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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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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER
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Date: NOV 30 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 is a Texas corporation that claims to be engaged in the wholesale, retail sale and distribution of cellular telephones and accessories. The petitioner claims to be the wholly-owned subsidiary of [REDACTED] located in Karachi, Pakistan. It seeks to employ the beneficiary as its vice president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition, concluding that the petitioner had not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity, or that a qualifying relationship exists between the U.S. company and the foreign entity.

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 contends that the beneficiary would be employed by the U.S. company in an executive capacity. Counsel further claims that the petitioner was not afforded the opportunity to present additional evidence on the issue of whether a qualifying relationship exists between the U.S. company and the foreign entity. Counsel submits a brief but no further evidence on 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 first issue in the present matter is whether the beneficiary would be employed in a primarily managerial or executive capacity in the United States.

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 January 28, 2007 submitted with the Form I-140, Immigrant Petition for Alien Worker, the petitioner described the beneficiary's anticipated job responsibilities as vice president of the company as follows:

[The beneficiary] would assist in determining and formulating the company's goals and policies; provide overall direction within the guidelines set by the company's board of directors; plan and coordinate operational activities and insure these activities are fulfilled; and attend business related seminars, sales presentations and shows.

[He] would manage the daily business of the 4000-square foot facility in Dallas. His duties would include: research cellular phone products by various manufacturers and service providers such as T-Mobile, Sprint, AT&T and Cingular; correspond with domestic and foreign suppliers and vendors; research and negotiate potential lease agreements for new cellular phone store locations in various shopping malls; coordinate distribution-related activities with the company's retail offices located in Dallas, Texas and manage the daily activities of employees. He will oversee the finances of the company.

In addition, [the beneficiary] will oversee the manufacture and export of woven garments, such as boxer shorts and socks, to the United States as well as marketing of these products. He will continue to investigate new markets in the United States, thus managing the marketing function of [the U.S. company]. As the vice president of [the company, the beneficiary] will have full negotiating authority regarding new contracts with U.S. Distributors for textile products manufactured in Pakistan.

On August 20, 2007, the director issued a request for further evidence (RFE), in which he instructed the petitioner to submit: (1) a statement signed by an authorized official of the U.S. company describing the beneficiary's intended employment in the United States, stating the date of employment, job title, specific job duties, types of employees supervised, and the title and level of authority of the beneficiary's immediate supervisor; and (2) an organizational chart showing the beneficiary's position in the United States in relations to others in the company.

In a letter dated September 16, 2007 responding to the RFE, the petitioner stated that the beneficiary started his position as the vice president of the U.S. company on April 1, 2006. The petitioner provided the following description of the beneficiary's duties:

As the vice president of [the U.S. company, the beneficiary] is responsible for the management, marketing and development of the business operations of [the company and] directly reports to the President.

[The beneficiary] devotes approximately forty percent (40%) of his time actively overseeing the business operations (Administration and Human Resources Management) on an executive level. He spends approximately twenty percent (20%) of his time in financial management; and approximately forty percent (40%) of his time in planning and coordinating the expansion of the business operations.

As a vice president, he oversees two managers, the operations manager . . . and sales manager. In addition, he has two subordinates.

He oversees the daily business operations of the company on an executive level. He plans and directs expansion of [the U.S. company's] business operations. [He] establishes marketing and sales goals for [the U.S. company].

The petitioner provided an organizational chart, which shows the beneficiary reporting directly to the president of the U.S. company. Below the beneficiary are an operations manager and a sales manager, each of whom supervises one sales associate.

On January 7, 2008, the director denied the petition, concluding that the petitioner had not established that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The director found that the petitioner provided vague descriptions of the beneficiary's U.S. duties. Further, the director observed, the petitioner has not presented a detailed description of the subordinate employees' duties or their educational backgrounds. The director noted that the organizational chart does not include positions for administrative, human resources, warehouse, shipping/receiving, or financial management. The director observed that when a company has a limited number of employees, it becomes questionable whether the beneficiary is acting primarily in a managerial or executive capacity, and USCIS may reasonably conclude in such a case that the beneficiary will be performing a wide range of daily functions associated with running a business that are not managerial or executive in nature. The director found that based on the evidence provided, it cannot be concluded that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

On the Form I-290B, Notice of Appeal, counsel contends that the beneficiary's duties in the U.S. company are "inherently executive in nature." Counsel claims that the beneficiary "is responsible for the planning, coordinating and implementing expansion/marketing [sic] of the business," and that to accomplish this, he works through other employees within the organization as well as utilizes the professional services of accountants and attorneys as needed. In his appeal brief, counsel adds that the beneficiary assigns and delegates duties to the operations manager and the sales manager, and that the operations manager is the general manager of the company and performs the day-to-day operations of the company.

