- Chief Financial Officer – [REDACTED]
- Sales and Business Development – Revenue Traction (Contractor);
- Support/Pre-Sales Engineering – [REDACTED] (anticipated starting day of December 1, 2006)<sup>1</sup>
- Director of Project Management – [REDACTED] (Israel)
- MW Professional Services – [REDACTED]
- Project manager/Director of Pre-Sales – [REDACTED]
- Vice President of Research & Development – [REDACTED]

---

<sup>1</sup> United States Citizenship and Immigration Services (USCIS) records show that the petitioner filed an L-1B classification nonimmigrant petition on behalf of [REDACTED] in February 2007. The petitioner stated that call support and installation services for the U.S. company were provided by the Israeli company as of the time the petition was filed.

The petitioner provided resumes and position descriptions for each of these employees. The petitioner's letter included an organizational chart which shows the beneficiary's supervision of [REDACTED], [REDACTED], and "sales and marketing." The chart indicates that [REDACTED] is assisted by a freelance accounting employee, while Mr. [REDACTED] is depicted as supervising "Support, Bitband Ltd." and a vacant pre-sales position. No employees or contract staff are identified in the sales and marketing department.

The petitioner provided a copy of the beneficiary's IRS Form W-2 for 2005, and copies of federal quarterly tax returns and state quarterly wage reports, which confirm that the beneficiary is currently the only payroll employee. The petitioner provided evidence that Sagent Management, the company managed by [REDACTED] has been retained by the foreign entity to provide certain accounting, tax and human resources services for the U.S. company. The petitioner submitted a letter of agreement between the foreign entity and Ink Communications, a Boston, Massachusetts company, appointing the latter as "PR counsel" from August 2005 through August 2006. Finally, the petitioner submitted a services agreement executed between the foreign entity and RevenueTraction LLC in May 2003.

The director denied the petition on November 29, 2006, concluding that the petitioner failed to establish that the beneficiary would be employed by the U.S. company in a primarily managerial or executive capacity. The director questioned whether the beneficiary would devote the majority of his time to performing primarily managerial or executive duties, as the petitioner had not established that he would be relieved from personally performing non-qualifying tasks by a subordinate staff. The director suggested that the beneficiary would primarily perform the tasks necessary to produce a product or to provide services. The director emphasized that the beneficiary is the sole employee of the U.S. company and noted that the petitioner had not submitted copies of IRS Forms 1098 or 1099 to document its use of contractors.

On appeal, counsel for the petitioner asserts that the beneficiary is clearly functioning in both an executive and managerial capacity with the petitioning company, given that he is the highest level employee in the U.S. company and reports only to the chief executive officer of the foreign entity. Counsel notes a spelling error made in the director's decision and asserts that the director failed to thoroughly review the file.

In a letter dated December 12, 2006, the petitioner objects to the director's finding that the company's use of contract employees was not documented. The petitioner notes that evidence was submitted, including copies of contracts and evidence of payments made by the U.S. company. The petitioner notes that since the contractors utilized are corporations, no IRS Form 1098 or 1099 is required.

The petitioner states that the beneficiary is one of the top executives of the worldwide organization with responsibility for all activities in North America. The petitioner states that the beneficiary's responsibilities include the following:

- 1) Total responsibility of the Company P&L . . .
- 2) Establishing and Managing Strategic relationships with Customers, Technology Partners and System Integrators.
- 3) Direct influence on Corporate Overall Strategy, based on local market needs
- 4) Establishing the Goals and the Policies of the North America Operations

- 5) Decision making within operational independence, under the general supervision of the Executive Vice President for Strategy and with direct interaction with the CEO of the Company
- 6) Presenting on behalf of [the company] at various forums and conferences in the fields of IPTV
- 7) Managing the Customer Deliveries and Customer Satisfaction, and eventually managing several people in his North American Organization, in Pre-Sales, Post-Sales and Sales functions

The petitioner states that "the sales and pre-sales functionality was managing and reporting directly to [the beneficiary] and executed via external contractor company by name "Revenue Traction." The petitioner indicates that a "clear majority of time" is devoted to executive job duties with an emphasis on establishing company strategies for North America and forming strategic relationships with partners and customers.

