



U.S. Citizenship
and Immigration
Services

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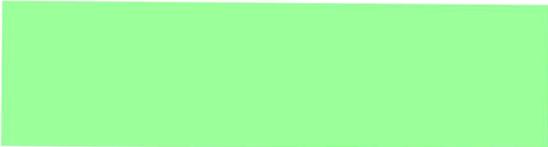
Date: **JUN 25 2013** OFFICE: TEXAS SERVICE CENTER



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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on certification. The AAO will affirm the director's decision to deny the petition.

The petitioner filed this immigrant petition seeking to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner, a Florida corporation established in 2007, engages in the import and export business. The petitioner claims to be a subsidiary of the beneficiary's foreign employer, [REDACTED] (the foreign entity), located in Venezuela, based upon the foreign entity's purported 60% ownership of the U.S. petitioner. The petitioner seeks to employ the beneficiary as its General Manager.

I. The Law

Section 203(b) of the Act states in pertinent part (with emphasis added):

(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 Form I-140 to seek classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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. *See* section 101(a)(44) of the Act. Such a statement must clearly describe the duties to be performed by the alien. *Id.*

With respect to managerial and executive capacity, section 101(a)(44) of the Act defines the terms as follows:

(A) 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.

(B) 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.

8 U.S.C. § 1101(a)(44) (emphasis added).

The language of the statute is specific in limiting this provision to only those executives and managers who have previously been employed by 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.

The pertinent regulations at 8 C.F.R. § 204.5(j)(2) provide definitions for the following terms:

Affiliate means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(B) 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.

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.

II. Analysis

Employment Capacity in the United States

Upon review of the record and for the reasons discussed herewith, the AAO concurs with the director's finding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial capacity in the United States.

The petitioner filed Form I-140, Immigrant Petition for Alien Worker, on December 7, 2009. On Form I-140, the petitioner indicated that it employs a staff of six persons and has a gross annual income of \$395,766.

In a letter accompanying the initial petition, the petitioner explained that it specializes in the import and export, purchase, sale, distribution, production and trade of food products for animal consumption, its derivatives and any other animal supplies, as well as equipment and materials for the farming industry in general. The petitioner also explained that it provides technical solutions for the industry by exporting the best and most advanced equipment available in the market for design related businesses that have the need, including offering purchasing assistance to those businesses that need to obtain specialized equipment. The petitioner stated that it employs five employees.

The petitioner specified that the beneficiary will be employed in a managerial capacity. The petitioner described the beneficiary's job duties in the United States as the following:

Since his entry into the U.S. as an intracompany transferee, in September 2008, [the beneficiary] has performed in his current position as a General Manager of [the petitioner], where he has been responsible for overseeing the daily sales operations of the US company and ensuring the company's goals and objectives are met. He has been and will continue to be in control of all personnel decisions and he will handle the accounts receivable and accounts payable including payroll. [The beneficiary] is familiar with all phases of the company's business operations. Moreover, he has general experience, which he has developed during the years he has worked for the company. [The beneficiary] is fully prepared to execute the duties as the General Manager of the United States branch of the Company in the next 3 years.

The petitioner provided a breakdown of the beneficiary's job duties, as follows:

Meeting with Executive Director (10%): The General Manager will receive daily guidance and orders from the Executive Director and will be responsible for implementing the orders of the Executive Director as needed; making recommendations to the Executive Director based on his/her observations of the company operations. The General Manager will be the eyes and ears of the Executive Director and will fill in for same when the Executive Director must be absent on business trips. In such occasions, the daily meetings will be held telephonically.

Implementation of budgeting decisions (10%): Correct budgeting allocation and implementation is a crucial aspect of the operations. Therefore, the General Manager will dedicate great care and detail on the supervision of same.

