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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



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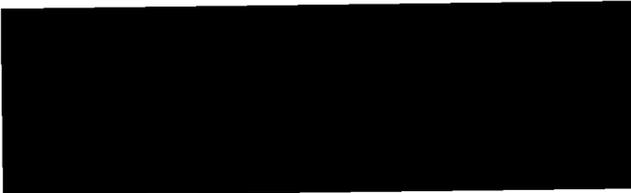
IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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 United States corporation based in York, Nebraska that engages in the manufacture of pneumatic conveying equipment. It seeks to employ the beneficiary as its General Manager – Asia Pacific. 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 was employed by the foreign entity in a primarily managerial or executive capacity.

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 director's decision is in error. Counsel submits a brief and additional 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).

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

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

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) 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 an undated letter submitted with the Form I-140, Immigrant Petition for Alien Worker, the petitioner indicated that it hired the beneficiary as its General Manager – Asia Pacific in 2005 to expand its business in Asia. The petitioner stated that while the company is based in York, Nebraska, the beneficiary was hired under an H-1B visa and has been situated in Shanghai, China for most of his time with the company. The petitioner stated the following with respect to the beneficiary's U.S. position:

As General Manager – Asia Pacific, based in York, Nebraska, [the beneficiary] will continue to be in charge of the Asia Pacific Office in Shanghai, China. He will continue to be responsible for developing and negotiating set up of [REDACTED], running and managing all business and daily activities and operations and personnel. A significant part of his responsibilities will continue to include localizing manufacturing and sourcing; developing the market in various industries especially cement related industries. He has conducted many presentations of design and proposals at various exhibitions in the Asia Pacific region. He will continue to do so, in Asia Pacific and elsewhere.

In a document dated July 24, 2008, entitled "Status of Cyclonaire Operations in Asia (Work Requirements for [the Beneficiary])," the petitioner indicated that in September 2006, the petitioner reached a verbal agreement with [REDACTED] a Chinese company, to collaborate on the pneumatic conveying business, with S-Couvrot acting as a technical support party and signing contracts on behalf of the petitioner, as the latter did not have a legal presence in Shanghai. The petitioner stated that in September 2007, the two parties agreed to form a 60-40 joint venture which would set up and invest in a company in Shanghai, to be named Cyclonaire [REDACTED], by the end of September 2008. The petitioner described the "work on hand" for the beneficiary as including the following categories:

- Work to form Cyclonaire Shanghai [such as transferring two S-Couvrot employees to Cyclonaire Shanghai; recruitment and training of additional staff; setting up of office systems]
- Setting up of a pneumatic conveying demo system & assembly workshop at S-Couvrot
- Sale & marketing
- Preliminary design & quotation preparation
- Delivery of sold system
- Commissioning of delivered system
- Miscellaneous [such as liaise with accounting on payment and collection issues; monthly reporting on various aspects of operation; arrangements for CEO visits]

The record also contains a copy of the beneficiary's resume, which describes his responsibilities as General Manager – Asia Pacific for the petitioner as:

- Reporting to CEO
- In charge of the Asia Pacific Office in Shanghai
- Develop the market in China first and Asia Pacific

- Identify, negotiate and propose cooperation partner
- Identify, negotiate and propose sale agents
- Identify, audit and build up local suppliers.
- Marketing & Sales, Quotation preparation/submission/negotiation
- Basic design and proposal preparation.
- Identify, audit and secure local manufacturers.
- All documentation preparation/translation.
- Set up after sales service team after reaching a local partnership.
- Run and manage local office.

On August 8, 2008, the director issued a request for further evidence (RFE), in which he instructed the petitioner to submit the following evidence relating to the beneficiary's position abroad:

1. A detailed description of the duties performed by the beneficiary in his position abroad, including the actual specific, day-to-day tasks that were involved with the completion of each duty and an estimate of the percentage of time the beneficiary dedicated to each duty.
2. A detailed organizational chart for the beneficiary's employer abroad that corresponds with the beneficiary's employment abroad, including the names and a detailed description of the job duties for the beneficiary's subordinate employees, or if he had no direct subordinates, identify the individuals whose work he directed, with whom they were actually employed, and describe the arrangement that gave the beneficiary the authority to supervise their work.

