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



U.S. Citizenship
and Immigration
Services

DATE:

AUG 22 2013

OFFICE: TEXAS SERVICE CENTER

FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the nonimmigrant visa petition and 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 Florida which operates a gas station, convenience store and car wash and claims to be a subsidiary of [REDACTED] located in India. The petitioner seeks to employ the beneficiary as its 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 based on three independent grounds of ineligibility, finding that the petitioner failed to establish: (1) that it has a qualifying relationship with the beneficiary's foreign employer; (2) that the foreign employer has employed the beneficiary in a managerial or executive capacity for at least one year; and (3) that the beneficiary would be employed in a qualifying managerial or executive capacity in the United States.

On appeal, counsel asserts that the director's denial was unsupported, as there is substantial evidence submitted on the record which establishes with the preponderance of the evidence that the petitioner and the foreign employer are parent and subsidiary, that the beneficiary is acting in a managerial or executive capacity with the foreign employer, and that the beneficiary will be employed in an executive or managerial capacity with the petitioner.

I. The Law

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 which 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.

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.

II. Qualifying relationship between the petitioner and the foreign employer

The first issue to be discussed in the present matter is whether the petitioner has established that a qualifying relationship exists between the petitioner and the foreign 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); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The pertinent regulation at 8 C.F.R. § 205.5(j)(2) defines a "subsidiary" as follows:

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.

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 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 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.

In the present matter, the petitioner states that 510 of its 1,000 outstanding shares of stock (or 51%) are owned by the foreign employer thereby establishing the foreign employer and petitioner as parent and subsidiary. On appeal, counsel asserts that the petitioner has submitted sufficient evidence to establish a

qualifying relationship between the petitioner and the foreign employer, including stock certificates, an IRS Form 1120, U.S. Corporation Income Tax Return, for 2011 reflecting the foreign employer's asserted 51% ownership in the petitioner, and a wire transfer received by the petitioner from the beneficiary in the amount of \$389,965. Counsel states that the stock certificates alone establish with the preponderance of the evidence that the foreign employer and the petitioner are parent and subsidiary, and with the additional evidence referenced above, the petitioner has demonstrated with clear and convincing evidence that a qualifying relationship exists between the entities. Counsel further contends that the director based his decision, in part, on the petitioner's failure to submit a corporate stock ledger which was not requested in the request for evidence (RFE). Counsel now submits the aforementioned stock ledger on appeal.

The AAO does not find counsel's assertions persuasive. First, as general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to establish 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.* Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. In the current matter, the director requested in the RFE that the petitioner submit evidence to establish a stock purchase that created the foreign employer's ownership and control over the petitioner, including original wire transfers from the parent company, cancelled checks, deposit receipts, or bank statements. Further, the director also stated that the petitioner could submit "any other additional documentation to show your company has a qualifying relationship to the foreign entity [as] claimed."

In response, the petitioner referenced documentation already submitted on the record, including the stock certificates and its IRS Form 1120 for 2011. Also, the petitioner submitted evidence of two wire transfers from the beneficiary to the petitioner in the following amounts and on the following dates: (1) \$39,975 on February 4, 2009 and (2) \$389,965 on February 20, 2009. However, the aforementioned wire transfers do not establish that consideration was paid by the foreign employer for 510 shares in the petitioner. Indeed, the stock ledger submitted on appeal notes that the foreign employer purchased 510 shares on April 14, 2008 for \$510. As such, the petitioner failed to submit any additional relevant evidence in response to the director's RFE. The petitioner provided no evidence regarding the origin of the funds transferred, and the purpose of the funds transfers, which were recorded on the wire transfer receipts as "transfer of funds" and "payment for goods." Therefore, this evidence could not be accepted as evidence of the foreign entity's purchase of a

majority of the petitioner's shares in April 2008. 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). 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

While the petitioner correctly states that the director did not specifically request a copy of the petitioner's stock ledger, the director did clearly request proof of stock purchase, adequate evidence of which was not provided, as well as "any other additional documentation." The petitioner chose to submit only the above-referenced wire transfer receipts which, for the reasons discussed, do not support the petitioner's claims that the foreign entity purchased a majority of the petitioner's shares. Although the director observed that the wire transfer documents did not establish that the funds transferred originated with the foreign entity, the petitioner has offered no additional documentation pertaining to the stock purchase in support of the appeal. Therefore, the petitioner has not submitted sufficient evidence to establish a qualifying relationship between the petitioner and the foreign employer. For this reason, the appeal must be dismissed.