Meetings with staff (10%): The General Manager will implement the general directives and specific orders of the Executive Director by holding daily meetings with subordinate staff, to identify and correct any problems, troubleshoot the implementation of new procedures, supervise quality control and ensure processes are integral and fully dependent. During such meetings, the General Manager will observe staff and later make recommendations regarding bonuses, promotions, salary increases or termination as needed.

Administrative tasks (30%): Most of the day of the General Manager will be taken by routine administrative tasks such as signing checks, approving invoices, reviewing documents, reviewing correspondence, taking phone calls from clients and vendors, liaisioning [sic] with outside legal and accounting firms, and also liasoning [sic] with vendors, clients and other outside sources if staff requires the intervention of the General Manager in specific situations.

Implementation of new contracts (20%): The General Manager will ensure new contracts are fully taken care of when initiated, by assigning staff to handle each detail needed in order for the relationship with the new customer to start off correctly, until the contract is fully absorbed by the company and a routine is fully established.

Marketing, Advertising, Administrative and Legal Issues (20%): Under the guidance and directive of the Executive Director, the General Manager will coordinate and implement marketing and advertising expenditures, as per contracts approved by the Executive Director, and make recommendations, conduct or order research as needed to give the Executive Director the tools needed to make major decisions. The General Manager will pursue banking, vendor, legal and accounting issues as needed reporting development of same to the Executive Director.

In support of the petition, the petitioner submitted its Certificate of Incorporation, filed with the State of Florida on July 2, 2007. The Certificate of Incorporation named the petitioner's initial directors as the following: (1) the beneficiary, President; and (2) [redacted] Treasurer. The Certificate of Incorporation

stated that the petitioner shall have two directors initially, the number of which may be modified from time to time, but shall never be less than two.

The petitioner submitted the U.S. entity's organizational chart, which depicts the beneficiary at the top as General Manager. Underneath the beneficiary are the following positions: an Administrative Assistant, [REDACTED]; an outside accountant (unidentified); a Sales and Purchasing Manager, [REDACTED] and an Import and Export [employee], To be Hired. Additionally, the Sales and Purchasing Manager is depicted as supervising the following positions: [REDACTED] International Sales (To be Hired); and a Warehouse [employee], [REDACTED]. In total, eight positions are depicted in this chart.

The petitioner submitted position descriptions for its U.S. employees, as follows:

Sales Manager

Meeting with General Manager and Executive Director (10%): The Sales Manager will receive daily guidance and orders from the General Manager and will be responsible for implementing the orders of the General Manager and the Executive Director as needed, making recommendations to the General Manager and to the Executive Director based on his/her observations of the company operations. The Sales Manager will be responsible for researching and keeping information on sales and market conditions, and also on competition.

Sales Efforts (80%): Most of the time of the Sales Manager will be spent on aggressively pursuing sales leads, telephonically, via email and in person, in-house and on outside visits to customers and prospective customers as needed. The Sales Manager will have an expense account and will receive authorization for expenditures as needed from the General Manager.

Meetings with sales staff (10%): The Sales Manager will conduct daily meetings with assistants to coordinate the mechanics of the sales operation such as payments, delivery, stock, transportation and other operational issues, to ensure integrity of the operations, and identification of any potential problems in the operational system of the company activities. Quality control is an integral part of the Sales Manager's duties, and same will rely on several staff members to effectively ensure correct implementation of operational procedures to ensure good quality of operations. The Sales Manager will rely on staff to prepare all needed documentation for each operation.

Total: 100%

Purchasing Manager

Meeting with General Manager and Executive Director (10%): The Purchasing Manager will receive daily guidance and orders from the General Manager and will be responsible for implementing the orders of the General Manager and the Executive Director as needed, making recommendations to the General Manager and to the Executive Director based on his/her observations of the company operations. The Purchasing Manager will closely work

in tandem with the Sales Manager, ensuring stock, transportation and sourcing issues correctly address the needs of the company.

