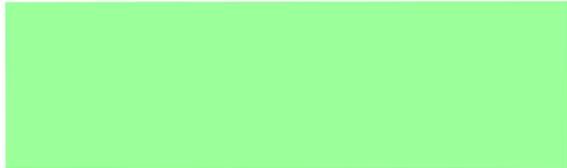


(b)(6)

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



U.S. Citizenship  
and Immigration  
Services



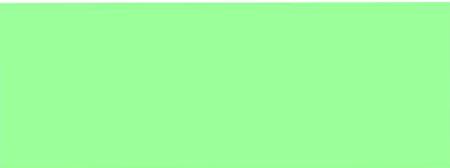
DATE: **JUL 29 2013** OFFICE: TEXAS SERVICE CENTER

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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, ("the director") denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation established on February 3, 2010. The petitioner states on the Form I-140, Immigrant Petition for Alien Worker, that it is a "distributor" and employs six personnel. It reported a gross annual income of \$190,674 when the petition was filed. It 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.

On January 11, 2013, the director denied the petition determining that the petitioner failed to establish: (1) that the petitioner has a qualifying relationship with the beneficiary's foreign employer; and (2) that the petitioner will employ the beneficiary in a 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. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the evidence of record is sufficient to satisfy the petitioner's burden of proof.

To establish eligibility for the employment-based immigrant visa classification, the petitioner must meet the criteria outlined in section 203(b) of the Act. 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.

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. 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.

## I. The Issues on Appeal

### A. *Qualifying Relationship*

The first issue to be discussed in this matter is whether the petitioner submitted sufficient evidence to establish that it has a qualifying relationship with the beneficiary's 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 below* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate," "multinational," and "subsidiary").

### The Law

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

*Affiliate* means:

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

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

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

### Facts and Procedural History

In this matter, the critical relationship is between the beneficiary's overseas employer, [REDACTED] and the petitioner. In a September 12, 2011 letter in support of the petition, the petitioner claimed it is a subsidiary of [REDACTED] a company established in Dubai, United Arab Emirates (UAE). The petitioner submitted evidence establishing it was incorporated in the State of Florida on February 3, 2010. As evidence of the qualifying relationship, the petitioner submitted the Articles of Incorporation for the United States entity which show that the

petitioner is authorized to issue 1,000 shares of common stock. The petitioner also submitted a stock certificate dated February 4, 2010, showing 1,000 shares of common stock issued to [REDACTED] the foreign employer, and signed by both the company president and secretary.

The petitioner further submitted its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, for 2010. On the Schedule K to the Form 1120, the petitioner stated that it is not owned directly 20% or more, or indirectly 50% or more, by any foreign or domestic corporation, partnership, trust, or tax-exempt organization. Additionally, the petitioner responded "No" where asked if any one foreign person owned, directly or indirectly, at least 25% of the voting power of all classes of the petitioner's stock entitled to vote or the total value of all classes of the corporation's stock. Thus, according to the petitioner's 2010 IRS Form 1120, it is not majority owned and controlled by the foreign company.

The petitioner also provided the foreign entity's memorandum establishing itself as a limited liability company with two parties, Mohammad [REDACTED] and [REDACTED] filed with the government of Dubai on March 3, 2002. The petitioner also attached the foreign entity's financial statements for the period ended December 31, 2010 and for the period ended July 31, 2011. The foreign entity's financial statement ending December 31, 2010 did not include any reference to ownership of the petitioner. On page 13 under note 11 of the foreign entity's financial statement ending July 31, 2011, the foreign entity indicates an ownership interest in [REDACTED] located in Miami, Florida, a different U.S. company than the petitioner.

In a request for further evidence (RFE) the director requested additional documentation to establish the qualifying relationship between the petitioner and the beneficiary's foreign employer. The director specifically requested proof of the original stock purchase, such as copies of the original wire transfers for the parent company, cancelled checks, deposit receipts, and bank statements.