Although the appeal will be dismissed, the AAO notes that the director's discussion of the qualifying relationship between the petitioner and foreign entity included an observation that the beneficiary "started the petitioning company after entering the U.S. on a B1/B2 visa." The director concluded that "since the affiliate or subsidiary relationship did not exist when the beneficiary entered the U.S., it cannot be found that the beneficiary came to [the] US on a non-immigrant visa to continue working for the same employer." The director further concluded that "while the beneficiary was working abroad for the foreign entity, it was not the same employer because the U.S. company did not exist."

At the time this immigrant petition was filed, the beneficiary was not working for the petitioning company and was not physically present in the United States. Rather, he was residing in Trinidad and Tobago and working for the foreign entity, and had done so for more than one year subsequent to the formation of the claimed qualifying relationship between the two entities and for more than one year in the three years preceding the filing of the petition. The fact that there was no claimed qualifying relationship between the entities at the time the beneficiary was admitted to the United States as a B1/B2 nonimmigrant several years prior to the filing of the petition is irrelevant. The director's conclusions in this regard were contrary to the applicable statute and regulations and will be withdrawn. However, for the reasons discussed above, the petitioner did not adequately support its claim that it is a subsidiary of the beneficiary's foreign employer.

III. Foreign employment in a managerial or executive capacity

The next issue to be addressed is whether the petitioner has established that the beneficiary is employed in a qualifying managerial or executive capacity with the foreign employer.

On appeal, counsel asserts that the director's failed to provide a reasoned analysis as to how he reached his conclusion that the beneficiary was not employed in a qualifying capacity abroad, and notes that the director's determination appeared to be based on the erroneous finding that the two companies did not claim have a qualifying relationship during the beneficiary's period of employment abroad. Counsel states that the petitioner has demonstrated by the preponderance of the evidence that the beneficiary is employed in a managerial or executive capacity with the foreign employer. In addition, the petitioner submits an expert opinion in support of this claim.

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (discussing "more likely than not" as a greater than 50 percent probability of something occurring).

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established by a preponderance of the evidence that the beneficiary is employed abroad in a qualifying managerial or executive capacity.

In order to determine whether the beneficiary would be employed in a qualifying executive or managerial capacity, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In support of the Form I-140 Petition for an Immigrant Worker, the petitioner provided the following description of the beneficiary's duties with the foreign employer:

[The beneficiary] has been employed as Managing Director of [the foreign employer] from 2001 to the present. In this position, he occupies the most senior executive and managerial position within the company. [The beneficiary] oversees the development and growth of the company, he formulates, and implements corporate policy, and makes decisions at the highest level. He supervises, hires and fires managerial staff and he determines company direction, engaging in discretionary decision-making.

In the RFE, the director stated that the petitioner had not submitted sufficient evidence to establish that the beneficiary acted in a qualifying managerial or executive abroad. The director requested that the petitioner

submit a more specific listing of foreign duties, including the percentage of time the beneficiary spent on each duty. In response, the petitioner generally explained the beneficiary's duties as follows:

Strategic planning to grow presence and market share and generating resources and/or revenues for the company, identify merger, acquisition and other expansion/investment opportunities for the corporation, approve company operational procedures, policies and standards; review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions.

Further, the petitioner provided two general duty categories and assigned percentages of time spent by the beneficiary on each, as follows:

- 55% Develop & Implement 3-5 year vision and strategy – through development, implementation and executive review of policies, procedures and markets.
- 45% Monitor/Analyze/Direct the Management and operation of the corporation

Within first category above, the petitioner further explained that the beneficiary reviewed and analyzed market trends; conducted feasibility studies, cost/benefit analysis, and determined prospective target markets; met with industry and trade leaders; identified new prospective supply chains; and provided advice and guidance on short-term and long-range goals, amongst other duties. Regarding the latter duty category listed above, the petitioner stated the beneficiary's responsibilities included: directing and managing a maintenance manager, head of security, and administrative assistant; providing direction on growth and expansion of service and sales operations; ensuring compliance with company operating policies, procedures and programs; developing policies and strategies for financial management; and encouraging and facilitating the application of technology, amongst other duties.

The definitions of executive and managerial capacity 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).

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 duties offered by the petitioner, such as reviewing and analyzing market trends, meeting with industry and trade leaders, identifying new prospective supply chains, providing direction on growth and expansion of service and sales operations, and developing policies and strategies for financial management, are overly vague and provide little probative value as to the beneficiary's actual day-to-day activities. Although the beneficiary's duties emphasize his creation of visions, strategies, policies, procedures, goals, the record includes no specific

examples or documentation to support these assertions. Further, the petitioner does not specifically describe the purported studies conducted, target markets identified, or technologies applied by the beneficiary. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. Overall, 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).