In support of the appeal, the petitioner submits an advisory opinion letter from [REDACTED] Ph.D., Lecturer at Stanford University's Graduate School of Business. [REDACTED] indicates that he reviewed the beneficiary's "current job description," the applicable definitions of "executive" and "manager," and the director's Notice of Decision dated November 29, 2006. [REDACTED] states that, in his opinion, the beneficiary's position meets and exceeds the statutory definitions, noting that one of the beneficiary's duties is "to manage his company's relations with tier one Venture Capitalist." [REDACTED] avers that the acquisition of funds is "the key to the lifeblood of any company and it integrally involves managing 'a major component or function' of the company." [REDACTED] expresses disbelief that the director could miss this "salient evidence" and "a myriad of other examples," and is perplexed as to why the director "failed to see the obvious." Finally, [REDACTED] opines that "even meeting one component of the definition . . . should satisfy the government's requirement."

Upon review of the record in this matter and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity.

Although the AAO concurs with the director's ultimate determination, it must be noted that when denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). Upon review of the director's decision, the reasons given for the denial are conclusory with no specific references to the evidence entered into the record. As the AAO's review is conducted on a *de novo* basis the AAO will herein address the petitioner's evidence & eligibility. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The AAO acknowledges that the petitioner submitted a lengthy description of the beneficiary's duties in support of the initial petition, and that such description included a number of duties that would typically be consistent with the statutory definitions of managerial or executive capacity. However, a review of the submitted position description in light of the totality of the record raises questions as to whether the submitted description represents a complete and accurate account of the beneficiary's actual duties as of the date the petition was filed. For example, the petitioner indicated that the beneficiary's responsibilities include coordination of the U.S. organization, supervision and control of professional employees, recruitment and termination of sales and technical support employees, and direction over sales, marketing and technical support teams. While these duties would generally be considered managerial in nature, the lack of any subordinate employees in the United States organization leads the AAO to the reasonable conclusion that the beneficiary's position description encompasses many duties that are speculative in nature, and contingent upon the U.S. company's success in achieving the milestones and objectives set forth in its business plan. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner provided a list of 27 duties assigned to the beneficiary, which included directing and leading the work of the U.S. team, setting objectives with sales personnel and recruiters, directing and managing sales staff, recruiting key sales hires, evaluating team work output, and conducting employee reviews. Similarly, the beneficiary's stated responsibilities for directing and overseeing sales and pre-sales support, managing customer support, and directing development of competitive analysis also imply the existence of support staff who in reality have not yet been hired. As will be discussed further below, the beneficiary had no direct subordinates to oversee at the time the petition was filed. Similarly, the AAO questions whether the beneficiary, as the sole employee of the U.S. operation, which is described in corporate documentation as a "sales office," actually oversees and manages "sales, business development, engineering, [quality assurance], manufacturing and technical support throughout entire life cycle of products." The beneficiary's stated role in developing product roadmaps, prioritizing product requirements, and leading product management for the "server division's 3<sup>rd</sup> party and OEM products," have not been adequately explained and appear to be inconsistent with the nature, purpose and stage of development of the U.S. sales office. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The definitions of executive and managerial capacity have two separate requirements. 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). While the beneficiary, as the managing director and sole employee of the U.S. office, undoubtedly is responsible for planning, goal-setting, oversight of the day-to-day operations, and eventually, hiring of additional employees, the record does not establish that his actual duties as of the date the petition was filed were primarily managerial or executive in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

