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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

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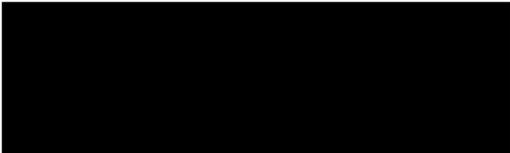
Office: NEBRASKA SERVICE CENTER

Date: NOV 03 2009

IN RE: Petitioner: [REDACTED]
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)

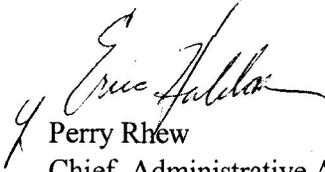
ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew

Chief, Administrative Appeals Office

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

The petitioner claims to be a corporation organized in the State of California that engages in the business of event management, production and design. The petitioner seeks to employ the beneficiary as its chief executive officer. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

On June 13, 2008, the director denied the petition determining that the petitioner failed to establish that the beneficiary was employed abroad, or would be employed in the United States, in a qualifying managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director's denial of the petition is in error. Counsel asserts that the director failed to take into account the petitioner's "explanation that the daily operational tasks of the business are carried out by third-party vendors." Counsel submits a brief and additional documentation in support of these assertions.

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 first issue in this matter is whether the beneficiary was employed abroad in a primarily executive or managerial capacity.

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

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

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

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

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;

- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter dated March 27, 2007, accompanying the Form I-140, Immigrant Petition for Alien Worker, the director of 20/20 Productions Europe Ltd., the petitioner's affiliate in Scotland, stated that the beneficiary was Director and Corporate Secretary of the foreign company from 1990 to August 2002. The letter contains the following statement regarding the beneficiary's position abroad:

As a co-Founder and co-Director of the UK company, [the beneficiary] has played a key executive and managerial role within the organization. While in the U.K., he co-directed and managed the company's operations, finances, administration, and marketing. He also managed major company projects, including event and video productions, multimedia and graphic design. In addition, he recruited and trained employees for the Production, Design, and Administration departments. [The beneficiary's] training and personnel management was a key factor in the U.K. company's receipt of the "Investor in People" status (recognition of excellent Employee Training and Personnel Management standards).

The petitioner also submitted an organizational chart labeled "20/20 Productions Europe Ltd. Organisational Chart," which lists the beneficiary as "C.E.O. USA/Director Europe," with direct supervision of a "Production" employee and indirect supervision of employees in the Europe entity.

On March 13, 2008, the director issued a request for further evidence (RFE). In connection with the beneficiary's position abroad, the director requested a more detailed description of the beneficiary's duties along with an estimate of the percentage of time the beneficiary dedicated to each specific duty, and an organizational chart that corresponds with the beneficiary's period of qualifying employment abroad. The petitioner was instructed to include on the chart all departments and teams and the names and detailed descriptions of the job duties of the beneficiary's immediate supervisor and subordinate employees.

In response to the RFE, the petitioner submitted a more detailed description of the beneficiary's position in the foreign entity, grouping the beneficiary's responsibilities into the following categories and assigning a percentage of time spent on each category:

- Organizational Goals and Policies -- 15%
- Marketing Strategy -- 25%
- Client Development -- 25%
- Project Management -- 15%
- Personnel Management -- 15%
- Business Management -- 5%

The tasks listed under these categories include, among other duties: developing and planning overall business strategy; financial planning; ensuring legal compliance; formulating and executing marketing strategy; functioning as primary client liaison; presenting company to potential clients; management and coordination of event production staff on-site; directing video program production; set and evaluate goals for company staff; assign specific projects to staff and supervise workload; and supervise, train, evaluate, hire and terminate staff. The petitioner indicated that all of the beneficiary's executive and managerial duties were shared with his co-director in the foreign entity.

The petitioner also submitted an organizational chart entitled "20/20 Production Europe Ltd – Employees from 1990-2002." The chart shows the beneficiary and his co-director at the top of the organizational hierarchy with employees listed in four different departments below them. Based on their stated dates of employment, the following staff appeared to have been in place during the year preceding the beneficiary's transfer to the United States: a marketing manager in the marketing department; in the administrative department, one office manager and three admin assistants; in the production department, five producers and one production assistant; and in the Design/IT Department, one senior designer, two designers, and one IT coordinator. The directors' direct reports during that time included the marketing manager, the office manager, and the senior designer. The petitioner also provided a brief description of the duties of each of the beneficiary's subordinates in the foreign entity. The responsibilities of the directors' direct reports are described as follow:

