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

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FILE:

Office: NEBRASKA SERVICE CENTER

Date:

MAR 29 2010

IN RE:

Petitioner:

Beneficiary:

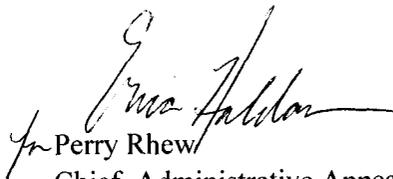
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 corporation organized in the State of California that engages in the marketing and distribution of food products. The petitioner claims to be a wholly-owned subsidiary of [REDACTED], a Korean company. It seeks to employ the beneficiary as its sales administration manager. 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 has been or will be employed 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).

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 July 25, 2007 submitted with the Form I-140, Immigrant Petition for Alien Worker, the petitioner stated that the beneficiary would be acting as the U.S. company's "top managerial sales officer" with the following job duties:

- Develops and reviews standards, policies and procedures for all functions involved with or related to sales activities in the U.S., Canada and Mexico;
- Communicates to the sales staffs in the company, the company's goals for market leadership, superior customer loyalty, and returns on investment [sic].
- Supervises sales activities and staffs of the company's branch offices in the U.S., Canada and Mexico – plans, analyzes and implements the advertisements and promotions in the same region to increase sales volume;
- Manages the company's product distribution lines, transportation of products and exports to the third countries;
- Maintains inventory and other assets related to the company's sales functions.
- Assures that all sales agreements and other documents necessary to the sale of the company products are completed accurately and in full compliance with all local, state, and federal laws, and submitted to the accounting office in a proper and timely fashion.
- Assures that the sales employees are staffed with individuals who are competent, trustworthy and adequately trained for their positions.
- Develops and manages the company's internet home page, other internet systems and ERP (SAP) System;
- Receives and reviews all customer satisfaction surveys and customer complaints and trends, and performs sales service failure analysis and corrective actions with appropriate personnel;
- Collects data about competitors and analyzes their prices, sales and strategies of marketing; and
- Provides the company with information and suggestions regarding the promotion, advertisement and pricing of the products.

The petitioner indicated on the Form I-140 that it has 35 employees. The petitioner submitted its organizational chart, which shows the beneficiary reporting to the "VP Sales Executive" and overseeing eight employees in the areas of planning, marketing, purchasing & trading, logistics, and design & MIS. The petitioner also submitted California Forms DE-6 for the second quarter of 2005 through the first quarter of 2007, the latest of which lists seven employees, only four of whom correspond to the employees listed on the organizational chart.¹

¹ The AAO notes that the petitioner may have submitted an incomplete copy of the Form DE-6 for the first quarter of 2007, as the single page of that document in the record indicates that it was "page 1 of 3." It is noted that the Form DE-6 for the last quarter of 2006 is three pages long and lists 19 employees.

On August 21, 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 with the U.S. company:

1. A more detailed description of the duties to be performed by the beneficiary, including the day-to-day tasks involved in the completion of each duty and an estimate of the percentage of time the beneficiary would dedicate to each duty.
2. Clarification as to why the employees listed on the U.S. organizational chart do not match those on the company's Form DE-6 in 2007.
3. A detailed organizational chart showing the beneficiary's position in the U.S. in relations to others in the company, and including the names of all departments and teams and the names and detailed description of the job duties for the beneficiary's immediate supervisors and subordinate employees.
4. For any claimed professional, the petitioner is asked to provide the name, profession, minimum educational requirements and field of studies, and documentation that the individual has met those requirements.