Purchasing (80%): Most of the time of the Purchasing Manager will be spent on coordinating the purchasing efforts of the company, through contacts telephonically, via email and in person, in-house and on outside visits to suppliers, transport companies, agents, vendors, and other outside services as needed. [T]he Purchasing Manager will also liaison very actively with the parent company to coordinate efforts with the parent company's logistics team.

Meetings with staff (10%): The Purchasing Manager will conduct daily meetings with the Sales Manager and assistants to coordinate the mechanics of the operations such as payments, delivery, stock, transportation and other operational issues, to ensure integrity of the operations, and identification of any potential problems in the operational system of the company activities. Quality control is an integral part of the Purchasing Manager's duties as well, and same will rely on several staff members to effectively ensure correct implementation of operational procedures to ensure good quality of operations. The Purchasing Manager will rely on staff to prepare all needed documentation for each operation.

Total: 100%

Administrative Assistants and Secretaries, other clerical staff

Meeting with General Manager and/or Division Manager (10%): Each Administrative Assistant, Secretary or specific assistant (stock assistant, sales assistant, shipping assistant, etc.) will participate in daily meetings with the General Manager and/or the specific Division Manager directly responsible for the department. During such daily meetings the Administrative Assistants, Secretaries and other assistants will review their work orders, and will communicate any problems or potential problems to the Managers. They will inform management of any potential issues relating to operations, staff, or other aspects of the company's business. This will ensure all staff members and management are always fully informed on potential problems, while at the same time brainstorming on new ideas and sharing research and other information crucial to the good performance of the team.

Clerical functions (80%): Most of the day of the assistants and secretaries will be taken by the performance of their assigned functions.

Continued education (10%): We will encourage our staff to continually update their skills by reading industry materials, guides, conducting research and updating on market trends, data and other information as needed.

Total: 100%

Sales Team

Meeting with Sales and Purchasing Managers (10%): The sales team will have daily meetings with the Sales Manager and with the Purchasing Manager to fully coordinate sales efforts with administrative and other aspects of the company's operations. During such meetings, new sales leads will be discussed and the sales team will receive their instructions regarding which deals to pursue. The sales team will present sales orders to management and the manager will take same for approval by the General Manager or Executive Director as needed, depending on the level of authorization needed based on the company's established authorization procedures.

Sales (80%): The sales team will dedicate most of its efforts and time to aggressively pursuing sales leads and closing on sales contracts, incrementing sales and researching the market for new sales opportunities and competition, making recommendations on a daily basis for adjustments.

Administrative tasks (10%): The sales team will produce sales reports, and work with administrative staff to product the necessary documentation for the operations.

Total: 100%

The director issued a request for evidence (RFE), instructing the petitioner to submit, *inter alia*, a more definitive description of the beneficiary's proposed job duties in the United States including a brief description of the job duties of the beneficiary's immediate subordinates or identifying what essential function the beneficiary manages, and evidence documenting the company's use of contractors and the duties performed.

In response, the petitioner submitted, *inter alia*, the following amended description of the beneficiary's proposed job duties in the United States:

Meeting with Executive Directors (Board of Directors) (10%): The General Manager will receive daily guidance and orders from the Board of Directors and will be responsible for implementing the orders of the Board of Directors as needed; making recommendations to the Board of Directors based on his observations of the company operations and opportunities specifically in the import and export, purchase, sale, distribution, production, trade, of food products for animal consumption, and equipment and materials for the farm and cattle industry.

Implementation of budgeting decisions (10%): Correct budgeting allocation and implementation is a crucial aspect of the sales and purchasing of equipment and materials for the farm industry operations. Therefore, the General Manager will dedicate great care and detail on the supervision of the sales and purchase department.

Meetings with staff (10%): The General Manager will implement the general directives and specific orders of the Board of Directors and analyze the entire company by holding daily meetings with managers of sales/purchase, and warehouse department to determine whether

any issues or problems have been identified and corrected, review the implementation of new procedures, and quality control of the new products. Oversee through the departments the best products at the best value to allocate them in Venezuela and Latin America, and ensure processes are integral and fully dependent. During the meetings, the General Manager will discuss any pending issues with manager [sic] staff and later make recommendations to improve any areas as needed to ensure profitability of the business.