Upon review, the AAO concurs with the director's conclusion that the petitioner has failed to establish that the beneficiary would be employed in a primarily executive or managerial capacity in the United States.

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.* In addition, it should be noted that the definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner initially stated that, among other duties, the beneficiary would "assist in determining and formulating the company's goals and policies;" "provide overall direction within the guidelines set by the company's board of directors;" "plan and coordinate operational activities and insure these activities are fulfilled;" and "manage the daily business" of the Dallas facility. However, the petitioner did not define the company's goals, policies, or operational activities, or clarify what "managing the daily business" of the company entails. The petitioner's response to the RFE failed to provide any further detail. The petitioner claimed that the beneficiary spends 40% of his time "overseeing the business operations," 20% on "financial management," and 40% on "planning and coordinating the expansion of the business operations." Again, the petitioner's general language sheds no light on what it is that the beneficiary actually does on a day-to-day basis. 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the petitioner indicated that the beneficiary would "research cellular phone products by various manufacturers and service providers;" "correspond with domestic and foreign suppliers and vendors;" "research and negotiate potential lease agreements" for new store locations; and "coordinate distribution-related activities with the company's retail offices." Since the beneficiary would actually perform market and product research, negotiate contracts, and deal directly with supply and distribution contacts, he would be performing tasks that are necessary to provide the company's service or product, and such duties would not be considered managerial or executive in nature. Given the petitioner's vague breakdown of the beneficiary's duties, it cannot be determined what proportion of the beneficiary's time would actually be devoted to these non-qualifying tasks. 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).

Beyond the required description of the job duties, the 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.

On appeal, counsel claims that the beneficiary's duties in the U.S. company are executive in nature. 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-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. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Here, the petitioner claims that the beneficiary "oversee[s] the business operations . . . on an executive level," and specifically, "oversees two managers" and two other subordinates. Counsel also claims on appeal that the operations manager is actually the general manager of the company and performs the day-to-day operations of the company. However, the petitioner has failed to provide any information relating to the job duties of any employee of the U.S. company other than the beneficiary. Without that information, it cannot be determined whether the beneficiary actually has a subordinate level of managerial employees who would relieve him from having to perform non-qualifying duties and allow him to focus primarily on the broad goals and policies of the organization rather than its day-to-operations. 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). Further, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are

supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. Here, although the petitioner indicated that two employees on the petitioner's staff bear the title of "manager," as discussed above, the petitioner has failed to provide any job description for these employees. Thus, the evidence is insufficient to establish that the beneficiary's subordinates are "supervisory or managerial" employees other than in position title. Further, the petitioner has not provided any evidence that would establish that these employees possess or require a bachelor's degree, such that they could be classified as professionals. Accordingly, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

In addition, although counsel claims on appeal that the petitioner "utilizes the professional services of accountants and attorneys as needed," the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its 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)).

Finally, 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. 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 (9th 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)). Furthermore, it is appropriate for USCIS 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 petitioner claimed that it operates a 4,000-square-foot warehouse and two retail stores. Based on the petitioner's representations, it does not appear that the reasonable needs of the company might plausibly be met by the services of two "executives," two "managers," and two sales associates. As the director noted, the evidence does not support the conclusion that the beneficiary would be relieved from purchasing, warehouse, financial, administrative tasks and other day-to-day operational tasks of the company. In any event, 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 described deficiencies in the record, the AAO concurs with the director's conclusion that the record does not establish that the beneficiary would be employed in the United States in a primarily executive or managerial capacity. For that reason, the petition will be denied.

The second issue in the present matter is whether the petitioner has established that it has a qualifying relationship with the beneficiary's overseas employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C).

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In its letter dated January 28, 2007, the petitioner indicated that it is a wholly-owned subsidiary of the foreign entity. The petitioner submitted its articles of incorporation, dated March 14, 2001, which state that the company has the authority to issue 1000 shares of common stock of "no par value." The petitioner also submitted a copy of the company's share certificate number 1, dated April 25, 2001, certifying that "[REDACTED]" is the owner of 1,000 common shares, no par value, of the company. In addition, the petitioner submitted its tax returns for the years 2003 through 2005. Schedule K of the 2004 tax return identifies the owner of 100% of the company's stock as [REDACTED]. Schedule K of the 2005 tax return identifies the owner of 100% of the company's stock as "[REDACTED]". The petitioner's 2003 tax return identifies Pakistan as the country of the owner of 100% of the company's stock, but the name of the shareholder was not provided.