In response to the RFE, the petitioner provided a description of the beneficiary's job duties in the U.S. which includes the following categories and percentages of time attributable to each category:

- Establish the company's mid- and long-term (3- and 5-year terms) goal for the operation of the company (15%)
- Set up detailed yearly sales and export goals (15%)
- Pricing and managing (15%)
- Development of new products (10%)
- Budget planning (10%)
- Advertisement planning and assessment 10%
- Making contracts with logistics-related companies (10%)
- Resolve media-related issues (5%)
- Development of new market (5%)
- Employee training/education and performance assessment 5%)

The tasks involved in each of the above categories are described in some detail. With respect to the beneficiary's subordinates, the petitioner explained that the names listed on the original organizational chart did not match those on the DE-6 Forms because the chart listed them by their nicknames rather than their legal full names. The petitioner noted that two of the individuals on the original chart were no longer employed by the company. The petitioner submitted a revised U.S. organizational chart, dated September 23, 2008 which shows the beneficiary reporting to the company's president and supervising six employees, including two each in "Marketing and Planning" and "Purchasing and Trading," and one each in "Design and Management Information

System" and "Logistics." The petitioner also submitted job descriptions for the company's president and the beneficiary's subordinate employees, including (1) a manager and an assistant manager in "Marketing and Planning"; (2) an assistant manager in "Design and Management Information System"; (3) two assistants in "Purchasing and Trading"; and (4) a manager, an assistant manager, and an assistant in "Logistics." The subordinate employees' duties were described per group rather than per individual employee.

On October 27, 2008, the director denied the petition, concluding that the petitioner had not established that the beneficiary "has been or will be employed in a primarily managerial or executive capacity." Specifically, the director found that the record does not demonstrate that the majority of the beneficiary's duties have been or will be primarily directing the management of the organization, or that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties. Further, the director found, the petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis, nor has it been shown that the beneficiary manages an essential function of the organization or that he operates at a senior level within an organizational hierarchy.

On appeal, counsel contends that the director's decision is in error, and that the beneficiary indeed qualifies as a manager for purposes of the benefit sought. Specifically, counsel asserts that the beneficiary manages an essential function of the company. Counsel claims that the beneficiary's function is "sales administration," to be distinguished from the sales function, and describes it as "market research and analysis, and utilizing the results of such research and analysis to plan and implement marketing campaigns, identify and target appropriate demographics" and "package, warehouse and ship the products that are sold; and arrange all aspects of product import and export necessary to provide the products to be sold." Counsel cites to, and draws comparison with, several unpublished AAO decisions in support of the claim that the beneficiary qualifies as a function manager.

In addition, counsel contends that, despite the small number of employees under his supervision, the beneficiary's job does not involve "first line supervision," and even if it does, a substantial portion of the beneficiary's supervisory duties would involve the supervision of professional employees. Counsel asserts that the "Marketing and Planning subfunction clearly involve the professional occupation duty set of Market Research Analyst or Economist," which counsel claims is among those occupations described in the Department of Labor's O*NET as requiring a minimum of a bachelor's degree or equivalent. Counsel points out that the individuals with the titles of manager and assistant manager of Marketing and Planning both possess bachelor's degrees and therefore qualify as professionals.

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.* 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.

In considering whether the beneficiary would function in a managerial capacity, the AAO notes that 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). 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. *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). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Here, counsel claims on appeal that the beneficiary manages an essential function, namely "sales administration," which is different from the sales function. Counsel characterizes "sales administration" as a function that involves marketing, on the one hand, and packaging, warehousing, and other product delivery responsibilities, on the other hand. Counsel claims that as the beneficiary

reports directly to the company's president, he and his team are separate from the chain of command under the vice president of sales.

Upon review, the AAO finds that the record contains inconsistent information regarding the corporate chain of command of the company as well as the beneficiary's duties and function within the company. With respect to the chain of command, the organizational chart submitted with the initial petition places the beneficiary and the "sales administration" staff under the vice president of sales, while the chart submitted in response to the RFE shows that the beneficiary reports directly to the president of the company. The petitioner has not accounted for these different representations of the beneficiary's place within the corporate hierarchy. 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).