Administrative tasks (25%): The General Manager will review and approve administrative tasks delegated to his administrative assistant who is to prepare invoices, prepare payroll. He will approve invoices and reviewing documents, liaisoning [sic] with outside legal and accounting firms, and also liaison with vendors, clients and other outside sources if staff requires the intervention of the General Manager in specific situations.

Implementation of new contracts (25%): The General Manager will ensure new contracts are fully taken care of when initiated, by assigning staff to handle each detail needed in order for the relationship with the new customer to start off correctly, until the contract is fully absorbed by the company and a routine is fully established.

Marketing, Advertising, Administrative and Legal Issues (20%): The General Manager will coordinate and implement marketing and advertising expenditures, as per contracts approved by the Executive Board of Directors, and make recommendations, conduct or order research as needed to give the Board of Directors the tools needed to make major decisions. The General Manager will pursue banking, vendor, legal and accounting issues as needed.

The petitioner provided additional position descriptions for its U.S. staff, as follows:

Administrative Assistant: [redacted] Reports to: General Manager. Supervises: Not supervise [sic].

This position is located underneath the General Manager to whom it reports. Its functions are to use its technical know-how to assist the operations at all levels. To provide support in order to ensure the most effective and efficient development of all operations of the company.

Main functions:

- *Provide support in the preparation and development of bids, quotes, delivery notes, requisitions, and all task related to purchases, sales of equipment or spare parts required by the company;*
- *Prepare invoices and submit accounting records and payroll for the company to Accountant;*
- *Maintain up to date the entire price lists used for quotes;*
- *Elaborate cost supporting information for quotes; and*
- *Maintain the effective communication with suppliers in order to gather the necessary information to estimate quotes.*

Sales Manager: [REDACTED] Reports to: General Manager. Supervises: Sales workers during the execution of projects.

This position is located underneath the General Manager and must provide periodic reports. It is in charge of the proper operation of the sales department for the company. Coordinate and organize all sales quotes and operations required to meet the deadlines of the needs of a buyer. At the same time, establish commercial connections with customers in order to determine purchase and sales requirements.

Main functions:

- *Coordinate sales and delivery and material supply;*
- *Supervise the sales staff and the quality of the work;*
- *Visit the customers and their purchasing department managers, in order to provide information and to offer the products in the case of new customers, and in the event of an existing customer, perform follow up of the quality of the equipment or products provided;*
- *Generate, apply, and review contract executions;*
- *Review the prepared offers from staff, estimating costs and final review prior [sic] its submission to the customers;*
- *Elaborate and update report related to the terms and conditions agreed with the suppliers;*
- *Control and monitor accounts payable with domestic and international suppliers;*
- *Measure the customer satisfaction and take the corrective action in those situations where it deviates from the established processes; and*
- *Develop requisitions for all the required materials or equipment requested by customers, implementing the respective procedures related to purchases of equipment, materials and products, as well as those for evaluation of suppliers.*

Sales: [REDACTED] Reports to: General Manager and Sales Department. Supervises. None.

This position is underneath the Sales Manager and Provides support to management in all activities related to sales.

Main functions:

- *Prepare quotes, purchase orders, delivery notes, third party communication and everything related to purchases, sales of equipment and products for the company;*
- *Update the complete price list of all the products offered by the company;*
- *Prepare all the proper documentation related to the import of merchandise;*
- *Develop USA and International market;*
- *Actively participating events [sic] where explains the benefits and usages of our products;*
- *Assist the sales manager on creating the strategies on commercialization;*
- *Responsible to achieve the sales goal of the company in USA and Venezuela; and*

- *Marketing and sales strategies for Venezuelan market.*

Warehouse: Reports to: General Manager. Supervises: The entire staff in terms of Health, hygiene and environment.

