



U.S. Citizenship
and Immigration
Services

(b)(6)

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

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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 U.S. petitioner is a corporation organized in the State of Florida in April 1999. The petitioner states on the Form I-140, Immigrant Petition for Alien Worker, that its type of business is "sales of industrial equipment" and that it employs six personnel. The petitioner reported a gross annual income of \$262,117 when the petition was filed. It seeks to employ the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

On August 17, 2012, the director denied the petition determining that the petitioner failed to establish: (1) that the petitioner's foreign parent company employed the beneficiary in a managerial or executive capacity; and (2) that it 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.

I. The Law

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.

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. The Issues on Appeal

A. Managerial or Executive Capacity for the Foreign Entity

The first issue in this matter is whether the petitioner submitted sufficient evidence to establish that the qualifying foreign entity employed the beneficiary in a managerial or executive capacity for at least one year in the three years prior to the time of the beneficiary's application for classification and admission into the United States.

Facts and Procedural History

In a letter appended to the petition, the petitioner noted that the beneficiary had 25 years of experience as a manager. The petitioner indicated that the beneficiary had filled the position of general manager for the foreign entity for several years and in 2011 filled the general manager position in the United States. The petitioner stated that in these positions, the beneficiary had performed the following duties:

- Prepare and present the annually [sic] projection and global strategies of the company;
- Analyze, develop and execute new alliances to increase the international business opportunities and profitability for the company;
- Evaluate monthly reports in order [to] determine requirements for increasing profits;
- Periodic review of financial statements and data related to the incomes and expenses in order to take financial decisions;
- Implement innovating techniques to ensure and improve the company goals;
- Evaluate financial risk and business opportunities;
- Monitor general operations executed in order to align procedures to the plan projects;
- Execute strategic plan by implementing short and long-term goals that align with the scope of service, mission and values of the company;
- Initiates action plans as necessary, as to employ new personnel, put into operation new regulations, arrange new investments, between others;
- Direct, formulate and continuously update the company policies and procedures in favor of the financial improvement;
- Direct and coordinate the mayor [sic] company activities including hire, supervise and evaluate the professional performance of the managers;
- Design and apply the incentives and promotions plan of the employees and planning the training required;
- Provide positive and constructive feedback to the personnel by coaching, mentoring, counseling or corrective guidance and action, as appropriate;
- Ensure a safe work environment for employees by enforcing the execution of all safety programs and makes recommendations for changes as necessary.

The record also included an organizational diagram for the foreign entity.¹ The organizational diagram depicted the beneficiary in the position of president directly supervising a general manager, who in turn supervised an operations manager, an executive secretary, and an administrative manager. The organizational chart also identified four sales executives reporting to the operations manager, a driver reporting to the executive secretary, and a security person reporting to the administrative manager. The record included brief overviews of the duties of each of the identified positions.

The petitioner also provided original and translated versions of the foreign entity's payroll for 2009, 2010 and 2011.² The payroll documents show the beneficiary was paid by the foreign entity each month and worked each month in the 2009, 2010, and 2011 years. The record also included the foreign entity's monthly tax returns for 2010 and 2011, bank statements for 2010 and 2011, and sales/suppliers invoices.

Upon review of the limited information in the record regarding the beneficiary's actual duties for the foreign entity, the director issued a request for evidence (RFE) instructing the petitioner to submit additional evidence establishing that the foreign entity employed the beneficiary in a managerial or executive capacity.

In response, in a May 31, 2012 letter on the petitioner's letterhead, the president of the foreign entity and the beneficiary as president of the petitioner certified that the beneficiary had worked for the foreign entity in "the position of President for more tha[n] 10 years non interrupted since 1985 until 2010." The letter-writers further informed that as president of the foreign entity, the beneficiary:

Developed duties as assign [*sic*] task to subordinates, taking in consideration their capacities, assigning deadlines, specifying parameters and resources; establish control methods to evaluate the employee's performance; train and help to develop the subordinate staff; evaluate effectiveness of the staff; execute support actions as select, train and rewards [*sic*] employees; be responsible for his duties and the staff duties for the board of directors and develop and implement the work methodology between others.