With respect to the beneficiary's function, the record contains disparate accounts of the beneficiary's job duties that do not consistently support counsel's claim that the beneficiary is involved in a separate function from the sales function. In the July 25, 2007 letter, the petitioner identified the beneficiary as "the U.S. subsidiary's top managerial sales officer" and listed responsibilities that would appear to fall squarely within the area of sales, such as "[s]upervises sales activities and staffs of the company's branch offices in the U.S., Canada and Mexico"; "maintains inventory and other assets related to the company's sales functions"; "[a]ssures that the sales employees are staffed with individuals who are competent, trustworthy and adequately trained for their positions"; and "[r]eceives and reviews all customer satisfaction surveys and customer complaints and trends, and performs sales service failure analysis and corrective actions with appropriate personnel." These job duties would suggest that the beneficiary's role falls within the sales department.

However, the beneficiary's job description that was provided in response to the RFE presents a different set of duties, which appears to indicate that the beneficiary is more involved in marketing and market research. For example, the beneficiary is said to spend 15% of his time "establish[ing] the company's mid- and long-term (3- and 5-year terms) goal for the operation of the company." This involves the beneficiary "collecting data about competitors [of the company], analyzing them and making reports on benchmarking their meritorious sales strategies and techniques." In addition, spending 10% of his time on the "development of new products," the beneficiary, working with the sales and R&D staff, "performs customer survey" and "determines [the specific] nature of the new product and which markets would be appropriate for the product." The beneficiary also spends 10% of his time on "advertising planning and assessment," 5% on "resolv[ing] media-related issues," and 5% on "development of new market," where the beneficiary "collects data about potential markets" and "analyzes the collected data to obtain forecasts about possibility of developing the particular market."

In addition, the job description for the company's president (whom the petitioner identifies as the beneficiary's direct supervisor in its response to the RFE), while not incompatible with the description of the beneficiary's job submitted at the same time, again highlights the issue of whether the beneficiary's duties qualify as primarily managerial in nature. Among other things, the president

is said to "direct the beneficiary to collect related data, prepare and report to him the draft of [the company's mid- and long-term plan]"; "direct the beneficiary to analyze relevant data for pricing and report to him"; "receive reports from the beneficiary about the development of new products" and "plans for advertisements and promotions"; and "to develop or expand market in North, Central and South America, direct the beneficiary to collect related data [and] prepare for a plan." Thus, the beneficiary's tasks as framed by the requirements of his immediate supervisor would appear to involve collecting and analyzing data and preparing reports. As such, the beneficiary would be performing tasks that do not fall directly under traditional managerial duties as defined in the statute. Again, 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. at 604.

As discussed above, the record contains three different depictions of the beneficiary's functions that portray the beneficiary as engaging in a supervisory role in sales in one instance, involved primarily in marketing in another, and performing non-qualifying tasks in data collection and analysis in the third. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Further, the inconsistent accounts of the beneficiary's job responsibilities fail to demonstrate conclusively that the beneficiary manages an essential function rather than performs the duties related to the function. Thus, the AAO cannot find based on the record that the beneficiary qualifies as a "function manager," as counsel claims.

The record is also insufficient to support a conclusion that the beneficiary qualifies as a "personnel manager." 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. 8 C.F.R. § 204.5(j)(2).

Based on the information provided in response to the RFE, the beneficiary has under his supervision six employees – a manager and an assistant manager in Marketing and Planning; an assistant manager in Design and Management Information System; two assistants in Purchasing and Trading; and a manager, an assistant manager, and an assistant in Logistics. The petitioner did not provide job descriptions for each of the subordinate employee listed; rather, a list of job responsibilities was provided per group. Based on the information provided, it cannot be determined whether those employees bearing "manager" and "assistant manager" titles actually supervised or managed other employees, or if the job responsibilities were simply shared among the individuals in each group. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or

even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d. 904, 907 (E.D. Tenn 2003) (cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)).

The record also does not establish that any of the beneficiary's subordinate employees are "professionals." 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. It is noted that the petitioner provided evidence that one of the beneficiary's subordinate employees, the manager in marketing and planning, holds a bachelor's degree in economics. On appeal, counsel added documentation showing that the assistant manager in marketing and planning also holds a bachelor's degree. However, 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. The petitioner has not provided evidence that the positions of assistant manager and manager in marketing and planning actually require a bachelor's degree.² As noted above, the petitioner has not provided specific, individual position descriptions for these individuals.