He assists in the assembly and packaging activities in the warehouse. Performs standardized duties and tasks, resolves routine questions and refers more complex issues to higher levels. Move merchandise by hand, hand truck, or forklift equipment to maintain continuous flow of merchandise.

Main functions:

- *Receiving and check of incoming cargo;*
- *Shipping supervision- freight control;*
- *Report of rejected products;*
- *Origination of Shipping document, labels;*
- *Packaging control; and*
- *Make the entries and recording of merchandise in the inventory.*

Operations Import and Export Manager: To be Hired. Reports to: General Manager. Supervises: Part time workers during the execution of projects.

This position is located underneath the General Manager and must provide periodic reports. It will be in charge of the proper operation of the import and export activities currently being handled by the Sales Manager. Coordinate and organize all import and export operations required by the company. At the same time, establish commercial connections with international customers in order to determine product or equipment merchandise.

Main functions:

- *Will coordinate activities of international traffic division for the company and will negotiate settlements between foreign and domestic shippers by performing the following duties personally;*
- *Must be familiar with contract negotiations with freight carriers;*
- *Converts foreign currency figures into US monetary equivalents, or domestic currency into foreign equivalents;*
- *Corresponds with foreign companies;*
- *Must be up to date with HTS codes[.] Plans and directs flow of air and surface traffic moving from overseas destinations;*
- *Engage in receiving and shipping freight, documentations, way billing, assessing charges, and collecting fees for shipments;*
- *Examines invoices and shipping manifests for conformity to tariff and customs regulations; and*
- *Contacts custom officials to effect release of incoming freight and resolve customs delays.*

In response to the RFE, the petitioner provided an amended organizational chart for the U.S. entity. The amended chart depicts the "Board of Director" at the top, directly supervising the beneficiary as General Manager. The beneficiary is depicted as supervising an Administrative Assistant, [REDACTED], a Sales and Purchase Manager, [REDACTED] an Import and Export [personnel], To be Hired, and a Warehouse Chief, [REDACTED]. The Sales and Purchase Manager is depicted as supervising a Sales [employee], [REDACTED] and an International Sales [employee], To be Hired. The chart also depicts an outside accountant (unidentified).

The petitioner also provided copies of its Forms 941 for 2009, Employer's QUARTERLY Federal Tax Return. The petitioner's Form 941 for the fourth quarter of 2009 (ending in December) shows that the petitioner employed two persons.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in a managerial capacity in the United States. The director observed that the petitioner's descriptions of the beneficiary's job duties and the U.S. entity's staffing were not consistent with the other evidence in the record.

The director then reopened the decision for the limited purpose of certifying the decision to the AAO. The director informed the petitioner that it had 30 days in which the petitioner could submit a brief or other written statement for consideration. The petitioner has opted not to submit a brief or other written statement for consideration within the given period.

Based upon the evidence in the record, the AAO finds that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial capacity in the United States. See section 101(a)(44)(A). The AAO reviews each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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). Initially, the petitioner described the beneficiary as spending the majority of his time on "routine administrative tasks such as signing checks, approving invoices, reviewing documents, reviewing correspondence, and taking phone calls from clients and vendors." The petitioner specifically asserted that the beneficiary would "handle the accounts receivable and accounts payable including payroll."