In response, the petitioner again provided a copy of its share certificate and also submitted a partial copy of its February/March 2010 bank statement, and copies of three sales contracts between the foreign entity and [REDACTED] and payment transfers. The partial bank statement showed a funds transfer from the foreign entity on March 4, 2010 deposited to the petitioner's bank account. The sales contracts between the beneficiary's foreign employer and [REDACTED] are dated January 28, 2010, February 27, 2012, and June 29, 2012. The contracts list the petitioner as the consignee of \$30,000, \$35,000, and \$30,000 of commodities. The payment transfers are receipts issued to the beneficiary's foreign employer by [REDACTED] for these same amounts.

Upon review of the information in the record, the director found that the record included inconsistencies regarding the actual ownership of the petitioner. The director determined that the petitioner had not established that it has a qualifying relationship with the foreign entity.

On appeal, counsel for the petitioner asserts that the petitioner is 100 percent owned by the parent foreign entity. Counsel references the previously submitted share certificate issued by the petitioner and copies of commercial licenses issued by the government of Dubai, Department of Economic Development, to demonstrate the qualifying relationship and to show that the foreign entity is still doing business. Counsel acknowledges that Schedules A and K of the petitioner's IRS Form 1120 for

2010 did not indicate that a foreign corporation owned directly or indirectly 20 percent or more of the petitioner's stock. Counsel asserts that this inconsistency in the documentation should be treated as a scrivener's error on the part of the accountant who prepared the petitioner's 2010 taxes. Counsel requests that the amended tax filings submitted by the petitioner's accountant for 2010 and 2011 and the accountant's accompanying letter explaining the circumstances surrounding the improperly filed documents be reviewed and the director's decision reversed on this issue.

The record on appeal includes an undated letter signed on behalf of the petitioner's accounting service provider stating that it was told that the petitioner was a United States Florida corporation and did not know that the petitioner was owned 100 percent by a foreigner. The accounting service referenced corrected IRS Forms 1120-F for the 2010 and 2011 year. The record on appeal further includes a copy of an unfiled Form 1120-F, U.S. Income Tax Return of a Foreign Corporation, for the 2010 year with an attached Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business. The Form 5472 identifies the direct 25 percent foreign shareholder as [REDACTED] who is located in Miami, Florida. The Form 5472 further identifies the "citizenship, organization or incorporation" of the 25 percent foreign shareholder as "China" and the country under whose laws the direct 25 percent foreign shareholder files an income tax return as a resident as "China." Part IV of the 2010 Form 5472 reports "\$0" in monetary transactions between reporting corporations and the foreign related party for the 2010 year. The record on appeal does not include amended tax filings for the 2011 year.

#### Analysis

To establish that the foreign entity and the petitioner enjoy a qualifying relationship, the petitioner must provide probative consistent evidence establishing the relationship. The record in this matter did not support a determination that the petitioner and the foreign entity are affiliates or enjoy a parent/subsidiary relationship. The record shows that the petitioner is a United States corporation, incorporated in the State of Florida. As the director found, the stock certificate allegedly issued to the beneficiary's foreign employer, [REDACTED] is inconsistent with the tax returns the petitioner filed with the United States government.

Counsel's assertion that the inconsistency should be treated as a scrivener's error on the part of the accountant who prepared the returns is not supported by the documents submitted on appeal. First, the petitioner has not provided evidence that the 2010 amended return was actually filed. 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)). Second, the attempt to correct the previously submitted returns failed to establish that the beneficiary's foreign employer owns any percentage of the petitioner. As noted above, the claimed amended return for 2010 identifies a Chinese national as the owner or partial owner of the petitioner; not a limited liability company established in the UAE as set out in the stock certificate provided. 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). In this matter, the record on appeal does not resolve the inconsistency regarding the

petitioner's ownership; rather, it further casts doubt on the legitimacy of the claimed qualifying relationship between the petitioner and the foreign entity which employed the beneficiary.

Moreover, 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.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate by-laws, 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.