The record also included a May 28, 2012 letter on the foreign entity's letterhead, signed by the general manager, [REDACTED] stating that the beneficiary had performed the position of general manager for more than 20 years working full time. The letter-writer stated that the beneficiary had "the first managerial position of the company developing general duties as direct supervision of the Operation and Administrative Managers, both qualified personnel with professional degrees, as well, he gave direct instruction to the Executive secretary[, a] position occupied by a lady with an associate degree." The letter-writer also indicated that at the end of each year the beneficiary reported to the directors and analyzed the annual financial report, and developed and setup the company business plan in order to reach the annual company goals. The letter-writer

¹ The petitioner does not identify the date of the foreign entity's organizational diagram and whether the diagram depicts the current or past organizational structure.

² The translated version of the foreign entity's payroll identifies the beneficiary in the position of general manager and another individual in the position of president; the untranslated version identifies the beneficiary in the position of "presidente" and another individual in the position of "gerente general."

concluded that the beneficiary (i) managed the entire organization, (ii) supervised and controlled the work of other professionals, and (iii) was directly responsible for hiring, firing or recommending that the employees work in the company as well as evaluating their performance according to company goals.

The beneficiary also provided some examples of his specific daily duties while employed at the foreign entity as reported by the foreign entity's letter-writer. The beneficiary indicated that he provided instructions to the operations manager regarding the kind of vendors to contact in order to accomplish any special requirements for customers and that he was in charge of initial meetings of every process for special bids requested by customers. The beneficiary noted that he had a short conversation with the Operations Manager every day to check the status of every proposal and advise her or offer support to deal with managers of special vendors. The beneficiary explained that he met weekly with the administrative manager to review the accounts payable and receivable report and take any actions necessary on human resource problems as well as approving payments to be made. The beneficiary noted that every morning he reviewed the bank accounts and kept in direct communication with the account managers, stocks advisor and other important vendors and customers' contacts. The beneficiary stated that his daily contact with his managers and relevant managers of his vendors and customers was an important key to the success of closing major deals with big corporations. The beneficiary indicated he usually met biweekly with the external accountant and was directly involved in proposals presented to the government.

The petitioner also provided printouts of electronic mail transmissions between the beneficiary and other entities, many of which were untranslated.

Upon review, the director determined that the record was insufficient in establishing that the beneficiary was employed in a primarily managerial or executive capacity for the foreign entity for at least one year in the three years prior to the time of the beneficiary's application for classification and admission into the United States.

On appeal, counsel re-submits the foreign entity's organizational chart and provides an overview of the employees' duties. The description of the duties of the foreign entity's president, the beneficiary's position on the foreign entity's organizational diagram, indicates the beneficiary was responsible for the following:

- Be responsible for the company representation internationally – 20 percent;
- Direct the assembly and directive shareholders meetings – 15 percent;
- Approve decisions made by the General Manager – 23 percent;
- Suggest to the directive members the actions to take in consideration in order to run the company – 25 percent;
- Execute any other plan according with the statutes and rules of the company – 18 percent.

Counsel also provides two powers of attorney appointing the beneficiary to represent two different companies before authorities in Venezuela. The powers of attorney are dated in 1999 and 2000. Counsel also submits the untranslated versions of the foreign entity's payroll records from 2006 through 2009. The record on appeal also includes certificates of education for several of the foreign entity's employees.

Analysis

The record in this matter does not include sufficient probative evidence that the beneficiary worked in a managerial or executive capacity for the foreign entity.

In examining the executive or managerial capacity of the beneficiary, United States Citizenship and Immigration Services (USCIS) will look first to the 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, 1108 (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 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.

Preliminarily, we observe that the petitioner sometimes refers to the beneficiary as the foreign entity's president and sometimes refers to the beneficiary as the foreign entity's general manager. The petitioner's own descriptions of duties for these two separate positions are different and the petitioner places the two positions on different levels within the foreign entity's hierarchy. Accordingly, the petitioner has presented an inconsistent explanation of the beneficiary's actual role for the foreign entity. Moreover, the petitioner indicates that the beneficiary worked for the foreign entity until 2010; however, the foreign entity's payroll records show that the beneficiary continued to be paid for the same job (president) until at least the end of 2011 and the record reflects that the beneficiary has resided in the United States since December 2009. The petitioner does not explain why the foreign entity continued to pay the beneficiary in 2011 for full time work. 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 beneficiary's explanation of his duties for the foreign entity indicates he was in the position of general manager. The foreign entity's claimed current general manager described the beneficiary's duties as managing the organization, supervising and controlling the work of other professionals, and hiring, firing, and evaluating the foreign entity's employees. On appeal, the beneficiary's position for the foreign entity is described as being responsible for representing the company, directing shareholder meetings, approving decisions made by the general manager, suggesting actions to the directors, and executing plans according to the rules of the company. As the record does not include a consistent, probative description of the beneficiary's actual duties for the foreign entity for at least one year in the three years prior to the time of the beneficiary's application for classification and admission into the United States, the petitioner has not established this essential element.