Accordingly, the petitioner has not adequately demonstrated that the beneficiary manages supervisory, managerial or professional employees, such that he could be considered a "personnel manager."

² The AAO notes counsel's assertion that the "Marketing and Planning subfunction clearly involve the professional occupation duty set of Market Research Analyst or Economist," which counsel claims is among those occupations described in the Department of Labor's O*NET as requiring a minimum of a bachelor's degree or equivalent. Counsel has not provided any evidence to demonstrate that the job responsibilities of those generic positions are in fact comparable to the actual duties of the beneficiary's subordinates. The employee'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.

In light of the foregoing, 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. For that reason, the petition will be denied.

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

In the July 25, 2007 letter, the petitioner indicated that the beneficiary served as International Marketing Manager of [REDACTED], the petitioner's parent company located in Korea, "for more than one year immediately prior to entering the U.S. under E-2 status in 1999." Specifically, the petitioner stated the following with respect to that position:

In 1998, [the beneficiary] was made Manager at International Marketing Department of the company. As Manager, [the beneficiary] established and implemented the company's sales goals and strategies. He was responsible for projects and day-to-day tasks that were strategic to the company's international marketing plan in accordance with established time lines, goals, and expectations of quality, integrity and service. [The beneficiary] also evaluated customer research, international market conditions, competitor data, and implemented marketing plan changes as needed, overseeing all international marketing advertising and promotional staff and activities.

The petitioner indicated that the beneficiary had worked for the foreign entity since 1991, became a Production Plan Clerk in 1994, an Assistant Manager for the Export Team in 1995, and the "Coordinator at Nice Team" in 1997, prior to becoming the International Marketing Manager.

In the RFE, the director requested the following evidence relating to the beneficiary's position abroad:

- A more detailed description of the duties performed by the beneficiary, including the day-to-day tasks involved in the completion of each duty and an estimate of the percentage of time the beneficiary dedicated to each duty.
- A detailed organizational chart showing the beneficiary's position abroad, including the names of all departments and teams and the names and detailed description of the job duties for the beneficiary's immediate supervisors and subordinate employees.
- For any claimed professional, the petitioner is asked to provide the name, profession, minimum educational requirements and field of studies, and documentation that the individual has met those requirements.

In response to the RFE, the petitioner stated that in 1998, the beneficiary was made "Manager in Export Administration at the International Department" of the foreign entity and remained in that position until he transferred to the United States in 1999. The petitioner submitted a lengthy

description of the beneficiary's duties in that position, along with the time allocated to each category duties.

The petitioner submitted an organizational chart for the foreign entity "as of 1998 -1999," which shows the International Department as one of five departments under the direction of the president, who in turn served under the chairman and vice chairman of the company. The International Department, head by a director, is subdivided into three "centers" – Export, Business Development, and Import. The Export Center, headed by a general manager, is divided into a sales team and an administration team. At the top of the administration team is a senior manager, followed by the beneficiary with the title of "manager." On the chart, the "team" under the beneficiary included two assistant managers, two supervisors and two assistants.

The petitioner also submitted job descriptions for the beneficiary's direct supervisor, the senior manager, and subordinates, which in this case were identified as two assistant managers, two "clerks," and two assistants. No evidence relating to the subordinate employee's educational background or the educational requirements of their positions was provided.

In his decision, the director noted the names of the beneficiary's subordinates overseas and found that evidence was not "submitted to establish that the beneficiary supervises or manages other supervisory, professional or managerial employees." The director also found that "the record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization." The director concluded that "[b]ased on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity."

On appeal, with respect to the beneficiary's qualifying employment abroad, counsel stated only that "the detailed description of [the beneficiary's] job duties while he was a Manager at the overseas parent company, and the Organizational Chart for the foreign parent, also establish that that job was managerial. Whether or not the employees who reported to him were 'professional,' it is clear that he was in charge of managing employees who were themselves 'managerial' and/or 'supervisory.'"