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. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest. In this matter, the petitioner provided a partial copy of its February/March 2010 bank statement for examination. However, a partial copy of a bank statement is insufficient. Not only does a partial copy fail to include all relevant transactions, a bank statement does not identify the purpose of a deposit or transfer. The petitioner in this matter failed to provide stock purchase agreements, subscription agreements or other evidence establishing that the foreign entity actually purchased the petitioner's stock. Thus, it is not clear from the partial bank statement that any funds deposited by the foreign entity were funds for the purchase of shares rather than for the purchase of materials or products. Again, without documentary evidence to support the petitioner's claims, the petitioner has not met its burden of proof. *Matter of Soffici, supra*.

Accordingly, the record did not include probative evidence that the foreign entity actually paid monies for its purchase of the petitioner's stock. We observe further that Part IV of the 2010 Form 5472 provided on appeal reports "\$0" in monetary transactions between reporting corporations and the foreign related party for the 2010 year. The lack of monetary transactions between the companies for the 2010 year further undermines the petitioner's claim that the foreign entity actually provided monies to the petitioner.

Upon review of the totality of the record, the petitioner has not provided consistent probative evidence establishing a qualifying relationship between the beneficiary's foreign employer and the proposed U.S. employer as required by section 203(b)(1)(C) of the Act. For this reason, the petition may not be approved.

*B. Managerial or Executive Capacity with the Petitioner*

The next issue in this matter is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity for the U.S. entity.

The Law

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.

#### Facts and Procedural History

In the petitioner's initial letter appended to the petition, it referred to the beneficiary's position as "general manager." The petitioner stated that two managerial employees, a sales and marketing manager and a warehouse manager, reported to the beneficiary. The petitioner noted that each of the managerial level employees had marketing, administrative, and operational staff reporting to them. The petitioner indicated that the beneficiary "was charged with a high level of functional management responsibilities for the direct development of marketing and sales of [its] electronic security systems in the United States and neighboring countries."

In the director's RFE, the director requested that the petitioner provide a definitive statement describing the duties the beneficiary will perform for the U.S. entity, including all specific daily duties and the percentage of time spent on each duty. The director also requested the petitioner's organizational chart showing the number of subordinate managers/supervisors or other employees who reported directly to the beneficiary, including a brief job description of their duties, as well as evidence of contractors, if any, used by the petitioner.

In response, the petitioner stated that in the beneficiary's position as "president," the beneficiary "makes decisions as to the policy and goals of the company," "exercises wide latitude in discretionary decision-making and receives only general direction from the Board of the parent company," and he "oversees the operation of Sales Department and Warehouse Department, as well as professional service." The petitioner set out the beneficiary's responsibilities and the time allocated to each duty as follows:

- Establishing and developing company policies, goals and strategies to penetrate new markets and customers. Implementing strategies to retain presence and reputation of the company and Parent Company. (40% of the time).
- Implementing marketing plans and strategies and report to the Board and Parent company. (15% of the time).
- Overseeing company finance; controlling and allocating operating capital for the company. (15% of the time).
- Overseeing customer and vendor relationships, including sourcing, negotiating and executing mayor [*sic*] contracts and approving payments to vendors. (15% of the time).
- Reviewing the evaluating [*sic*] the needs for work force, making determination of hiring and discharging of employees and managing outsource professional services. (10% of the time).
- Maintaining regular communications with the foreign parent company. (5% of the time).

The petitioner also provided the following descriptions of the sales department manager and the warehouse manager's duties:

The Manager of Sales Department is in charge of the daily office administration and directs and coordinates sales activities; negotiates with customers to draw up procurement of contracts and assists with export related issues; assigns sales territory to sales representatives; [a]nalyzes market trends and costs and manages customer records. [He] holds a college diploma in International Business and Economics.

The [M]anager of Warehouse Department manages company's inventory. He verifies incoming and outgoing shipments; authorizes work order for repairs and requisitions for replacement of products, coordinates warehouse activities with such activities as production, sales, records control, and purchasing, as well as oversees independent contractors. [He] holds a Master degree in Arts.