Marketing Manager

- Formulate marketing communications strategy
- Implement communications strategy
- Build awareness of company
- Initial contact with potential Clients
- Assist Directors in creating Client relationships
- Public relations coordinator for company

Office Manager

- Responsible for administrative needs of company
- Deal with Director's correspondence
- Deal with building matters
- Supervise Admin Assistant(s)
- Assist revenue-generating departments with project requirements (Design and Production)
- Organize logistics for company personnel (flights, hotels, subsistence)
- Responsible for day-to-day financial accounts compilation

Senior Designer

- Responsible for successful completion of all design-related projects
- Supervise Design Dept staff
- Instruct and train Designers
- Ensures consistency of design elements

- Control department costs and project budgets

In his decision denying the petition, the director noted that the description of duties for the beneficiary's position abroad and that in the United States were identical except for several tasks under "personnel management." The director further observed that, of the beneficiary's total time, "65% was devoted to marketing client development and functioning as the main liaison with clients for projects" and "responding to correspondence from clients, vendors, and others, and maintaining business requirements" filled 5% of the beneficiary's time.¹ These tasks, the director found, were daily operational tasks necessary to ensure the operation of the petitioner's business and therefore cannot be deemed qualifying. The director concluded that "the petitioner has failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function for either the U.S. position or the position abroad."

On appeal, counsel asserts that the beneficiary and his co-director equally shared executive responsibilities for the foreign company from the time the company was founded in 1990 until 2002. Counsel maintains that the beneficiary's standing as an executive in the United Kingdom was recognized by others in the business community, as evidenced by his membership in an executive-level network and invitations to events reserved for executives in the creative industries. Counsel further asserts that, in his capacity as co-director of the U.K. company, the beneficiary supervised multiple employees in supervisory and managerial capacities. Counsel further emphasized that the beneficiary had the authority to hire and fire such employees and exercised discretion over the day-to-day operations of the U.K. organization. Therefore, counsel concluded, there is no basis for the director's conclusion that the beneficiary did not serve in a managerial capacity abroad.

Counsel submits a letter dated July 2, 2008 from the beneficiary's co-director in the foreign entity. In response to the director's determination that the beneficiary spent the majority of his time providing direct services to clients, the beneficiary's co-director stated that the nature of the corporate communications industry is such that corporate clients rely on the top executives of communications firms to be present and involved in the initial client contact, creative development, negotiations and the making of initial strategic decisions. He further explained:

[M]eeting with top executives of corporate clients and fostering business relationships with those clients are at the *very core* of successful direction and management of our organization. Our whole business turns on identifying clients and meeting their creative design or event needs. Without [the beneficiary's] constant attention to cultivating new and existing client relationships, there would be no corporate clients, and therefore no need for provision of our services.

With respect to the beneficiary's responsibilities in the foreign company, he stated:

¹ It is unclear whether the director's analysis of the apportionment of the beneficiary's time applied to the beneficiary's position in the U.S. or abroad, or both.

We both directed the organization and made key decisions together. We also both supervised other professional employees in the production, design, and marketing departments – including a Marketing Manager and an Office Manager, as well as Producers and Designers. In addition, we both continued to work on client development and project management at the highest level – maintaining continuing communication with corporate clients; overseeing creative direction on client projects; managing the creative team working on the projects; and providing on-site management for events for our most important clients. Just prior to establishing the U.S. company in 2002, we had a total of 11 employees who assisted us in the provision of design, production and event management services for our clients.

The petitioner submitted on appeal letters from the foreign entity's bank, attorneys and accountants, attesting that during the years of 1999-2002, the beneficiary "has been involved in all executive decision making" and "has taken full financial responsibility" for the company.

Upon review, the AAO finds that the evidence of record is sufficient to demonstrate that the beneficiary was employed abroad in a primarily executive or managerial capacity. The director's decision with respect to that issue will be withdrawn.

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). However, beyond the required description of the beneficiary's job duties, U.S. Citizenship and Immigration Services (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 this matter, the AAO finds that the petitioner has sufficiently demonstrated that the beneficiary was employed abroad in a primarily executive and managerial capacity. While some of the tasks listed on the beneficiary's job description may be characterized as non-qualifying tasks, the AAO finds the evidence does not indicate that these comprised the majority of the beneficiary's job duties abroad. The AAO further notes the evidence shows that, during the last years of his employment in the foreign entity prior to his transfer to the United States, together with his co-director, the beneficiary directed and managed a staff of eleven employees in the foreign company, including at least two managerial employees.