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 company'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 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 failed to corroborate its claims regarding the staffing and organizational structure of the foreign entity. The petitioner submitted an organizational chart for the foreign employer indicating that it has 19 employees working below the beneficiary and that the beneficiary himself supervises three managers including a maintenance manager, an administrative coordinator and a head of security. However, the most recent payroll documentation submitted by the foreign employer from December 2011 indicates that the company has only 12 employees. Further, the payroll documentation does not include the individuals identified as holding the positions of maintenance manager or head of security. Indeed, none of the seven members of the security department are included in the most recent foreign payroll documentation. Additionally, the other claimed managerial employee reporting to the beneficiary, the administrative coordinator, is listed as an administrative assistant in the company's payroll documentation. Lastly, another claimed manager reporting to the administrative coordinator, the cleaning supervisor, is not reflected as a manager in the foreign employer's payroll, but simply as a "cleaner," consistent with four of his other colleagues. 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. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, the petitioner also submits an expert opinion from [REDACTED] Director of Graduate Studies at the University of Bridgeport. [REDACTED] concludes, based on his asserted experience in business and management that the beneficiary qualifies as an executive consistent with the Act. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron Int'l.*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.*; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to

"fact"). In the present expert opinion, [REDACTED] merely repeats the language of the statute and the beneficiary's foreign duties in concluding that he acts as an executive. [REDACTED] descriptions and conclusions are no more specific than the vague and unsupported foreign duty description previously provided for the beneficiary on the record. Again, merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

In conclusion, the petitioner has provided a vague and non-specific duty description for the beneficiary in his capacity with the foreign employer and has failed to corroborate its claims regarding the foreign entity's staffing levels and organizational structure. The petitioner has not established by a preponderance of the evidence that the foreign entity employs the beneficiary in a qualifying managerial or executive capacity. For this additional reason, the appeal must be dismissed.

IV. Employment with the petitioner in a managerial or executive capacity

The last issue to be addressed is whether the petitioner has established that it will employ the beneficiary in a qualifying managerial or executive capacity

On appeal, counsel asserts that the beneficiary qualifies as an executive, stating that the director analyzed only whether the beneficiary qualified as a manager. Counsel further states that the director's conclusion that the beneficiary will likely perform primarily non-qualifying day-to-day operational duties is also in error and not supported by the record. Counsel notes that the petitioner provided evidence of sufficient employees to perform the day-to-day operational duties of the business. Counsel contends that the petitioner has established by a preponderance of the evidence that the beneficiary will be employed in an executive capacity.

The AAO does not find counsel's assertions persuasive. Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established with a preponderance of the evidence that the beneficiary acts in a qualifying managerial or executive capacity with the petitioner.

In order to determine whether the beneficiary would be employed in a qualifying executive or managerial capacity, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the RFE, the director stated that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would act in a qualifying managerial or executive capacity. As such, the director requested that the petitioner submit a more specific listing of the beneficiary proposed U.S. duties, including the percentage of time he would spend on each duty. In response, the petitioner generally explained the beneficiary's U.S. duties as follows:

Strategic planning to establish and grow presence in United States and generating resources and/or revenues for the company; identify merger and/or acquisition opportunities and direct implementation activities; approve company operational

procedures, policies and standards; review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions.

Further, the petitioner submitted general duty categories and assigned percentages of time spent by the beneficiary performing each, as follows:

- 60% Develop & Implement 3-5 year vision and strategy – through development, implementation and executive review of policies, procedures and markets.
- 20% Monitor/Analyze/Direct the Management and operation of the corporation
- 10% Hire/Fire managerial/executive staff
- 10% Communicate with Parent Company

Within the first duty category listed above, the petitioner further stated that the beneficiary would and analyze market trends for expansion; conduct feasibility studies, cost/benefit analyses, and determine prospective target markets; identify new prospective suppliers; study the feasibility and cost/benefit of automation; and provide advice and guidance on short-term and long-range goals, amongst other duties. Regarding the second category listed above, the petitioner stated that the beneficiary's duties would include monitoring operating results relative to established objectives; providing direction on growth and expansion of operations; ensuring compliance with company operating policies, procedures and programs; developing policies and strategies for financial management; encouraging and facilitating the application of technology, amongst other duties. Further, the petitioner indicated that the beneficiary's duties related to hiring and firing employees would include the recruitment of professional candidates and completion of interviews; conducting performance appraisals of managerial and executive staff, and terminating managerial or executive staff when necessary.

The definitions of executive and managerial capacity 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).