The petitioner's organizational chart depicted the beneficiary in the position of president directly over the vice-president/sales manager and the warehouse manager. The vice-president/sales manager in turn is shown as over a sales person, a sales/coordinator, and an office clerk. The warehouse manager is shown as over independent contractors. Additionally, the petitioner submitted copies of five IRS Forms W-2, Wage and Tax Statement, for the 2011 year, the year the instant petition was filed. The Forms W-2 were issued to the beneficiary, and the individuals in the positions of vice-president/sales manager, warehouse manager, sales/coordinator, and sales person. The record did not include a W-2 issued to the individual in the position of office clerk. The record did not include IRS Forms 1099, Miscellaneous Income, or other evidence that the petitioner routinely employed contractors.

Upon review of the record, the director determined that the petitioner had not established that the beneficiary will primarily supervise or manage a subordinate staff of professional, managerial or supervisory personnel who will relieve the beneficiary from performing the non-qualifying day-to-day duties. The director also found that although the beneficiary is placed at the top of the petitioner's organizational chart, the petitioner had not established that the beneficiary will be relieved from performing primarily non-qualifying tasks.

On appeal, counsel asserts that the beneficiary performs primarily managerial responsibilities within the company and is employed in an executive capacity. Counsel avers that the beneficiary spends a significant amount of time exercising discretion over managerial issues such as: "determining Petitioner's company policies, updating Petitioner's business plan and model, reviewing and approving financial and business reports, negotiating contracts with prospective clients and existing clients, and determining which employees are deserving of promotion and/or termination." Counsel adds that the beneficiary "supervises and controls the work of subordinate professional and nonprofessional employees" and "is given wide latitude and discretion when it comes to the hiring and firing of petitioner's employees." Counsel adds further that the beneficiary "oversees other supervisory employees . . . while also primarily managing the petitioner's policies." Counsel reiterates that the beneficiary does not directly perform the routine sales and marketing functions carried out by the office.

Counsel also submits the beneficiary's personal statement regarding his duties. The beneficiary indicates:

- He is responsible for managing all aspects of the business operations in the U.S. and that he establishes policies, goals and strategies of the subsidiary. He is responsible for the overall development and expansion of the subsidiary;
- He obtains, controls, and allocates capital and operating capital for the subsidiary. He establishes final pricing guidelines and ultimately decides the final purchasing prices and adequacy of stock levels.
- He receives and reviews company's business performance reports, financial statements, and business forecasts.
- He identifies and evaluates potential market trends and economic conditions in the U.S. based on business reports. He oversees the negotiation of all the contracts, especially the major contracts over \$10,000.
- He has authority to personally hire and train all local staff.

Counsel on appeal revises the previously submitted description of the beneficiary's responsibilities and the time allocated to each of the beneficiary's responsibilities as follows:

- Spends 40 percent of his day identif[ying] places where petitioner can lower costs and generate higher profits and revenue; for instance exercising wide discretion in determining which [of the petitioner's] security systems and products to re-order and when.
- 20 percent of his day is spent advising his subordinate staff managers how to increase their efficiency and assisting in the development of solutions to unexpected problems. Beneficiary decides how to resolve problems and the subordinate staff managers follow and execute beneficiary's instructions.
- 30 percent of beneficiary's day consists of marketing ideas that would enable petitioner to expand into different sales territories. After reviewing the population density of the targeted areas, beneficiary tells his sales manager the areas he would like petitioner to target, and sales manager communicates with its sales team members, and assigns territories as per beneficiary's instructions.
- 10 percent of beneficiary's day consists of reporting to foreign parent and providing a brief summary of petitioner's productivity.

Counsel also provides an updated list of employees identifying the beneficiary's position as president, identifying an accounting service and two logistic services, as well as, the positions of a sales manager, a warehouse manager, a coordinator, two sales personnel, an office clerk, and an independent contractor. The list also included a brief description of the employees' duties. The record on appeal further includes IRS Forms W-2 for the 2012 year issued to 12 individuals.<sup>1</sup> The 2012 Forms W-2 for five of the petitioner's personnel showed salaries of \$6,000 or less. Counsel asserts that members of petitioner's subordinate staff include other managerial personnel who perform the services of the company and that the petitioner's corporate structure demonstrates that there is sufficient staff to relieve the beneficiary from performing non-qualifying tasks such as preparing and

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<sup>1</sup> The petitioner explained that two employees, the vice-president/sales manager and the warehouse manager no longer worked for the petitioner and had been replaced with other personnel.

placing orders, arranging delivery of products, data entry, filing, monthly bookkeeping and accounting.