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

First, the AAO notes that there appears to be significant differences between the characterization of the beneficiary's overseas position and duties in the petitioner's July 2007 letter and the description provided in response to the RFE. In the initial letter, the beneficiary's title overseas was stated alternatively as "International Marketing Manager" and "Manager at [sic] International Marketing Department." In describing the beneficiary's duties, the petitioner used phrases such as "established

and implemented the company's sales goals and strategies" and "overseeing all international marketing, advertising and promotional staff and activities." Both the title and the characterization of the beneficiary's duties in this instance suggested that the beneficiary held a senior, possibly the lead, role, within the foreign entity's international marketing department. In contrast, the submissions in response to the RFE indicated that while the beneficiary did hold the title "manager," there are three levels of managerial personnel above him within the international marketing department, and in fact, the beneficiary appeared to be a supervisor of a non-managerial, non-professional team within the department (as will be discussed further below). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. 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. *Id.*

Moreover, the description of the beneficiary's duties provided in response to the RFE suggests that the beneficiary did not "oversee" staff and activities as the petitioner initially stated. Rather, it appears the beneficiary spent a significant portion in his position abroad performing a number of research and data collection and analysis tasks that appear to be non-managerial in nature. For example, the beneficiary is said to have "perform[ed] comparison analysis of . . . export data, analyze[d] information about the competing companies and the export activities of the leading companies in the industries" from which he derived benchmark reports to be submitted to his supervisor and eventually to higher management for approval. The beneficiary also "conduct[ed] researches on work environment," "review[ed] and analyz[ed] process of the company's production, logistics, sales and R &D" and provided the results to the company's computer information systems staff for their program and systems development. The beneficiary apparently also "analyze[d] demands from customers and markets"; "perform[ed] researches on products that the company does not produce" but may want to develop; "perform[ed] analysis for export sales volumes for each country"; "perform[ed] analysis of the monthly sales amount and profits" and provided the results to the relevant teams; and "collect[ed] data about importing companies located in foreign countries," reviewed their import and distribution capabilities, and reported the results to his supervisor. These research and data collection and analysis tasks do not fall directly under traditional managerial duties as defined in the statute. While the petitioner did provide an allocation of time to the different categories of duties set forth in the beneficiary's job descriptions, the above tasks are found throughout the job description and, as such, it is not possible to deduce how much of the beneficiary's time those non-qualifying tasks consumed. 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.

Counsel contends on appeal that the beneficiary qualified as a manager in his overseas position since "[w]hether or not the employees who reported to him were 'professional,' it is clear that he was in charge of managing employees who were themselves 'managerial' and/or 'supervisory'." Although the beneficiary is not required to supervise personnel, if it is claimed that her 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.

Though requested by the director, the petitioner did not provide any information regarding the level of education of any of the beneficiary's overseas subordinates, or the educational requirements of any of their positions. Any 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). Alternatively, the lack of such evidence suggests that the petitioner is not claiming that any of those employees qualify as professionals. In any event, absent the requested information, the petitioner has not established that the positions occupied by any of the beneficiary's subordinate employees required at least a bachelor's degree, such that they could be classified as professionals. Nor has the petitioner shown that any of these employees could be classified as managers or supervisors. While two of the employees under the beneficiary bore the title of "assistant managers,"³ nothing in their job descriptions indicate that they in fact managed or supervised other employees. Thus, 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. Nor has the petitioner demonstrated that the beneficiary has the authority to hire and fire those employees, or recommend those actions, and take other personnel actions, as required by the regulations. *See* 8 C.F.R. § 204.5(j)(2).

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.

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.

³ It is noted that the organizational chart indicates that two other employees on the beneficiary's team were listed as "supervisors," they were described as "clerks" in the job descriptions. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591. Further, there is no indication that their job duties entailed the supervision of any other employee.