In denying the petition, the director found that the petitioner has not clearly established that it has a qualifying relationship with the foreign entity. The director acknowledged that the petitioner submitted its articles of incorporation and the single common stock certificate showing shares issued to the foreign entity. However, the director observed that the record contains no evidence that actual funds were committed or transferred by the claimed parent organization to pay for its ownership of the U.S. company.

On appeal, counsel contends that there was no request in the RFE for evidence of funds committed by the foreign entity; therefore, the petitioner did not have a chance to explain and provide additional documents on that issue. However, counsel does not present any evidence or forward any arguments on appeal to support a conclusion that a qualifying relationship exists between the U.S. and foreign entity.

Upon review, the AAO concurs with the director's conclusion that the petitioner has failed to demonstrate that a qualifying relationship exists between the U.S. and foreign entity.

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; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As noted, the only evidence in the record of ownership of the U.S. company is the share certificate and disclosures regarding the company's ownership on the company's tax returns for 2003 through 2005. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, *supra*. Here, the petitioner has not submitted any of the above-described supporting documentation. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

While the company's tax returns for 2003 to 2005 confirm that the holder of 100% of the company's shares resided in Pakistan, only the 2004 tax return specifically identifies the foreign entity as the owner. Further, in order to establish eligibility for classification as a multinational manager or executive for immigrant visa purposes, the petitioner must establish that it *maintains* a qualifying

relationship with the beneficiary's foreign employer, *i.e.*, the foreign entity that employed the beneficiary must continue to exist and have a qualifying relationship with the petitioner at the time the immigrant petition is filed. 8 C.F.R. § 204.5(j)(3)(i)(C). Here, the petitioner has offered no evidence that the foreign entity continues to own 100% of the U.S. company, or that a qualifying relationship continues to exist between the two entities in some other configuration, at the time the petition was filed. 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.

Counsel contends on appeal that the director failed to request further evidence relating to the qualifying relationship between the U.S. and foreign entities before denying the petition on that ground. The regulation at 8 C.F.R. § 103.2(b)(8) provides that if all required initial evidence does not demonstrate eligibility, USCIS may "in its discretion" request additional evidence. Thus, the director is not required to issue a request for further information in every potentially deniable case. Further, in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). As discussed above, based on the record that was before the director, the petitioner has failed to meet its burden of establishing by a preponderance of evidence that the beneficiary would be employed in the United States in a managerial or executive capacity, or that there exists a qualifying relationship between the U.S. and foreign entity. Moreover, even if the AAO were to find that the director should have requested evidence before denying the petition, the director's error would be harmless. Because the director did not request evidence relating to the issue of qualifying relationship prior to his decision, the petitioner had the opportunity to submit additional evidence to the AAO on appeal. *Cf. Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The petitioner did not avail itself of this opportunity. The petitioner has not supplemented the record with additional evidence on appeal, nor has the petitioner made any assertions to address the deficiencies in the record noted in the director's decision with respect to this issue.

In light of the foregoing, the AAO finds that the petitioner has failed to establish that it has a qualifying relationship with the beneficiary's overseas employer. For this additional reason, the petition will be denied.

Beyond the decision of the director, the AAO finds the record is insufficient to establish that the beneficiary was employed abroad in a primarily executive or managerial capacity.

In the January 28, 2007 letter, the petitioner indicated that the beneficiary became managing partner in [REDACTED] the foreign entity, in 1977 and has continued in that role "until the present time." The petitioner stated that the beneficiary's responsibilities in that position were "to establish the overall goals and policies of the company; negotiate agreements and contracts for goods and merchandise with suppliers and vendors; maintain rapport with existing and potential clients; explore

new business opportunities with Pakistan and abroad; hire and supervise staff; prepare and maintain the company's records and reports in compliance with all local and national Pakistani laws."

In the RFE, the director requested (1) a signed statement from an authorized officer of the foreign employer describing the beneficiary's qualifying employment abroad, stating the date of employment, job title, specific job duties, types of employees supervised, and the title and level of authority of the beneficiary's immediate supervisor; and (2) an organizational chart showing the beneficiary's position in the United States in relations to others in the company.

In its response to the RFE, the petitioner stated the following in regard to the beneficiary's duties overseas:

[The beneficiary] was responsible for the planning and management of [the foreign entity.] He established goals and policies for [the company.] He maintained technical liaison with customers and vendors.

* * *

He was also responsible for the marketing and business development of the company. He assessed financial sustainability of potential goods and services for the business. He was the ultimate operational authority for [the foreign entity] as the managing partner and Chief Executive Officer and was also managing the company's budget and personnel.

The time spent on each responsibility was as follows: Business Management (60%), Human resources management (10%), business development / Sales and Marketing/ client relationship (30%).