#### Analysis

Preliminarily, we observe the petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). The petition was filed September 15, 2011. Accordingly, the petitioner's employment of additional personnel in 2012, even if only on a part-time or intermittent basis, is not relevant to the proceeding at hand. When the petition was filed, the petitioner employed at most five personnel as demonstrated by the IRS Forms W-2 issued in 2011. Moreover, counsel's revision of the beneficiary's duties and the allocation of time the beneficiary spent on the claimed duties is inconsistent with previous descriptions submitted and additionally is not supported in the record. 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). Counsel's revision of duties creates further inconsistencies in the record regarding how the beneficiary allocates his time amongst his various responsibilities. Accordingly, the appeal will be adjudicated on the evidence in the record before the director and the beneficiary's general overview of his duties.

Upon review of the record, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *see also* 8 C.F.R. § 204.5(j)(5). That being said, however, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

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).

In this matter, the petitioner did not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. A petitioner may not claim that the beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the

beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. The petitioner in this matter has not submitted consistent probative evidence establishing that the beneficiary will primarily perform duties in either a managerial or an executive 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.

The petitioner initially stated that the beneficiary "was charged with a high level of functional management responsibilities for the direct development of marketing and sales of [its] electronic security systems in the United States and neighboring countries." The petitioner's use of the word "was" and the lack of specific information regarding the beneficiary actual daily duties to be performed for the petitioner necessitated the issuance of the director's RFE.<sup>2</sup> The petitioner repeated elements of the statutory definition of "executive capacity" in response to the director's RFE. For example, the petitioner indicated that the beneficiary "makes decisions as to the policy and goals of the company" and "exercises wide latitude in discretionary decision-making and receives only general direction from the Board of the parent company," language taken directly from sections 101(a)(44)(B)(ii), (iii), and (iv) of the Act. Further, the petitioner allocated 40 percent of the beneficiary's time to establishing and developing company policies, goals and strategies to penetrate new markets and customers and implementing strategies to retain presence and reputation of the company. However, referencing these broadly-cast business objectives is insufficient to establish the beneficiary's actual role within the organization. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava, supra*.

On appeal, the beneficiary adds that he establishes policies, goals, and strategies of the subsidiary and is responsible for the overall development and expansion of the subsidiary. The petitioner, however, did not provide a business plan or other documentary evidence demonstrating the beneficiary's establishment of its policies, goals, and strategies. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici, supra*. Although the beneficiary references his involvement in the plan to enter the U.S. market and establishing the petitioner's business in the United States, the beneficiary fails to provide evidence of his "executive" activities when the petition was filed. The beneficiary's vague statement

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<sup>2</sup> 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).

that he will review company's business performance reports, financial statements, and business forecasts did not include the specific tasks he will perform in carrying out such generic duties. Accordingly, it is not possible to conclude that these tasks are primarily managerial or executive duties rather than the daily operational tasks necessary to operate the petitioner's distribution business. Moreover, the record did not clearly set out who prepares these reports for the beneficiary's review. Although the beneficiary references the use of an accounting service, the record did not include evidence that the service prepared business performance reports or business forecasts or that the service prepared the day-to-day bookkeeping records. Similarly, counsel's assertion on appeal that the beneficiary spends a significant amount of time exercising discretion over managerial issues such as: "determining Petitioner's company policies, updating Petitioner's business plan and model, reviewing and approving financial and business reports," is not supported with documentary evidence. Again, 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, supra*. The record did not include sufficient evidence that the beneficiary will primarily establish the goals, policies, and strategies of the petitioner.