Here, the petitioner provided a position description that is essentially identical to that provided for his current position with the foreign entity, despite the fact that the two companies operate dissimilar types of businesses. 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 duties offered by the beneficiary are overly vague and they provide little probative value as to the beneficiary's actual day-to-day activities. Again, although the beneficiary's duties emphasize his creation of visions, strategies, policies, procedures, goals, the record includes no specific examples or documentation to support these assertions. The duties also reference activities not likely to be relevant to a small business operating a

convenience store/gas station and car wash, such as studying the feasibility and cost/benefit of automation and identifying merger and/or acquisition opportunities. In sum, the lack of specificity or examples in the provided duties casts doubt as to whether they represent the beneficiary's actual primary duties in light of the petitioner's current stage of development. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

When examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position.

The petitioner's provided organizational chart indicates that the organization will have six managerial employees, including the beneficiary, and five employees devoted to duties consistent with the non-managerial provision of goods and services, including two car wash attendants, two convenience store cashiers, and a merchandising clerk. Further, the petitioner's organizational chart indicates that the beneficiary will have two employees reporting directly to him, a V.P./general manager and a business development manager/corporate secretary. The V.P./general manager will in turn have three subordinate managers reporting to her, including a car wash manager, a systems and cashiers manager and a grocery merchandiser. The director requested that the petitioner provide an organizational chart including titles for all employees, their education levels, and brief job descriptions. Although, the petitioner provided job duty descriptions and titles in response to the director, the duty descriptions and titles provided did not match the titles specified in the petitioner's organizational chart. For instance, the petitioner provided duty descriptions for the following employees: vice president/operations manager, manager (store), manager (car wash), assistant manager (store), assistant manager (car wash), clerk (store) and clerk (car wash). 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). Also, no duty descriptions were provided for three of the petitioner's five subordinate managerial employees listed in the organizational chart, including the business development manager/corporate secretary, the systems and cashiers manager, and the grocery merchandiser, and the petitioner provided no duty description for the "merchandising and archivist" shown as reporting to the grocery merchandiser. 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).

In fact, the duty descriptions suggest that a manager and assistant manager are required to operate the petitioner's car wash and convenience store, casting doubt on whether the asserted higher level managers, such as the business development manager/corporate secretary, the V.P./general manager, and the beneficiary are actually performing higher level managerial and executive duties as asserted. Given the discrepancies noted and the lack of staff claimed to be involved in the day-to-day operations of the petitioner's businesses, the petitioner has not established that it can support the beneficiary's proposed executive position.

On appeal, counsel asserts that the beneficiary will be employed in an executive capacity, and contends that the director considered only whether the beneficiary would be employed in a managerial capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. 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.*

The petitioner has not provided sufficient evidence to establish that the beneficiary will be employed in an executive capacity. As noted, the petitioner has submitted a vague and non-probative position description for the beneficiary that provides no detail or supporting documentation regarding the goals and policies for which the beneficiary will be responsible. Further, the petitioner has submitted an organizational structure that is managerially top heavy as it includes six managerial employees and only five employees devoted to the provision of goods and services. Additionally, the petitioner has submitted an organizational chart and supporting duty descriptions that are inconsistent. As referenced above, 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 petitioner must demonstrate that the beneficiary operates within a complex organizational hierarchy as necessary to allow the beneficiary to primarily focus on directing management and implementing goals and policies. However, the petitioner has not provided sufficient evidence to establish that the beneficiary is primarily focused on these duties. In fact, the vague and inconsistent evidence submitted suggests that the petitioner has inflated the positions and duties of the beneficiary, and his asserted managerial subordinates, in order to qualify the beneficiary as an executive. 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.

582, 591-92 (BIA 1988). Therefore, the petitioner has not established that the beneficiary will act primarily in an executive capacity as defined by the Act.

As noted previously, the petitioner submits an expert opinion from [REDACTED] who concluded, based on his experience in business and management, that the beneficiary qualifies as an executive consistent with the Act. Again, USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron Int'l.*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.*; see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). [REDACTED] merely repeats the language of the statute and the beneficiary's U.S. duties in concluding that he acts as an executive. [REDACTED] descriptions and conclusions are no more specific than the vague and unsupported U.S. duty description provided previously for the beneficiary. Again, merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

In conclusion, the petitioner has provided a vague and non-specific duty description for the beneficiary in his proposed capacity with the petitioner, and has failed to provide a consistent and credible description of the company's personnel structure. Based on these deficiencies, the petitioner has not established that it will employ the beneficiary in a managerial or executive capacity. For this additional reason, the appeal must be dismissed.

V. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.