The AAO is satisfied that the evidence of record sufficiently demonstrates that as one of two directors of the foreign company, the beneficiary directed the management of the organization; established the goals and policies of the organization; and exercised wide latitude in discretionary decision-making as one of the two directors and owners of the company. The record also sufficiently demonstrates that the beneficiary was responsible for managing the organization; supervised and controlled the work of managerial employees over whom he had the authority to hire, fire or take other personnel actions; and had the authority to exercise discretion over the day-to-day operations of the company. Based on

the evidence of subordinate staffing available to the beneficiary in the foreign company and the duties of the beneficiary and his subordinates, the AAO is satisfied that the beneficiary primarily performed the high-level duties associated with the statutory definition of managerial capacity. The petitioner has adequately demonstrated that the majority of the day-to-day, non-managerial functions of the foreign company was performed by the beneficiary's subordinate managers and employees.

Based on the foregoing, the AAO finds that the petitioner has established that the beneficiary was employed by the company abroad in a primarily executive or managerial capacity. Accordingly, the director's decision with respect to the beneficiary's qualifying employment abroad will be withdrawn.

The second issue in this matter is whether the beneficiary would be employed by the U.S. company in a primarily executive or managerial capacity.

In his March 27, 2007 letter submitted with the Form I-140, the beneficiary's co-director in the foreign entity described the beneficiary's duties in the U.S. company as follow:

Executive duties

As CEO of [the petitioner], [the beneficiary] directs the overall management of the U.S. organization. He is responsible for setting the financial goals and policies of the company. He makes key decisions regarding the company's marketing strategy, client development, project management, and organizational goals. As CEO, he is the highest level executive of the U.S. organization, reporting only to the other co-Director.

Since August 2002, [the beneficiary] has been solely responsible for establishing and overseeing the U.S. office and clientele. [The beneficiary] meets with the targeted U.S. companies to market the [U.S. company's] services; negotiate business with new and existing clients; and maintains relationships with third party vendors to supply equipment and personnel for major client events. In addition, [the beneficiary] has recruited, hired and trained a Production and Marketing Associate . . . to assist with client development and client projects. This appointment has proven invaluable in developing the US company's capabilities and self-sufficiency in the US market. The position is fully funded from US-generated revenues.

Managerial duties

[The beneficiary's] role as CEO includes significant managerial responsibility. He is the main contact for clients, from the initial stage of negotiating prices for services, to ensuring that the client's ultimate objectives are achieved. For design projects, [the beneficiary] delegates work to the U.K. design team, and ensures that clients' deadlines are met. For event production and management, [the beneficiary] is responsible for providing business proposal and determining overall cost. He manages the hiring of third-party vendors for needed supplies, equipment, and services. If required, he

provides on-site supervision at the scheduled event location to ensure that the event runs smoothly. He also directly supervises a professional employee, as described above.

The letter stated that a vendor list and project proposal details were attached; however, such documents were not found in the record. Copies of the beneficiary's and the production and marketing associate's resumes were submitted with the original petition.

In the RFE, the director requested a more detailed description of the beneficiary's duties in the U.S. entity, along with an estimate of the percentage of time the beneficiary would dedicate to each specific duty. The director also requested a detailed description of the job duties for the beneficiary's subordinate employee in the United States.

In response, the petitioner submitted a description of the beneficiary's U.S. duties that was identical to that of his duties in the foreign company, with the exception of the "personnel management" section, where the beneficiary's supervisory responsibilities pertain only to the Production and Marketing Associate rather than to a multi-person staff.

The petitioner also submitted a description of a "typical day" for the beneficiary; a description of "client project-related managerial responsibilities" relating to a sample project in March 2008; IRS Forms W-2 for 2006 and 2007 for the beneficiary and his U.S. subordinate; and proposal outlines and invoices relating to three separate projects in March and June 2008.

The petitioner provided a description of the responsibilities of the beneficiary's sole subordinate in the United States, the production and marketing associate, which include administrative and secretarial tasks such as dealing with correspondence, filing, answering the phone, inputting account information; marketing tasks such as researching potential clients and assisting in creating presentations and promotion materials; and a number of project-related duties in design, video production and onsite event production.