Finally, as observed above, inherent to the definition of executive capacity, the organization must have a subordinate level of managerial employees for the beneficiary to direct allowing the beneficiary to primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. In this matter, the petitioner indicated it has two managerial employees who report to the beneficiary in his role as the petitioner's "president." The petitioner described the duties of the sales department manager as daily office administration, managing customer records, assisting with export related issues, analyzing market trends and costs, and coordinating and directing the sales activities which included negotiating with customers and assigning sales territory to sales representatives. The duties as described do not provide sufficient information to ascertain that the individual in this position primarily performs managerial duties. The majority of the duties described show the individual in this position performing routine operational tasks in the daily administration of the office and selling the petitioner's product. The only managerial duty involved appears to be assigning sales territories to sales representatives; however, as the petitioner has provided evidence of the employment of only two sales personnel, the amount of time allocated to this duty appears to be limited. Similarly, the petitioner's indication that the warehouse manager manages the company's inventory is followed by a description of the operational tasks this individual performs, such as verifying shipments, authorizing repairs and requisitions and coordinating warehouse activities. Although the petitioner stated that this individual oversees independent contractors, the petitioner did not provide documentary evidence of the routine employment of contractors. Again, without supporting documentary evidence the petitioner has not met its burden of proof in these proceedings. *Matter of Soffici, supra*. The record is insufficiently detailed and supported to establish that the petitioner has a subordinate level of managerial employees for the beneficiary to direct. The petitioner has not established that the beneficiary will primarily perform the duties of an executive as that term is defined in the Act.

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. 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 matter, the petitioner has not established that the beneficiary will primarily perform the duties of a personnel manager. The petitioner stated that the beneficiary spends 15 percent of his time overseeing the company's finances; however, other than the employment of an accounting service, the petitioner did not provide evidence that other employees performed any tasks related to the control and allocation of the petitioner's operating capital. Further, the petitioner has not identified the specific portion of the allocated 15 percent of time the beneficiary spends supervising/overseeing the accounting services. The beneficiary's oversight of an accountant or accounting service is insufficient to establish that the beneficiary primarily manages a subordinate professional or supervisory employee. The petitioner also identifies the beneficiary's oversight of a sales manager and warehouse manager and claims that these two individuals are supervisory employees. However, the description of duties for both the warehouse manager and the sales manager did not indicate that either of these individuals is primarily responsible for supervising other employees. As observed above, the sales manager performs a number of routine office duties but is not described as primarily supervising the two employees depicted as subordinate to the position on the organizational chart. Similarly, the petitioner did not provide documentary evidence of the warehouse manager's supervision of independent contractors. The petitioner's description of the beneficiary's oversight of these two employees shows at most that the beneficiary is performing the duties of a first-line supervisor when supervising these two employees as well as the two remaining members of the sales team. The record is insufficiently detailed to ascertain otherwise. Moreover, the petitioner allocates only 25 percent of the beneficiary's time to supervision and hiring, firing, and evaluating subordinate employees.

On appeal, the beneficiary references his authority to hire and train all local staff and provides anecdotal evidence demonstrating his authority. Again, however, neither the petitioner nor the beneficiary describes personnel supervision as the beneficiary's primary task. The few tasks more concretely described by the petitioner suggest that the beneficiary is actively participating in the performance of non-qualifying duties. For example, the petitioner described the beneficiary as implementing marketing plans and strategies in response to the director's RFE. The beneficiary describes his duties as obtaining and allocating capital, establishing pricing guidelines and deciding final purchasing prices and the adequacy of stock levels, and identifying and evaluating potential market trends and economic condition in the United States. Although these duties involve the exercise of business acumen and the ability to operate an enterprise, such duties do not demonstrate that the beneficiary is primarily engaged in a managerial capacity as the term is defined in the statute.

The record in this matter provides a broad overview of the beneficiary's duties. Although the petitioner employed four personnel subordinate to the beneficiary's position when the petition was filed, the record as presented is insufficient to establish that the beneficiary will primarily supervise individuals in managerial, supervisory, or professional positions. The petitioner has not provided the necessary detail to determine that individuals employed as "managers" primarily supervise other employees, perform primarily managerial duties, or occupy professional positions. In sum, based on the record of proceeding, the petitioner has failed to establish that the beneficiary performs duties

other than the duties of a first-line supervisor over non-professional employees. Likewise, the record does not establish that the beneficiary is relieved from performing other non-qualifying duties associated with the day-to-day operations of the petitioner's enterprise. Thus, the AAO cannot conclude that he will be functioning primarily as a personnel manager.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(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 *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. 593, 604 (Comm'r 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