Moreover, the petitioner's initial broad list of generic duties for the beneficiary as the foreign entity's general manager did not describe specific duties the beneficiary performed while he was employed by the foreign entity. Vague references such as preparing global strategies, analyzing and developing

new alliances, reviewing financial statements and data, improving the company goals with implementing innovating techniques, evaluating financial risk and business opportunities and monitoring general operations do not convey an understanding of the beneficiary's actual role within the foreign entity's organization. Similarly, generic duties such as executing strategic plans, initiating actions plans, directing and updating company policies, and directing and coordinating the company activities are insufficiently detailed to establish that the beneficiary primarily performed in a managerial or executive capacity for the foreign entity.

Turning to the beneficiary's explanation of his duties for the foreign entity, the beneficiary describes his duties as primarily supervising the operations manager and administrative manager. Although the foreign entity indicated that both the operations and administrative managers had professional degrees, it is not the qualifications of the individuals that establish a position as a professional position but rather their duties. In this matter, the description of duties for the operations and administrative managers is insufficient to establish that these individuals primarily performed professional duties. Moreover, the description of duties did not evidence that either of these individuals primarily performed managerial or supervisory duties, but rather performed the necessary operational tasks of the company. The beneficiary noted that he also performed the operational tasks of reviewing bank accounts, communicating with account managers, important vendors, and important customers, and presenting proposals to the government. These duties, while significant to the success of the foreign entity, are not primarily managerial or executive duties.

On appeal, counsel references the documentary evidence submitted and asserts that this evidence is sufficient to establish that the beneficiary worked for the foreign entity as its general manager. Upon review of the foreign entity's organizational chart and the overview of the staff's duties, we find the same inconsistencies regarding the beneficiary's actual role for the foreign entity prior to entering the United States. The submission of powers of attorney showing that the beneficiary was appointed to represent two different U.S. companies before authorities in Venezuela in 1999 and 2000 is irrelevant to establishing the beneficiary's role for the foreign entity in one of the three years prior to the time of the beneficiary's application for classification and admission into the United States. The payroll records establish that the beneficiary was employed by the foreign entity during the relevant time period but do not provide evidence that the beneficiary was employed in a primarily managerial or executive capacity. The certificates of education for several of the foreign entity's employees submitted on appeal likewise are insufficient to establish that the beneficiary primarily supervised professional, managerial, or supervisory employees. Again, it is the duties of the position that establish its nature, not the education of the individuals holding the position.

As the record does not provide consistent, probative evidence of the beneficiary's actual job duties while working in Venezuela for the foreign entity, the record does not support a conclusion that the beneficiary performed duties in either a managerial or executive capacity in one of the three years preceding the time of the alien's application for classification and admission into the United States. For this reason, the petition may not be approved.

B. Managerial or Executive Capacity for the Petitioner

The next issue in this proceeding is whether the petitioner has established the beneficiary will perform duties in an executive or managerial capacity for the U.S. petitioner.

Facts and Procedural History

In the petitioner's December 2, 2011 letter in support of the petition, the petitioner indicated that in February 2010 it decided to again begin operations again in Florida. The petitioner stated that it entered the market to facilitate the commerce of specific products according to customers' needs from U.S. distributors to Latin American customers. As referenced above, the petitioner's letter in support of the petition referenced the beneficiary's duties for both the foreign entity and the petitioner. Although the petitioner also allocated the amount of time the beneficiary spent on each of the listed duties for the petitioner, as noted above, the initial description of duties was general. The description did not establish the nature of the actual duties the beneficiary would perform for the petitioner. The petitioner's organizational chart, also initially included in the record, depicted the beneficiary as its general manager directly supervising an operation executive and a sales manager. The operation manager, in turn, is depicted as supervising a store assistant. The sales manager is shown as supervising a marketing executive and a sales assistant.