In denying the petition, the director found that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily executive or managerial capacity. As previously noted, the director observed that, of the beneficiary's total time, "65% was devoted to marketing client development and functioning as the main liaison with clients for projects," and 5% to "responding to correspondence from clients, vendors, and others, and maintaining business requirements," which the director found to be non-qualifying tasks. The director further determined that, although the petitioner asserted that the beneficiary supervises professional employees in the U.S. company, the record lacks evidence demonstrating that the beneficiary's sole subordinate is in fact employed in a professional capacity. The director concluded that the petitioner has failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function for the U.S. company. The director further noted that the company's size, by itself, is not a determining factor, but the petitioner still has the burden of proving that it has the necessary staff to ensure that the beneficiary can devote the majority

of his time to executing managerial or executive functions. The director concluded that, based on the record, the petitioner has not established that the beneficiary would be employed in the United States in a primarily executive or managerial capacity.

On appeal, counsel contends that the beneficiary's position in the United States is both executive and managerial in nature. Referring to the letter of July 2, 2008 from the co-director of the foreign entity, counsel asserts that the beneficiary directs the management of the U.S. organization and establishes its goals and policies with respect to business development, strategy, and long-term goals; that his duties necessarily include oversight and supervision of the company's essential functions of client development and project management; and that the beneficiary makes all discretionary decisions for the U.S. company and does not receive any supervision from the U.K. company.

Counsel further claims that the beneficiary does not engage in the direct provision of services, and that "the company relies mainly on the services of third-party vendors to carry out operational tasks associated with the creation and execution of client materials and events." In support of this assertion, counsel refers to the company's tax returns for 2005 and 2006, which counsel claims indicate that third-party vendors constitute 60% of expenses needed to keep the business running.

Counsel further claims that the beneficiary satisfies the definition of a "managerial employee" both as a manager of other employees and as a manager of a function. Counsel contends that the sole employee under the beneficiary's supervision in the United States qualifies as a professional employee. Counsel asserts that the beneficiary also qualifies as a function manager, since "the essential purpose of the U.S. company is to obtain clients and provide them with event management and design services, and as CEO, [the beneficiary] manages both client development and project oversight for all U.S. clients and client projects." Alternatively, counsel suggests that "the U.S. company may be viewed as a department or sub-division of the U.K. organization, with [the beneficiary] as the highest-level managerial company." Counsel asserts that the beneficiary is able to delegate operational tasks to third-party vendors, to the marketing and production associate, and a contract sales associate, and consequently is able to spend the majority of his time on managerial duties.

The petitioner submitted additional evidence on March 29, 2009. The new evidence includes the U.S. and foreign companies' financial and tax information for the year 2008; an updated organizational chart and appendix; and employment information pertaining to a new employee who replaced the previous Production and Marketing Associate as of September 2008. The new organizational chart, which appears to reflect the staff after September 2008, places below the production and marketing associate a sales associate who purportedly works on a commission basis, four individuals listed as "third-party vendors," and five individuals listed as "production freelancers." The appendix sets forth brief descriptions of the duties of the production and marketing associates, sales associates, vendors and freelancers on the chart, as well as the remuneration rates and total amounts paid in 2008 and 2009 for the vendors and freelancers.

Upon review, the AAO concurs with the director's conclusion that the petitioner has failed to establish that the beneficiary would be employed in the United States in a primarily executive or managerial 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'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.* However, as previously noted, the AAO must also examine the claimed managerial or executive capacity of a beneficiary based on the totality of the record, 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.

Counsel's contentions on appeal are primarily premised on the claim that the company relies mainly on the services of third-party vendors to carry out the operational tasks of the company so that the beneficiary does not have to be involved in directly providing the company's services. However, the petitioner has not presented sufficient evidence to document the existence of these third-party vendors, or the extent of the services they provide to the company. On appeal, the petitioner submitted a document entitled "Preferred Vendor List and Approximate Vendor Spend" which lists 14 separate companies and individuals that purportedly provide services at an approximate annual cost to the company of \$147,000. Counsel claims that this amount constitutes 60% of expenses needed to keep the business running, as stated under "Cost of Goods Sold" in the company's tax returns for 2005 and 2006. While the 2005 Form 1120 states the total cost of good sold as \$151,484, and the 2006 Form 1120 states the cost of goods sold for the year as \$95,215, there is insufficient information on the tax returns to illustrate how these amounts may have been allocated to vendors and independent contractors. Further, aside from the "Preferred Vendor List" and a sample contract with a single independent contractor, the petitioner has provided no evidence of contractual agreements with outside vendors or contractors for services, or any evidence of payment made to and received by any such contractors. 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 acknowledges the evidence submitted by the petitioner in March 2009, including the organizational chart depicting the U.S. staff of the beneficiary as including a commission-based sales associate and a number of third-party vendors and freelancers. However, the AAO notes that the 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). To the extent the additional evidence pertains to the staffing of the U.S. company during the 2008-2009 period, it will not be considered in the determination of the beneficiary's executive or managerial capacity at the time the petition was filed in 2007. It is noted that, on appeal, the petitioner submitted a copy of an "Engagement Agreement with Independent

Contractor" dated in March 2007 between itself and AdScholars LLC for commission-based sales services. However, there is no evidence in the record of commissions paid at any point in time to [REDACTED] or to [REDACTED] the named sales associate in the contract. Further, although the petitioner claimed that it has been utilizing other contractors and freelancers since before 2007, the petitioner has submitted no evidence, such as contracts of service or proof of payment to these individuals by the company, to support this claim. 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.