The petitioner initially stated that the beneficiary "was charged with a high level of functional management responsibilities for the direct development of marketing and sales of [its] electronic security systems in the United States and neighboring countries." Although this reference may be the petitioner's indication that the beneficiary will be managing the function of the development of marketing and sales, the petitioner did not further articulate the essential nature of the function. In addition, we observe that in response to the director's RFE, the petitioner stated that the beneficiary will spend 40 percent of his time developing policies, goals and strategies to penetrate new markets and customers and 15 percent of his time implementing marketing plans and strategies and reporting to the board and parent company. On appeal, counsel specifies that the beneficiary will not directly perform the routine sales and marketing functions carried out by the office and we observe that the petitioner did indicate that the sales manager analyzes market trends and costs as one of the duties of the position. However, in counsel's revision of the beneficiary's proposed duties, counsel states that the beneficiary will spend 30 percent of his day on reviewing population density of targeted areas and marketing ideas that would expand the petitioner into different territories. The beneficiary confirms in his statement of his duties that he identifies and evaluates potential market trends and economic conditions in the United States. It is unclear from the disparate information in the record regarding the beneficiary's actual tasks in relation to marketing or marketing and sales to conclude that the beneficiary is primarily managing an essential function, rather than performing the essential operational tasks to market and sell the petitioner's product. The petitioner did not include any supporting documentation that the beneficiary primarily spent his time developing the policies, goals, and strategies of the company as it relates to a marketing/sales function. The record is simply deficient in this regard.

Upon review of the totality of the record including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, and the nature of the petitioner's business, the petitioner has not established that the beneficiary's actual duties incorporate primarily executive or managerial functions. Although the petitioner may have plans to further expand its business, the record before the director failed to establish that the company currently has a reasonable need for the beneficiary to perform duties that are primarily in a managerial or executive capacity as those terms are defined in the statute. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak, supra*. The petitioner has not provided sufficient probative, consistent evidence demonstrating the beneficiary's role within the petitioner is primarily managerial or executive.

### III. Previous Nonimmigrant Petition

The petitioner previously filed an L-1A nonimmigrant petition on the beneficiary's behalf, a classification which also requires the petitioner to establish the beneficiary's duties comprise primarily managerial or executive tasks. The director denied the L-1A petition filed March 18, 2011 finding that the petitioner had not established the beneficiary would be employed in primarily a managerial or executive capacity. The petitioner appealed the denial decision and the AAO withdrew the director's decision citing several factual errors made by the director and remanded the matter as the petitioner had not established a qualifying relationship with the beneficiary's foreign employer. USCIS records reflect that the nonimmigrant petition remains pending.

The instant record of proceeding does not contain copies of the evidence submitted in support of the previously filed L-1A petition that the AAO remanded to the director with further instructions. It must be emphasized that each petition filing is a separate proceeding with a separate record. *See Hakimuddin v. Dep't of Homeland Sec.*, No. 4:08-cv-1261, 2009 WL 497141, at \*6 (S.D. Tex. Feb. 26, 2009); *see also Larita-Martinez v. INS* 220 F.3d 1092, 1096 (9th Cir. 2000) (stating that the "record of proceeding" in an immigration appeal includes all documents submitted in support of the appeal). In making a determination of statutory eligibility, USCIS (and the AAO) is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Accordingly, although we recognize that the AAO previously found that the petitioner had established that the beneficiary would perform the duties of a personnel manager, the instant record fails to establish this essential element.

Further, examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427. In the present matter, the director reviewed the record of proceeding and concluded that the petitioner had not established the beneficiary would be employed in a primarily managerial or executive position, as well as finding that the petitioner had not established the requisite qualifying relationship. In both the request for evidence and the final denial, the director articulated the objective statutory and regulatory requirements and applied them to the matter at hand. Upon review

of the totality of the information in the record at hand, including the inconsistent evidence submitted on appeal in this matter, we concur with the director's decision.

#### IV. 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.