The petitioner provided overviews of the duties of the beneficiary's subordinate employees, including the operation executive and sales manager. The petitioner indicated that the operation executive spends the majority of her time: developing, maintaining and monitoring billings and receipts; maintaining the company's archival and administrative files; managing day-to-day processing of accounts receivable and payable; reconciling monthly activity and generating year-end reports, and fulfilling tax related requirements; overseeing monthly and quarterly assessments and forecasts of the organization's financial performance; and administering payroll and employee benefits and organizational insurance. The operations executive spent a limited amount of time preparing annual audits and liaising with outside vendors, and managing grantor contracts and reimbursement requests. The duties of the operations executive did not include supervisory duties. The sales manager's duties included listening to customer requirements and making presentations to make sales, maintaining and developing relationships with existing customers, meeting with potential customers, acting as a contact between a company and its existing and potential markets, and negotiating agreements, price, costs, delivery and specifications with buyers and managers. The sales manager's duties did not include any supervisory duties. The store assistant is described as being responsible primarily for opening the store and interacting with guests and team members.

In response to the director's RFE, the petitioner provided a more specific description of the beneficiary's duties as its general manager. The petitioner stated:

- [The beneficiary] manages the main connection between the foreign corporations and [the petitioner] in order to determine the best equipments [sic] required by customers in Venezuela and others [sic] Latin American countries. [20 percent of the work week]
- From the city of Miami, [the beneficiary] is capable to handle a better communications [sic] with the suppliers and coordinate meetings in order to establish price agreements and times of shipping of all equipments [sic] required by foreign customers. [10 percent of the work week]
- Also, from the city of Miami in Florida, [the beneficiary] supervises the correct procedure developed by his employees to ship the merchandise to Latin America, due to he counts [sic] with a variety of freight forward companies operating from Miami to Latin America

- as well as shipments by air or by sea, according [to] the customers' urgency and the prices offered. [10 percent of the work week]
- [The beneficiary] is in constant communication with the manager of the Venezuelan parent company because they are in charge to coordinate the reception of all equipments [sic] sent by [the petitioner]. [5 percent of the work week]
 - [The beneficiary] assists to meetings with major vendors two or three times a week. During these meetings, the vendors provide information about new equipments [sic] released in the market and offered competitive prices to the company, during these meetings [the beneficiary] also approves new purchases and payments to the vendors. [10 percent of the work week]
 - [The beneficiary] also makes a daily marketing analysis in order to increase sales every year and share the ideas of the proposed goals to his subordinates. This daily work includes directing, handling, coordinating and motivating his employees to make additional efforts to reach the proposed goals for the end of the year. [5 percent of the work week]
 - [The beneficiary] is [r]esponsible for the overall performance of the corporation. Correct and implement the policies regarding the administration, commercialization, marketing, sales, finance, personnel, and training services. [15 percent of the work week]
 - [The beneficiary] meets frequently with subordinate executives to ensure that the commercial operations are implemented in accordance with these policies. Retain overall accountability even though may delegate several responsibilities including the authority to oversee subordinate executives who direct the activities of the departments of the corporation, its policies on a day-to-day basis. [10 percent of the work week]
 - [The beneficiary] reviews and approves to submit quarterly reports to update the company on new or ongoing activities and issues. He also submits, in a timely manner, all requested corporate paperwork, due to he is responsible to ensure that the proper corporate status is maintained. [5 percent of the work week]
 - [The beneficiary] represents and speaks on behalf of the corporation to the public and other organizations. He also attends all corporate meetings and trainings. [5 percent of the work week]
 - [The beneficiary] is [r]esponsible and has the authority to hire and fire employees, and supervise and coordinate the employees' jobs through the departments. [5 percent of the work week]

The petitioner also included a revised organizational chart. The chart depicted the beneficiary as general manager directly over an operation executive, an administrative manager, and a sales manager. The chart showed the operation executive over an assistant manager and the sales manager over a marketing executive and several sales assistants. The record further included the petitioner's Florida Department of Revenue Employer's Quarterly Reports (UCT-6) for the four quarters of 2011. The UCT-6 for the fourth quarter of 2011, the quarter in which the petition was filed, showed the petitioner employed six individuals, including the beneficiary. The names on the fourth quarter UCT-6 corresponded to the names of the individuals in the positions of general manager, operation executive, assistant manager, sales manager, and a sales assistant. A sixth name on the UCT-6 did not correspond to any of the names listed on the petitioner's organizational chart.