Accordingly, the AAO must conclude that the petitioner has not shown that it employs any staff or utilizes any contractors other than the beneficiary and one subordinate employee, the production and marketing associate, whose employment by the petitioner is corroborated by the Forms W-2 in her name.

With respect to the beneficiary's responsibilities within the company, the petitioner has submitted job descriptions for the beneficiary that list the same duties, with the same allocation of time to different categories of duties, in his positions in both the foreign and U.S. companies. Given that the beneficiary co-directed a subordinate staff of eleven persons in four departments in the foreign entity, and is assisted by a single employee in the United States, the AAO finds it reasonable to question the accuracy of the petitioner's claim that the beneficiary's duties in the United States are exactly the same as his duties overseas. Under the circumstances, it is reasonable to question whether a single employee could provide the same support as eleven employees, so that the beneficiary would be sufficiently relieved of non-qualifying duties so that he could perform primarily executive and/or managerial duties in the United States to the same extent he did in his position abroad. 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).

Even assuming that the disparity in staffing need between the two companies can be attributed to the difference in the level of activity and volume of business of the two companies, the AAO finds the evidence of record does not sufficiently demonstrate that the beneficiary functions in a primarily executive or managerial capacity in the U.S. company.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. As previously noted, the evidence is insufficient to show that there are other employees or contractors under the supervision of the marketing and production associate, the beneficiary's sole subordinate employee in the United States, thus she could not be considered a "supervisory" or "managerial" employee. She also does not qualify as a professional employee, contrary to counsel's contention on appeal. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the

Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, while the petitioner claimed that the beneficiary's subordinate employee has a bachelor's degree and that the degree is required for her position, there is no evidence to support the claim that a bachelor's degree is actually necessary to perform the work she purportedly performs. Thus, the petitioner has not shown that the beneficiary manages any supervisory, professional, or managerial employee, as required by section 101(a)(44)(A)(ii) of the Act.

The record also does not support counsel's claim that the beneficiary primarily functions in a managerial capacity as a "function manager." 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) of the Act, 8 U.S.C. § 1101(a)(44)(A). In such a situation, the assumption would be that there are other employees who would carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. As such, it remains the petitioner's obligation to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary. As discussed above, the petitioner has failed to provide evidence to substantiate its claim that the beneficiary has sufficient staff or contractual service providers to relieve him from having to primarily perform the non-qualifying tasks of the company.

Similarly, counsel's claim that the beneficiary functions in a primarily executive capacity in the United States is not persuasive. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. Again, the petitioner has failed to show that there is a subordinate level of managerial employees for the beneficiary to direct, or indeed, that there

is sufficient staffing to relieve the beneficiary from having to focus primarily on the day-to-day operations of the company rather than on its broader goals and policies.

The AAO notes that, as required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. At the time of filing, the petitioner was a five-year-old company that claimed to have a gross annual income of \$220,000. As discussed, the petitioner did not submit sufficient evidence to demonstrate that it employed more than one single subordinate employee who would relieve the beneficiary from perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as chief executive officer and one other employee. The AAO acknowledges that, as the petitioner asserted, the beneficiary "is not the person who is designing a client's corporate logo" or "the person who is pointing the spotlight on a keynote speaker at a corporate event." However, the petitioner has not sufficiently demonstrated that there is sufficient staff to relieve the beneficiary from primarily performing the coordinating and administrative tasks associated with the design projects and corporate events that constitute the services and products provided by the company. 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 Intn'l*, 19 I&N Dec. 593, 604 (Comm. 1988).

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) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

In light of the above, the AAO finds that the evidence is insufficient to establish that the beneficiary would be employed by the United States company in a primarily executive or managerial capacity. For that reason, the petition will be denied.

Finally, the AAO acknowledges that USCIS has previously approved multiple L-1A petitions filed by the petitioner on behalf of the instant beneficiary. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103. Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time

reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Despite the previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. See section 291 of the Act. Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous nonimmigrant petition approval by denying the instant petition.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.