In response to the RFE, the petitioner provided a description of the beneficiary's position abroad that categorizes his duties and allocates his time to those categories as follows:

1. Setting Up of [REDACTED] (15%)
2. Administration (25%)
3. Finance/accounting (25%)
4. Sales & Marketing (15%)
5. Project Management (17%)
6. Miscellaneous (3%)

The petitioner listed a number of duties under each category, as restated in full in the director's decision. The petitioner also submitted a document entitled "Summary of Employment 2005-2008," in which the petitioner claimed that S-Couvrot's Bulk Material Department has been working under the management of Cyclonaire on Cyclonaire projects since April 2007, and would be transferred to Cyclonaire (Shanghai) after its incorporation. The petitioner identified the three employees of S-

[REDACTED] as [REDACTED] and [REDACTED]. According to the petitioner, the Senior Systems Engineer and the Admin Clerk reported directly to the beneficiary, and the Technician reported to the Senior Systems Engineer. The petitioner provided brief job descriptions for these employees. The petitioner also submitted an organizational chart dated July 2008 for [REDACTED] which depicts a "current"

structure for the company consisting of the Bulk Material Department of S-Couvrot, as described above, and a "proposed" structure, with the beneficiary, as General Manager, supervising the S-Couvrot Senior Project Engineer and Technician, and a number of other positions yet to be filled.

On October 20, 2008, the director denied the petition, concluding that the petitioner has not established that the beneficiary was employed abroad in a primarily managerial or executive capacity. Specifically, the director noted that the petitioner acknowledged that the beneficiary spent over 30% of his time in non-qualifying sales and marketing and project management duties. Of the remaining duties, the director found that a number of them are "clearly non-qualifying duties such as renting office space, planning and construction of a demonstration pneumatic conveying system and workshop, setting up filing and procurement systems, and preparing budgets." The director found that other duties, such as "drafting of policies, systems and regulations for the operation," "planning of organization/headcount/pay package" and "preparation/execution of various administrative/operation plans" are too vague to be determined whether they qualify as managerial or executive level duties.

Further, the director noted, the petitioner only provided time estimates for broad categories rather than specific duties, thus it is not possible to estimate the amount of time spent on the clearly operational duties versus those that qualify as managerial or executive. The director also found the record to be inconsistent as to the number of employees supervised by the beneficiary. The director noted that the organizational chart submitted depicts only a "proposed" hierarchy for Cyclonaire (Shanghai), which was not yet in existence at the time of the decision. In addition, the director observed that while it appears the beneficiary has control of the work of the S-Couvrot employees, it is unlikely that he has authority to fire them given that they remain employees of another company. Moreover, the director found, the beneficiary apparently spent less than 25% of his time managing these individuals.

On appeal, counsel contends that the beneficiary's role "is indeed managerial, executive, and in the alternative, he is a functional manager." Counsel argues that the duties the director found to be non-qualifying are in fact managerial and/or executive in nature, based on counsel's interpretation of the job duties of a general manager as described in the Department of Labor's *Dictionary of Occupational Titles* (DOT) and/or its Occupational Information Network (ONET).¹ Counsel further asserts that the descriptions of duties that the director found to be vague in fact comport with the regulations and the ONET description, thus such duties are all "managerial and/or executive." Counsel further asserts that, insofar as the beneficiary is found to be involved in the completion of non-qualifying day-to-day tasks of the company, the reasonable needs of the organization in light of the overall purpose and stage of development of the organization must be considered. Counsel further claims that a large portion of the beneficiary's duties are executive, as defined by the regulations. Counsel claims that the beneficiary directs the management of the company, establishes goals and policies, and receives very little supervision and guidance from higher level executives and board members. Alternatively, counsel argues, the beneficiary should be considered a function

¹ Counsel includes in his brief a list of duties purportedly found in "ONET, The Dictionary of Occupational Title ("ONET"). It is unclear whether counsel is referring to ONET or the DOT.

manager in that he is managing an essential function or operation, namely the Asia-Pacific branch of the business.

Counsel denies that there are any inconsistencies as to the number of subordinate employees supervised by the beneficiary. Counsel reiterates that the two S-Couvrot employees whom the beneficiary was supervising have formally commenced work under Cyclonaire (Shanghai) as of January 1, 2009, and that another employee has been recruited. Counsel further argues that in view of the joint venture between Cyclonaire and S-Couvrot, as a general manager employed by Cyclonaire, the joint venture majority shareholder, the beneficiary has complete control over the employees of S-Couvrot.