In response to the RFE, however, the petitioner substantially changed the beneficiary's duties. Foremost, the petitioner deleted the beneficiary's routine administrative duties and delegated those administrative tasks to his administrative assistant. The petitioner materially changed the beneficiary's duties described in the section entitled "meetings with staff," giving the beneficiary more supervisory duties over subordinate staff in both the U.S. and foreign entities. The petitioner also amended the beneficiary's initial responsibility to report to an Executive Director to reporting to a Board of Directors, and subscribed different percentages of time to the beneficiary's job duties related to his administrative duties and duty to implement new contracts. In sum, the initial description of the beneficiary's job duties appeared to have the beneficiary doing more non-qualifying work, while the second iteration of the job has the beneficiary performing less non-qualifying work and managing more of the actual work done in the petitioner's operation through subordinates.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added and changed the beneficiary's job duties. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

The petitioner's initial description of the beneficiary's job duties in the United States indicate that the beneficiary will primarily perform non-qualifying duties, including routine administrative duties. 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 capacity. See section 101(a)(44)(A) of the Act (requiring that one "primarily" perform the enumerated managerial duties); see also *Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Other than performing administrative tasks, many of the beneficiary's remaining job duties are unclear. The petitioner's initial description of the beneficiary's job duties indicated that he reports to, receives guidance and directives from, advises, and makes recommendations to an Executive Director, a position not depicted in the petitioner's U.S. organizational chart or the petitioner's Certificate of Incorporation.¹ Therefore, it is not clear what the beneficiary's actual duties entail. Furthermore, many of the beneficiary's job duties are stated in a vague or overly broad manner. For example, the petitioner asserted that the beneficiary will "dedicate great care and detail [to the implementation of budgeting decisions]," "ensure new contracts are fully taken care of," "coordinate and implement marketing and advertising expenditures," and "pursue banking, vendor, legal and accounting issues as needed." The petitioner has failed to provide any meaningful detail or explanation of the beneficiary's activities in the course of his daily routine. 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*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.*

The petitioner's descriptions of the job duties of the U.S. employees and the overall organizational structure of the U.S. entity are not entirely consistent or credible. For instance, on the organizational chart, the petitioner indicated that it employs a Sales and Purchasing Manager, Herbert Rojas. However, the petitioner then provided separate position descriptions for a Sales Manager and a Purchasing Manager, with each position dedicating 100% of his or her time on the specified sales or purchasing duties. In response to the

¹ In fact, the petitioner's Certificate of Incorporation indicates that the beneficiary holds the top position in the company as President; if the beneficiary is the Executive Director of the company, then his job duties related to meeting with, reporting to, and advising the Executive Director are not credible or relevant to the facts at hand.

RFE, the petitioner indicated that [REDACTED] is its Sales Manager, and provided no position description or job duties previously assigned to the Purchase Manager. In addition, the petitioner changed the warehouse employee's placement in the organizational hierarchy. Initially the petitioner depicted the warehouse employee as being subordinate to the Sales and Purchasing Manager, but later changed him to be directly subordinate to the beneficiary, parallel to the Sales and Purchasing Manager. Further, the petitioner's initial description of the sales person's job indicated that she spends 80% of her time on pursuing sales, whereas the petitioner's description of the sales person's job duties in response to the RFE indicated that she mainly provides "support to management in all activities related to sales."

The petitioner indicated that the positions of the Import and Export [employee] and International Sales [employee] are currently vacant. According to the petitioner's position description in response to the RFE, the Import and Export [employee's] job duties are currently being performed by the Sales Manager. However, the petitioner's corresponding description of the Sales Manager's job duties did not include any duties assigned to the Import and Export [employee]. The petitioner did not adequately document which employee(s) is/are currently performing the duties of the Import and Export [employee] and International Sales [employee]. Given that the petitioner is an import and export business by nature, it is unclear which employee(s) are actually performing the day-to-day operational activities of the petitioner.

The petitioner provided no evidence documenting the company's use of contractors and the duties performed, as specifically requested by the director. Therefore, the petitioner failed to establish that it utilizes an outside accountant to perform essential accounting duties. The petitioner failed to explain which of its employee(s) perform the company's essential accounting duties. 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).