Upon review of the limited evidence in the record, the director denied the petition, determining that the petitioner had not established that it will employ the beneficiary in primarily a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary is performing in both a managerial and executive capacity and has been since 2010. Counsel avers that as the beneficiary is responsible for the overall direction of the petitioner, the petition should be approved. Counsel contends that the director's observation that the petitioner has only six or seven employees reveals that the director overlooked the beneficiary's responsibility for directing the petitioner through independent contractors. Counsel, on appeal, references letters from [REDACTED] and [REDACTED].³ Counsel also notes that the petitioner employs customs brokers and freight forwarding services which are under the beneficiary's direction, thus relieving him of performing these duties. The petitioner also provides a further breakdown of the beneficiary's duties on a daily basis. Counsel concludes that the director based his decision solely on the petitioner's size. Counsel also asserts that the beneficiary is performing an essential and controlling function with respect to a large and complex business enterprise which requires significant decision making and that the beneficiary has also been involved in formulating and executing the petitioner's policies. Finally, counsel observes that the beneficiary's L-1 visa classification was approved and that the beneficiary is working in a managerial or executive position with the same international organization.

Analysis

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

In this matter, the petitioner does not clarify whether its claim is that the beneficiary's duties fall under both definitions of managerial and executive capacity as set out in section 101(a)(44)(A) of the Act and section 101(a)(44)(B) of the Act or just one of the definitions. Rather, the petitioner recites partial sections of the definition of manager and the definition of executive in support of its claim that the beneficiary is eligible for this visa classification. If, however, the petitioner is claiming that the beneficiary qualifies as both an executive and a manager, the petitioner must demonstrate that the beneficiary's responsibilities meet the requirements of each capacity. The petitioner may not claim to employ a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. On review, the petitioner's description of the beneficiary's duties fails to establish that the beneficiary will be engaged in primarily managerial or executive duties for the petitioner.

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*

³ Although the record on appeal includes an October 10, 2012 letter from [REDACTED] indicating it has provided accounting services to the petitioner since 2009, the record does not include a letter from [REDACTED].

World, Inc. v. INS, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Counsel in this matter asserts that the beneficiary will perform both executive and managerial duties.

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.

In this matter, although the beneficiary is listed as head of the organization, the record does not include documentary evidence that the beneficiary has a subordinate level of managerial employees to direct. First, as the individual on the petitioner's revised organizational chart in the position of administrative manager was not employed by the petitioner when the petition was filed, this position is not considered a current subordinate employee. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Second, although the petitioner employed an operation executive and a sales manager when the petition was filed, the description of duties for these positions did not indicate that either of these individuals manages a particular department; rather the description of duties indicates generally that these individuals primarily perform the routine operational tasks of a bookkeeping/accounting clerk and of a salesperson. The generic descriptions of the duties of the sales manager and operations executive positions are insufficient to ascertain that the actual daily duties comprise primarily managerial tasks.

Moreover, a review of the petitioner's initial generic description of the beneficiary's duties fails to demonstrate that the beneficiary's actual duties within the organization are primarily executive duties. 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 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). The petitioner's more specific description of the beneficiary's duties in response to the director's RFE also fails to establish the beneficiary primarily performed executive duties. For example, it is the beneficiary who determines the best equipment required by customers, who communicates with suppliers and coordinates meetings, who interacts with a variety of freight forwarding companies, who handles logistics with the foreign entity, who meets with vendors and approves new purchases, and who performs a daily marketing analysis. These duties are operational tasks necessary to continue the sale and export of products and goods. Although the beneficiary may delegate several responsibilities to subordinates, the petitioner has not effectively described either the beneficiary's executive tasks or the delegation of specific tasks to demonstrate that the beneficiary focuses primarily on the goals and policies of the organization rather than the day-to-day operations of the enterprise.