Counsel challenges the director's finding that only 25% of the beneficiary's time is spent on supervisory duties. Counsel argues that many of the other duties, such as sales and marketing, are incidental to the training of subordinate employees so that they can assume those duties upon the beneficiary's transfer to the United States. Counsel contends that other duties deemed non-qualifying by the director under the headings of "setting up Cyclonaire (Shanghai)" and "finance/accounting" also relate to employee matters. Thus, counsel concludes, the number of employees and the total time spent supervising them should not be determinative of the beneficiary's eligibility. Regarding the question of whether Cyclonaire (Shanghai) was in existence at the time of filing, counsel concedes that the entity was still in proposal stage at the time the petition was filed. However, counsel claims there have been further development since the director's decision and the entity is now incorporated and fully operational.

In support of the above claims on appeal, counsel submits, among other things: (1) a letter dated November 14, 2008 from [REDACTED] of the Robert H. Smith School of Business, University of Maryland, evaluating the beneficiary's role; (2) a letter dated November 10, 2008 from the chairman of S-Couvrot stating that the two S-Couvrot employees previously described "have been working under [the beneficiary's] management since 2007 and will be transferred to Cyclonaire (Shanghai) on January 1, 2009"; (3) a group photograph and copies of the business cards of the beneficiary and the three current employees of Cyclonaire (Shanghai); and (4) a number of documents to establish the existence and current functioning status of Cyclonaire (Shanghai).

Upon review, the AAO concurs with the director's conclusion that the petitioner has failed to establish that the beneficiary was employed abroad 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.* 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.

Further, it is 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 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). Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that the beneficiary's duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

Initially, the AAO notes counsel's reference on appeal to a description of the position of general manager from either ONET or the DOT that counsel deems to be analogous to the beneficiary's position. While this job description provides some insight into what may be the duties ascribable to persons occupying similar positions in a corporate hierarchy generally, they do not describe the beneficiary's job duties specifically. The beneficiary's actual job 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). Further, an employee will not be considered a manager simply because of his job title. As such, the AAO's analysis of the beneficiary's eligibility will be based on the description of the beneficiary's actual job responsibilities, as presented in the record, rather than on any generic equivalence of the proffered position.

Upon review of the description of the beneficiary's job duties abroad, the AAO concurs with the director's conclusion that the beneficiary was not "primarily" performing managerial or executive duties. As the director observed, most of the tasks listed under the categories of "sales and marketing" and "project management," which reportedly occupied 32% of the beneficiary's time, were day-to-day operational tasks of the company and therefore did not qualify as managerial or executive duties. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Further, as the director noted, a number of tasks listed under the other work categories also appeared to be possibly operational tasks, or tasks relating to establishing the operational routines of the company or department, that cannot be categorized as managerial or executive in nature. For example, under "Setting up of Cyclonaire (Shanghai) (15%)", the beneficiary's duties included "preparation of all documentation required, "visit/liaise with bank on setting up of bank account," "visit & renting of office area, "plan, organize and setting up of office," and "plan, organize and construction of the demonstration pneumatic conveying system. Under "Administration (25%)," the beneficiary was involved in the "preparation/execution of various administrative/operation plans," and "setting up of filing system" and "procurement system." Tasks that were potentially non-qualifying under "Finance/Accounting (25%)" include "preparation of budget" and "expense report", and "monitor/follow up in necessary payment collection from customers."

In addition, the AAO notes that in describing the beneficiary's "work on hand" as of July 24, 2008, the petitioner included a number of non-qualifying duties such as "preliminary design of a demo system," "prepare and place component orders," "prepare drawing/place order/follow up/quality check," "respond to sales inquir[ies,]" "preliminary design & quotation preparation," "collection of system information from clients," "presentation of quotation to clients," and "arrange delivery of system to client." Again, these tasks appear to be day-to-day operational tasks of the company that

would not qualify as managerial or executive duties. *Matter of Church Scientology International*, 19 I&N Dec 604. There is no indication in the record that these duties were delegated to any subordinate employees of the beneficiary at the time.