Finally, the petitioner has provided inconsistent claims regarding its actual staffing at the time of filing. On Form I-140 (filed on December 7, 2009), the petitioner indicated that it currently employs six employees. In a letter accompanying the initial petition, the petitioner claimed to employ five employees. Moreover, the petitioner's Form 941 for the fourth quarter of 2009 (ending in December) indicated that the petitioner employed only two persons. The petitioner failed to provide any explanation for these significant discrepancies.

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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Overall, based on the petitioner's failure to provide accurate, consistent and credible descriptions of the beneficiary's job duties and regarding the U.S. office's overall staffing and organizational structure, the petitioner has failed to establish that it will employ the beneficiary in a primarily managerial capacity. Accordingly, the AAO will affirm the director's decision to deny the petition.

Qualifying Relationship

Beyond the decision of the director, the AAO finds that the record lacks sufficient evidence to establish that the petitioner and the foreign entity have a qualifying relationship. To establish a “qualifying relationship” under the Act and the regulations, the petitioner must show that the beneficiary’s foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a “parent and subsidiary” or as “affiliates.” See generally § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); see also 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms “affiliate” and “subsidiary”).

In a letter accompanying the initial petition, the petitioner asserted that the foreign entity owns 60% of the U.S. petitioner, while the beneficiary and [REDACTED] each own 20% of the U.S. petitioner. Based upon this ownership structure, the petitioner is claiming to be a subsidiary of the foreign entity. As initial evidence of the qualifying relationship, the petitioner submitted the following documents:

1. The petitioner’s Certificate of Incorporation, filed on July 2, 2007, stating that the total number of outstanding shares the company is authorized to issue is 10,000 shares, and that the company initially began business by issuing 10,000 shares to [REDACTED]
2. The petitioner’s 2008 IRS Form 1120, U.S. Corporation Income Tax Return, and accompanying Schedule K, showing that no foreign or domestic corporation, partnership, or trust owned 20% or more (or 50% or more indirectly) of the corporation’s stock, and no foreign person owned 25% or more of the corporation’s stock;

The director issued a RFE instructing the petitioner to submit additional evidence of the qualifying relationship. In response to the RFE, the petitioner submitted, *inter alia*, the following documents:

1. The petitioner’s stock certificate number 1 issued to [REDACTED] on July 2, 2007 for 20% of the company’s shares of stock;
2. The petitioner’s stock certificate number 2 issued to the beneficiary on July 2, 2007 for 20% of the company’s shares of stock;
3. The petitioner’s stock certificate number 3 issued to the foreign entity on July 2, 2007 for 60% of the company’s shares of stock;
4. The petitioner’s stock ledger confirming the issuance of stock as depicted by the above certificates numbers 1-3, and confirming that no other previous or subsequent issuance or transfer of stock has taken place; and
5. The petitioner’s amended 2008 IRS Form 1120, U.S. Corporation Income Tax Return, and accompanying Schedule K, showing that the foreign entity owned 60% of the corporation’s stock. The petitioner explained that the previous Form 1120 indicating no foreign ownership was due to “an accounting mistake.”

Based on the evidence submitted, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity. The evidence in the record contains conflicting evidence regarding the petitioner’s claimed ownership structure. Although the petitioner asserted that, as of July 2, 2007, the foreign entity owns 60% of the U.S. petitioner (and that the beneficiary and [REDACTED] each own 20% of the U.S. petitioner), the petitioner’s Certificate of Incorporation, filed with the State of Florida on July 2, 2007, reflects that [REDACTED]

█ was issued 10,000 shares, representing 100%, of the petitioner's total outstanding stock. Neither the petitioner's stock certificates nor stock ledger accounts for the petitioner's initial issuance of 100% of the corporation's stock to █ on July 2, 2007. Notably, the petitioner's 2008 federal tax return, as initially submitted, showed that no foreign or domestic corporation, partnership, or trust owned 20% or more (or 50% or more indirectly) of the corporation's stock, which is consistent with the ownership structure depicted in the Certificate of Incorporation. The petitioner has not provided any explanation for the significant discrepancies regarding its purported ownership.