As noted above, the petitioner's office was established in June 2005 as a sales office, which, according to its business plan, had projected having an organization of approximately eight employees by the end of 2006, including a "marketing and support" organization. In reality, the U.S. company, as of the date of the director's decision, employed the beneficiary as managing director. To the extent that the petitioner is marketing, selling and supporting its products in the United States, it is evident that the beneficiary is directly responsible for these activities, and is not managing or directing these functions through lower-level personnel, as contemplated by his position description. 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).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. As the beneficiary has not been shown to supervise the various teams of employees he is claimed to manage, it is reasonable to conclude, and has not been shown otherwise, that he is performing non-managerial tasks that would normally be, and may eventually be assigned to a subordinate staff. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager. *See, e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The AAO acknowledges the petitioner's claims that the beneficiary manages professional employees, notwithstanding the fact that he is the sole employee of the U.S. company. The petitioner has stated that the beneficiary supervises several Israel-based employees, including [REDACTED] who do not appear on any of the submitted organizational charts, as well as [REDACTED] who do appear on the foreign entity's organizational chart, although with different position titles than those indicated in the petitioner's letter. These employees, likewise, do not appear to report to the beneficiary based on the organizational structure depicted. The petitioner also has consistently claimed that the beneficiary reports to the chief executive officer of the foreign entity, while the organizational chart indicates that the beneficiary reports to the "VP, Business." 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). Notwithstanding these inconsistencies, the petitioner has not adequately explained how the beneficiary supervises the claimed subordinates within the foreign entity, nor clarified how these employees would relieve the beneficiary from carrying out the day-to-day operations of the U.S. company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Based on the limited evidence submitted with respect to the beneficiary's supervision of foreign employees, the AAO is not persuaded that the foreign entity's employees are responsible for the marketing, sale or support of products in the U.S. market, or any other operational or administrative tasks associated with the U.S. office. The petitioner has also not adequately supported its claim that "call support and installation" are provided by the foreign entity.

The petitioner also claims to utilize a number of contract employees to perform certain functions for the U.S. operation. The AAO concurs with the petitioner that the director erred by requiring that the petitioner submit copies of IRS Forms 1098 or 1099 in order to establish the U.S. company's utilization of contract workers. The petitioner presented evidence that the foreign entity has retained Sagent Management to provide monthly bookkeeping services, tax preparation and certain human resources services for the U.S. office. The AAO notes that these services were not retained by the beneficiary in his role of managing director, but by the foreign entity's management staff. The petitioner has also submitted sufficient evidence to establish that the foreign entity contracted with a U.S. public relations firm, Ink Communications, although the agreement between the companies appears to have lapsed in August 2006. The AAO notes that the record does not support a finding that this public relations firm served as the U.S. company's marketing and business development department, as indicated on the initial organizational chart submitted for the U.S. company.

The petitioner states on appeal that "the sales and pre-sales functionality was managing and reporting directly to [the beneficiary] and executed via external contactor [sic] company by name 'Revenue Traction.'" The only documentary evidence in the record referencing Revenue Traction is a 2003 services agreement between that company and the foreign entity, which pre-dates the opening of the United States office by two years. The petitioner has not submitted evidence that the beneficiary contracted with this company, that he supervises marketing and sales services provided by this company, or that the petitioner was regularly paying this company for services at the time the petition was filed in 2006. 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. at 165. The petitioner has not adequately supported its claims that the U.S. company's sales and pre-sales activities were performed by an external contractor as of the date of filing.

The petitioner claims that the beneficiary manages an essential function or component of the petitioner's organization, namely, the U.S. operations. 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 in managing the essential function, 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. See 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. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

As noted above, beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the

depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, and the indirect supervision of employees within the scope of the function managed.

The addition of the concept of a "function manager" by the Immigration Act of 1990 simply eliminates the requirement that a beneficiary must directly supervise subordinate employees to establish managerial capacity. Despite the changes made by the Immigration Act of 1990, the statute continues to require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service or other non-managerial, non-executive duties, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. As discussed above, the petitioner has neither established that someone other than the beneficiary performs the day-to-day non-managerial tasks of operating the U.S. office, nor established that the beneficiary's duties are primarily managerial or executive in nature.

The AAO notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9<sup>th</sup> Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)).

At the time of filing, the petitioner was a one-year-old company engaged in the sales and marketing of Video-on-Demand solutions developed by its foreign subsidiary. It employs the beneficiary as its sole full-time payroll employee and utilizes the services of a contracted accounting/tax firm. As discussed above, the use of other contracted employees has not been adequately documented and the record does not establish that there were subordinate employees or contract staff to perform sales, marketing, customer support or administrative tasks associated with the day-to-day operations of the business. The petitioner has not established that it has a reasonable need for the beneficiary to perform primarily managerial or executive duties in light of its overall purpose and current stage of development.