On appeal, counsel acknowledges that the beneficiary did engage in non-qualifying tasks but asserts that some tasks were "an essential part of his overall purpose in setting up an office in Shanghai," and others, such as "setting up filing system" and "procurement system" and "preparing the budget," were actually managerial/executive in nature. While counsel's explanation of how these tasks could be interpreted as managerial tasks is not unreasonable, these phrases alone, without more, are simply too vague and open to different interpretations. For example, "preparation/execution of various administrative/operation plans" could have involved "creating goals and policies" of the Shanghai office, as counsel claims, or it could have meant the day-to-day execution of administrative tasks. Similarly, "setting up filing system" and "procurement system" could have been a matter of creating fundamental procedures for the office, as counsel claims, or it could have involved merely the physical setting up of these systems. Essentially, the record lacks the necessary details to support counsel's assumptions and interpretation of these descriptions of duties. 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).

The AAO also acknowledges counsel's submission of the letter from [REDACTED] addressing the beneficiary's managerial capacity. However, it has not been established that [REDACTED] possesses any direct experience relating to, or knowledge of, the petitioner or the beneficiary's role or actual job duties that would lend credence to his discussion of the beneficiary's qualification as a manager or executive for purposes of this petition. Rather it appears that he has only reviewed the beneficiary's job description as stated in response to the request for evidence. As discussed above, this description did not adequately address the amount of time the beneficiary allocated to specific duties. The AAO's review is based upon the totality of the evidence in the record of proceedings. While the AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony, 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).

Further, as the director noted, the petitioner allocated the beneficiary's time to the broad categories of duties rather than to specific duties. Thus, it cannot be determined how much of the 65% of the beneficiary's time allocated to "Setting up of Cyclonaire (Shanghai)," "Administration", and "Finance/Accounting" was actually attributable to the potentially non-qualifying tasks discussed above. Thus, in the absence of further details regarding the beneficiary's duties, the record is insufficient to demonstrate that the beneficiary's was *primarily* engaged in managerial or executive duties in his position abroad.

Counsel asserts on appeal that, even if the beneficiary performed a number of non-qualifying duties, "the reasonable needs of the organization in light of the overall purpose and stage of development of the organization must be considered." However, the reasonable needs of the petitioner will not

supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The petitioner must still establish that the beneficiary was employed abroad in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

Further, counsel asserts that "[w]ith the now functioning new office in Shanghai, many of these non-qualifying duties will quickly be eliminated and [the beneficiary] will be focusing on supervising, overseeing and managing the Shanghai office." The AAO does not find this assertion to be persuasive since at issue is whether the beneficiary's overseas duties had been primarily managerial or executive for at least one year at the time the petition was filed, not at a later point in time. 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 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. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 204.5(j)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Section 101(a)(44)(A)(iii) of the Act.

In this instance, the record is insufficient to support the petitioner's claim that the beneficiary managed subordinate employees in his position abroad. In response to the RFE, the petitioner claimed that three employees from S-Couvrot's Bulk Material Department has been working under the management of Cyclonaire, specifically under the beneficiary's direction, since April 2007, and would be officially transferred to Cyclonaire (Shanghai) after its incorporation. However, the evidence submitted at that time did not support that claim. The organizational chart dated July 2008 for Cyclonaire (Asia) Limited, depicts a "current" structure for the company where the Bulk Material Department of S-Couvrot Machinery, as described above, did not appear to be under the beneficiary's direction. It is only in the "proposed" structure that the beneficiary, as General Manager, is depicted as supervising the S-Couvrot Senior Project Engineer, Technician, and a number of other positions yet to be filled. Further, the record before the director contained no evidence documenting the claimed arrangement whereby the beneficiary had managerial responsibilities over the S-Couvrot employees prior to the incorporation of Cyclonaire (Shanghai). The record contains only one sample contract between S-Couvrot and the petitioner, dated May 8, 2008, which concerns the sale of certain products and contains no provisions relating to the management of S-Couvrot employees by the beneficiary. Going on record without supporting

documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel claims on appeal that the beneficiary “has explicit authority from S-Couvrot to manage all aspects of employee matters, including hiring and firing them.” Counsel submits a letter dated November 10, 2008 from [REDACTED] for confirmation of the above. However, upon review, the AAO notes that the letter in question states only that the beneficiary “has full authority to recruit or terminate all employees” under Cyclonaire (Asia) and Cyclonaire (Shanghai), with no reference to S-Couvrot employees. With respect to the S-Couvrot Project Engineer and Technician, the letter states only that they “have been working under [the beneficiary]’s management since 2007,” without elaborating upon the scope of his authority over such employees, and that these two employees would be transferred to Cyclonaire (Shanghai) on January 1, 2009. It is also noted that, in a document entitled “Summary of Employment” submitted in response to the RFE, the petitioner indicated that the S-Couvrot employees began working directly under the beneficiary in the name of Cyclonaire Asia as of April 2008, only three months prior to the filing of the petition. Again, at issue here is whether the beneficiary had indeed managed or directed the employees in question for at least one year in his position abroad and at the time the petition was filed. 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. at 49. As the evidence is insufficient to show that the S-Couvrot employees were in fact under the beneficiary’s management prior to their official transfer to Cyclonaire (Shanghai) in 2009, the AAO cannot conclude that the beneficiary qualified as a “personnel manager” in his position abroad.

Counsel argues on appeal that, alternatively, the beneficiary should have been considered a function manager in that he was “managing the Asia-Pacific branch of the business.” 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. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995) (citing *Matter of Church Scientology International*, 19 I&N Dec. at 604).

As discussed earlier, the record indicates that in his position abroad, the beneficiary was primarily involved in performing non-qualifying, operational tasks of the business. Further, it has not been sufficiently established that the beneficiary actually managed a subordinate staff that would have

relieved him from performing non-qualifying tasks. As such, it cannot be concluded that in his position abroad, the beneficiary qualified as a "function manager."

Counsel also claims that "a large portion of [the beneficiary's] duties are indeed executive within the definition of 8 C.F.R. 204.5(j)(b)." 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. Again, the evidence here does not establish that either of those two factors existed in connection with the beneficiary's position abroad. Accordingly, counsel's contention that the beneficiary qualified as an executive overseas also failed to find support in the record.

In light of the foregoing, the AAO concurs with the director's conclusion that the petitioner has failed to establish that the beneficiary was employed abroad in a primarily executive or managerial capacity. For that reason, the petition will be denied.

Beyond the director's decision, the AAO also finds that the evidence is insufficient to establish that the beneficiary would be employed in the United States in an executive or managerial capacity.

As previously noted, 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.* Here, it is noted that the director requested a complete, detailed description of the day-to-day duties to be performed by the beneficiary in his U.S. position, including an estimate of the percentage of time the beneficiary would spend performing his/her duties. Although the petitioner submitted a document entitled "Proposed duties for permanent position in the U.S." listing the anticipated duties the beneficiary would be performing, that document does not set forth an estimate of the percentage of time for each duty, as the director requested. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Further, it is noted that the description of the beneficiary's duties in the U.S. company is nearly identical to the description of his overseas job duties, except for the absence of the "Setting up of [REDACTED]" section that was in the overseas job description and some differences in the "Project Management" sections in the two job descriptions. Thus, as was the case with his overseas job duties, it appears that the beneficiary would be performing a number of non-qualifying duties in the United States. Without the requested estimate of time allocation, it cannot be

determined to what extent the beneficiary would have to perform non-qualifying duties. As previously noted, 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. at 604.

In addition, the record is unclear as to whether there is a subordinate staff in the U.S. company to support the beneficiary. In response to the RFE, the petitioner submitted an organizational chart for the U.S. company that depicts the beneficiary as General Manager -- Asia Pacific reporting directly to the owner/CEO of the company, with no subordinates reporting to him. Further, based on counsel's memo responding to the RFE and the description of the beneficiary's proposed U.S. job duties submitted at the same time, it appears that the beneficiary's subordinate staff would not be in place until after the completion of the incorporation of Cyclonaire (Shanghai), which counsel indicated would be by the end of 2008. Thus, at the time the petition was filed in July 2008, the beneficiary had no subordinate staff that would relieve him from having to perform non-qualifying duties in his U.S. position, even if the petitioner anticipates that staffing would be completed in the near future. Again, 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. at 49.

In light of these deficiencies in the evidence, the AAO finds that the record does not establish that the beneficiary would be employed in the United States 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.

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 it is shown 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.

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.