Although the petitioner attempted to replace its 2008 federal tax return with an amended tax return showing the foreign entity's purported 60% ownership of the petitioner's stock, the petitioner submitted no evidence that this amended tax return was actually filed with the IRS. The petitioner also provided no significant explanation, along with corroborating evidence, to document that the initial tax return contained "an accounting mistake" as claimed. As such, the petitioner's amended 2008 tax return bears little probative value.

Based on the contradictory evidence in the record regarding the petitioner's claimed ownership, the record lacks sufficient evidence to establish that the petitioner and the foreign entity have a qualifying relationship in the manner claimed by the petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Beneficiary as Employee and Sole Owner

Although the director's denial will be affirmed, the AAO withdraws the director's finding that the beneficiary may not be considered an employee of the petitioner.

The director found that the beneficiary may not be considered an employee of the petitioner. The director observed that the petitioner is "ultimately owned and controlled by the beneficiary" and concluded that "the beneficiary is the employer for all practical purposes." The director noted that USCIS regulations at 8 C.F.R. § 204.5(j)(5) require the beneficiary to be "employed" in a managerial or executive capacity, and thus must be an "employee."

Sections 203(b)(1)(C) and 101(a)(44) of the Act, along with the related regulations at 8 C.F.R. § 204.5(j), all make use of the terms "employed," "employee," and "United States employer." These terms are not defined by statute or the applicable regulations. Accordingly, the AAO must view how these terms are used in the statute and, considering the specific context in which that language is used, examine whether the terms are outcome determinative.

Statutory interpretation begins with the language of the statute itself. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). The AAO must “determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.” *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). The “inquiry must cease if the statutory language is unambiguous and ‘the statutory scheme is coherent and consistent.’” *Robinson*, 519 U.S. at 340; *see also United States v. Abuagla*, 336 F.3d 277, 278 (4th Cir. 2003).

While the statute uses the term “employee” in the definition of manager or executive, the AAO notes that the key elements of the statutory definitions focus on the duties and responsibilities of the employee and not the person’s employment status. Looking at the statutory scheme as a whole, the AAO concludes that it is most appropriate to review the beneficiary’s eligibility by making a determination on his or her claimed managerial or executive employment.

The AAO recognizes that there is some tension between the terms “employee” and “executive.” In *Matter of Aphrodite Investments Ltd.*, the INS Commissioner expressed concern that adopting the word “employee” would exclude “some of the very people that the statute intends to benefit: executives.” 17 I&N Dec. 530, 531 (Comm’r 1980); *but see Clackamas Gastroenterology Assoc., P.C. v. Wells*, 538 U.S. 440, 448-49 (2003) (examining whether a director-shareholder is an employee under the common-law touchstone of “control”). This tension would generally lead the AAO to carefully consider the statutory definitions in their entirety, including the four critical subparagraphs of each definition. *See* sec. 101(a)(44)(A) and (B) of the Act. If USCIS were to focus solely on an employer-employee analysis, without considering the constituent elements of the definitions, the inquiry would be incomplete under the statute.³

Upon review, the beneficiary’s employer-employee relationship with the foreign entity is not the essential issue for consideration when evaluating the petitioner’s eligibility. The decision of the director will be withdrawn as it relates to the beneficiary’s status as an employee. The AAO finds no need to further explore the issue of an employer-employee relationship between the beneficiary and its foreign and U.S. employers.

III. Conclusion

The AAO will affirm the decision of the director to deny the petition. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The decision of the director, dated March 9, 2010, denying the petition is affirmed.

³ The one area where the employment status of the beneficiary may be critical is the enabling statute at section 203(b)(1)(C) of the Act, which requires that the beneficiary has been “employed for at least one year” by a qualifying entity abroad. In this regard, based on the plain language of the statute, the beneficiary must be an employee of the foreign entity and not a contractor or consultant.