Upon review of the totality of the record, including the description of the beneficiary's duties, the duties of subordinate personnel employed when the petition was filed, and the nature of the

petitioner's business, the petitioner has not provided probative evidence that the beneficiary primarily performs duties in an executive capacity. The record is simply deficient in this regard.

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.

The petitioner in this matter has not established that the beneficiary primarily performs the duties of a personnel manager. A review of the petitioner's description of the beneficiary's duties does not reveal that the beneficiary primarily supervises and controls the work of other supervisory, professional, or managerial employees. Again, the initial description of the beneficiary's duties is generic and could apply to any number of positions. The overly broad position description does not assist in a determination that the beneficiary primarily performs duties as a personnel manager.

In addition, the petitioner provided evidence of five employees subordinate to the beneficiary's position when the petition was filed. The record did not establish that any of these individuals are managerial employees. Moreover, although the operation executive and sales manager are depicted as over other employees on the petitioner's organizational chart, the description of their duties did not demonstrate that either of these individuals primarily supervises other employees. Accordingly, the petitioner has not established that these two individuals are supervisory employees. Further, the description of duties for the operations executive shows she primarily performs the tasks of an accounting clerk or bookkeeper as well as other routine and non-professional operational tasks. These duties do not depict a professional position. Similarly, the sales manager performs the duties of a salesperson. The record did not establish that his duties require an advanced bachelor's degree and thus are not professional duties. A review of the remaining positions of sales assistant, assistant manager, and an unidentified position did not reveal that these positions are managerial, supervisory or professional.

On appeal, counsel for the petitioner references the beneficiary's direction of outside contractors, including freight forwarders, a storage facility, and an accountant. Counsel avers that these contractors perform many of the operational tasks of the company thus relieving the beneficiary to perform primarily executive or managerial duties. However, the petitioner did not provide any supporting documentary evidence to substantiate its use of contractors. 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)). Neither has adequate documentary evidence been submitted on appeal in support of counsel's assertion. 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). Moreover, the petitioner did not identify specific tasks performed by these outside contractors. Accordingly, it cannot be determined that the outside contractors relieve the beneficiary from primarily performing operational tasks.

The record in this matter shows that at most the beneficiary is acting as a first-line supervisor of non-professional, non-supervisory, and non-managerial employees. The petitioner has not established that the beneficiary will primarily perform the duties of 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 did not articulate any specific function that the beneficiary will manage. It is not sufficient to state generally that a beneficiary will manage "functions" or that the overall management of the organization constitutes the management of a function; rather the petitioner must describe the function with specificity and identify who will perform the routine duties of the function. In this matter, the petitioner has not identified any employees who perform the everyday routine operational tasks, including the duties of a first-line supervisor, thus relieving the beneficiary to primarily perform managerial duties. The beneficiary's business acumen in performing the essential tasks to operate the business, while undoubtedly valuable to the company, is not synonymous with an individual managing an essential function(s).

Counsel's claim that the director determined the petitioner had not established that the beneficiary will perform primarily in a managerial or executive capacity solely on the basis of the petitioner's size is in error. Although the director noted that the petitioner's size was a factor in his determination, the director also found that the petitioner had not sufficiently described the duties of the proffered position. We agree that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006);

Systronics Corp. v. INS, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In addition, a company's small size does not obviate the need to establish that a beneficiary is not primarily performing the duties of the organization. To establish such, the petitioner must fully and definitely describe the actual duties the beneficiary and his or her subordinates perform. Further, the petitioner must 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. In this matter, the petitioner has failed to provide this essential evidence.

Upon review of the totality of the record including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the lack of other employees to relieve the beneficiary from performing operational duties, including the duties of a first-line supervisor of non-professional employees, 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. Accordingly, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity.

III. Prior Approval

The AAO acknowledges that USCIS previously approved an L-1A nonimmigrant petition filed on the beneficiary's behalf, a classification which also requires the petitioner to establish the beneficiary's duties comprise primarily managerial or executive tasks. It must be noted, however, that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava, supra*. Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Moreover, in making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). In the present matter, the director reviewed the record of proceeding and concluded that the petitioner had not established the beneficiary had been or would be employed in a primarily managerial or executive position. 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. If the previous nonimmigrant petition was approved based on the same evidence as submitted in this matter, the previous approval would constitute gross error on the part of the director. Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

(b)(6)

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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.