[The beneficiary] had 4 subordinate managers, Engineering Manager, Technical Sales Manager, Sales and Marketing Manager and Office Manager, report[ing] directly to [him]. Additionally, he had supervised 4 employees working under their respective managers.

As a Managing partner at [the foreign entity], [the beneficiary] had ultimate control and responsibility for [the foreign entity's] overall operations and oversaw the daily business operations of [the foreign entity] on an executive level.

[The beneficiary] functioned at a senior level within the corporation as a Managing Partner of [the foreign entity]. [He] received general guidance from other partners and board of directors. [The beneficiary] kept the board of directors informed as needed regarding the performance of the business and other business related indicators.

The petitioner also indicated that in addition to [REDACTED] the beneficiary was responsible for the management of two affiliates, [REDACTED]. The petitioner submitted an organizational chart which depicts the beneficiary as managing partner of all three entities. With respect to the foreign entity, the chart shows a general manager under the beneficiary. Under the manager, there are three individuals listed under the headings "Personnel Dept.," "Accounts Dept.," and "Marketing Dept." Under "Marketing Dept.," there are three individuals listed under the headings "Export/Import," "Shipping," and "Sales."

While the director did not explicitly determine in his decision that the petitioner failed to demonstrate that the beneficiary was employed abroad in a managerial or executive capacity, the director noted that the descriptions of the beneficiary's overseas duties were vague. Further, the director noted that the petitioner did not submit a detailed description of the subordinate employees' duties or professional backgrounds, and the record does not establish that the beneficiary was primarily supervising professionals in the foreign entity.

On appeal, counsel asserts that the beneficiary was the managing partner of the foreign entity, with 100 employees under his management. Counsel contends that the organizational chart of the foreign entity clearly shows that the beneficiary's position abroad was executive in nature.

Upon review, the AAO finds the record is insufficient to establish that the beneficiary was employed abroad in an executive or managerial capacity.

Again, 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.*

As was the case with the beneficiary's U.S. employment, the petitioner has provided a vague and nonspecific description of the beneficiary's duties overseas that fails to demonstrate what the beneficiary did on a day-to-day basis. For example, the petitioner stated in response to the RFE that the beneficiary was "responsible for the planning and management" of the foreign entity, "established goals and policies" for the company, was "responsible for the marketing and business development" of the company, was "the ultimate operational authority" for the company "and was also managing the company's budget and personnel." The petitioner claimed that the beneficiary spent 60% of his time on "business management," 10% on "human resources management," and 30% on business development/sales and marketing/client relationship." Again, the petitioner's general language sheds no light on what it was that the beneficiary actually did on a day-to-day basis. 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Further, in addition to showing that the beneficiary performed the high-level responsibilities that are specified in the definitions, the petitioner must prove that the beneficiary *primarily* performed these specified responsibilities and did not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d at 1533. The vagueness with which the petitioner described the beneficiary's responsibilities does not enable the AAO to determine which portion of the beneficiary's time was actually spent on which duties, and consequently, it cannot be determined whether the beneficiary functions *primarily* in an executive or managerial capacity.

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.

Here, the petitioner has presented an incomplete and inconsistent picture of the beneficiary's subordinate staff in the foreign entity. In the letter responding to the RFE, the petitioner claimed that the beneficiary had under his direct supervision four subordinate managers, including an engineering manager, a technical sales manager, a sale and marketing manager, and an office manager. Additionally, the petitioner claimed that there were four other employees working under their respective managers. The organizational chart for the foreign entity submitted at the same time, however, depicts an entirely different staff. The chart shows a general manager under the beneficiary, and under the general manager, there are three individuals listed under the headings "Personnel Dept.," "Accounts Dept.," and "Marketing Dept." Under "Marketing Dept.," there are three additional individuals listed under "Export/Import," "Shipping," and "Sales." In addition, counsel claims on appeal that the beneficiary had 100 employees under his management overseas. The petitioner has not provided any explanation for these inconsistent descriptions of the beneficiary's overseas staff. 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). Further, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Additionally, the petitioner did not provide any information relating to the job duties of the beneficiary's subordinates overseas. Without that information, it cannot be determined whether the beneficiary actually had a subordinate level of managerial employees who relieved him from having to perform non-qualifying duties and allowed him to focus primarily on the broad goals and policies of the organization rather than its day-to-operations. Again, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church of Scientology International*, 19 I&N Dec. at 604 (Comm. 1988).

In light of these deficiencies in the evidence, the AAO finds that the petitioner has failed to establish that the beneficiary was employed abroad in an executive or managerial capacity as required by section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). For this additional reason, the petition will be denied.

Finally, the AAO acknowledges that USCIS has previously approved an L-1A petition 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 petition, 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.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.