The AAO acknowledges receipt of the expert opinion letter from [REDACTED], who states that he reviewed the beneficiary's "current job description," the USCIS definitions of "manager" and "executive," and the director's notice of decision. [REDACTED] did not provide a copy of the position description he reviewed, although he references the beneficiary's responsibility to "manage his company's relations with tier one Venture Capitalist[s]," a duty which is not included in any of the position descriptions submitted for review

by USCIS [REDACTED] also expresses his opinion that the petitioner need only establish that the beneficiary meets one component of one of the statutory definitions of managerial or executive capacity in order to establish eligibility for this visa classification. In fact, 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.

The AAO may, in its discretion, use an advisory opinion a statement submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). [REDACTED] opinion appears to be based on his review of a position description that has not been provided for review by USCIS, and does not specifically indicate how the beneficiary qualifies for the benefit sought under each of the four statutory criteria for either managerial or executive capacity. The opinion consists mainly of a critique of the director's decision, which, the AAO agrees, was substantively deficient.

The record shows that the petitioner intended to hire an additional worker shortly after the filing of the petition, and the petitioner has indicated its intent to operate with a total staff of ten employees by the second quarter of 2007. The AAO must emphasize that the critical facts to be examined are those that were in existence at the actual time of filing the petition. It is a long-established rule in visa petition proceedings that a petitioner must establish eligibility as of the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Based on the foregoing discussion, the petitioner has not established the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Furthermore, the record supports a finding of ineligibility based on an additional ground that was not previously addressed in the director's decision. The petitioner has failed to establish that the beneficiary was employed by the foreign entity for one year within the three years preceding the time of his application for classification as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Act.

The petitioner states that the beneficiary was employed by the petitioner's foreign subsidiary in Israel from January 1999 until February 2000. The beneficiary subsequently worked for a number of unrelated U.S. companies in H-1B status from April 2000 until April 2005. He has been employed by the U.S. petitioner, the parent company of his last foreign employer abroad, in H-1B status since May 2005. The instant immigrant petition was filed on September 12, 2006.

The regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) provides that if the beneficiary is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the beneficiary was employed overseas, the petitioner must provide evidence that, in the three years preceding his entry as a nonimmigrant, the beneficiary was employed by the entity abroad for at least one year in a managerial or executive capacity. While the beneficiary is currently in the United States working for the parent company of his last overseas employer, his one year of employment abroad does not fall within the

three years preceding his entry as a nonimmigrant authorized to work for the U.S. company. The evidence of record indicates that the beneficiary commenced employment with the petitioning company in May 2005.

The regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) simply allows USCIS to look beyond the three-year period immediately preceding the filing of the I-140 Petition in order to determine whether the beneficiary has the requisite one year of qualifying employment abroad. The regulation is applicable to aliens who are employed by qualifying U.S. entities in a nonimmigrant status. Without such a provision, an alien who had been employed by a qualifying organization in the United States in a valid nonimmigrant status for more than two years would otherwise be ineligible for classification as a multinational manager or executive. In this case, since the beneficiary's U.S. employment with a qualifying entity commenced in May 2005, the petitioner must establish that the beneficiary was employed by the foreign entity for a one-year period between May 2002 and May 2005. The record does not establish that the beneficiary was employed by the foreign entity during this period of time.

The petitioner would have USCIS determine the beneficiary's eligibility based on the three-year period preceding his initial entry to the United States as a nonimmigrant in April 2000. However, the beneficiary did not enter the United States as a nonimmigrant to render services to a qualifying organization at that time, nor did he work for a qualifying organization for the ensuing five years he spent in the United States before commencing employment with the petitioning entity. The statute and regulations clearly contemplate that a multinational manager or executive will have maintained a certain continuity of employment within the same multinational organization. The three-year window established by the statute ensures that there will be no significant interruptions in employment. The regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) does not create an exception that would allow a beneficiary who spent approximately five years working for unrelated U.S. entities subsequent to his period of qualifying employment abroad to be classified as a multinational manager or executive. The beneficiary's "entry as a nonimmigrant," for the purposes of determining his eligibility as a multinational manager or executive, coincides with his commencement of authorized employment with a qualifying organization in the United States.

Based on the foregoing discussion, the beneficiary is ineligible for classification as an multinational manager or executive pursuant to section 203(b)(1)(C) of the Act. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683 (9th Cir. 2003).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving

eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.