(b)(6)

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

U.S. Citizenship and Immigration Services

[redacted]

DATE MAY 07 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

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 in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** 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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Utah Limited Liability Company (LLC) that seeks to employ the beneficiary as its research and development 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.

In support of the Form I-140, counsel for the petitioner submitted a letter explaining that the beneficiary was instrumental in heading up the research and development team for the company's products. The initial evidence included a variety of business related documents for the petitioner and the beneficiary's foreign employer.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. On January 19, 2012, the director issued a request for evidence (RFE) informing the petitioner of various evidentiary deficiencies. The director requested additional evidence relating to the beneficiary's proposed employment with the U.S. petitioner and her previous employment with the foreign employer. Specifically, the director requested the beneficiary's job title, dates of employment, a statement regarding the beneficiary's title and level of authority, and a detailed description of the beneficiary's day-to-day duties with the percentage of time allocated to each duty. The petitioner was also asked to provide detailed information regarding the beneficiary's subordinate employees in the United States and abroad, including their duties and their educational qualifications.

In response to the RFE, relevant documents the petitioner provided included a letter from counsel dated April 11, 2012; the petitioner's minutes for a meeting held on January 5, 2011; the foreign employer's minutes for a meeting held on November 9, 2009; and a variety of documents relating to the petitioner's business. Both sets of meeting minutes contained brief descriptions of the beneficiary's duties.

After considering the petitioner's response, the director determined that the petitioner failed to establish that the beneficiary's employment with the foreign employer or for the U.S. entity had been or would be within a qualifying managerial or executive capacity. Specifically, the director determined that the record did not establish that a majority of the beneficiary's duties have been or would be primarily managing or supervising a staff that would relieve her of performing non-qualifying duties.

On appeal, counsel submits a letter and additional documents to further develop the beneficiary's duties with the foreign employer and the U.S. petitioner. Petitioner included a more detailed duty description for the beneficiary with percentages of time allocated to general duties and additional documents regarding the two companies and other employees.

Counsel now requests further consideration of this petition in light of these new documents, submitted on appeal. The petitioner failed to provide this information with the original petition or in

response to the director's specific request for this information. Notably, regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

In this matter, the petitioner provided documents that were partially responsive to the RFE therefore the petitioner's RFE response will be deemed a request for a decision on the record, and a decision will be issued on the basis of the record as it existed upon receipt of the timely filed RFE response in accordance with 8 C.F.R. § 103.2(b)(11). The petitioner may not now request that USCIS give consideration to evidence sought by, but not submitted in response to the RFE. Therefore, the AAO shall not consider the documentary evidence submitted with the Form I-290B and the petitioner's letter on appeal.

The petitioner raised no additional issues on appeal, therefore the AAO will determine whether the director's decision to deny the petition was correct based on the record as supplemented by the petitioner's response to the RFE. As noted, the director determined that the petitioner failed to establish that the beneficiary's employment had been or would be within a qualifying managerial or executive capacity.

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):
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> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily--
>
> (i) manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily--
>
> (i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

First, regarding the beneficiary's employment with the foreign employer, the AAO gives primary consideration to the description of the beneficiary's position and duties, as a detailed description of the beneficiary's actual daily tasks tends to 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 AAO also gives ample consideration to the job duties of the beneficiary's subordinate employees, the nature of the business, the employment and remuneration of employees, and any other facts that contribute to a comprehensive understanding of the beneficiary's actual role in a business.

In the petitioner's November 9, 2009 meeting minutes, the beneficiary's duties as Manager of Marketing and Development were listed as follows:

> Liaise with and report directly to the Managing Director and identify all markets both residential and commercial that the company can be engaged in; Develop new office administration systems relating to enhancing the performance of the company; Collect bids from prospective private and commercial projects and work with the Manager of Logistics and Projects in providing the bids to the appropriate customer/s.

Additionally, she was to "continue to manage the Research and Development department of the business markets; systems and products which will at some future time are to be launched to the marketplace. Also, supervise any staff who will be hired to assist in this research work."

The record contains little detail regarding the actual tasks that the beneficiary performed. Nevertheless, the overall job description is more consistent with that of a marketing specialist rather than a marketing manager. Furthermore, although the description noted the beneficiary was to supervise staff hired to support her, the petitioner failed to provide any evidence that staff was actually hired by the foreign entity. The organizational chart listed no employees and there was no payroll evidence of employees. Therefore, it is unclear who would relieve the beneficiary from performing all non-qualifying tasks associated with marketing and research and development in the absence of any employees subordinate to her. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988). Accordingly, the petitioner has not established that the beneficiary was employed in a primarily executive or managerial capacity with her foreign employer. For this reason the appeal will be dismissed.

Secondly, the petitioner did not establish that it would employ the beneficiary in a qualifying managerial or executive capacity. The beneficiary was appointed manager of research and development on January 5, 2011 as reflected in the petitioner's meeting minutes. The beneficiary's duties were described as follows:

> [T]to manage and supervise a team to research and develop products for the company to take to the marketplace; To hire and fire any such team members as she sees fit; To report directly to the CEO; To hold regular meetings with the team members to determine which products to develop and the timing of these products entering the marketplace. To ensure the release of new and innovative products, on a yearly basis.

Given this generalized duty description, it is impossible to determine how the beneficiary would spend her time on a day-to-day basis. The beneficiary's stated responsibilities for managing a team, reporting to a CEO, and holding meetings do not adequately convey any understanding of what she will actually do on a day-to-day basis. 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 petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Moreover, the petitioner provided no evidence of any employees hired to support this beneficiary in her proposed management role. There are no employees subordinate to this beneficiary on the organizational chart and there were no payroll documents submitted to establish that the petitioner currently has employees. Therefore it is unclear who would constitute the beneficiary's team and attend her meetings and relieve her of performing all non-qualifying tasks associated with her area of responsibility. Having no employees or staff to rely upon would leave the beneficiary in the position of performing all tasks to ensure accomplishment of operations assigned to her. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

While the petitioner indicates that the beneficiary would have the authority to hire team members, a petitioner must establish eligibility at the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Alternatively, the petitioner has not established that the beneficiary, as "manager of research and development" could qualify as a "function 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* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l, 19 I&N Dec. 593, 604 (Comm. 1988).*

In this matter however, the petitioner provided no evidence that the beneficiary manages an essential function. The AAO recognizes that other employees or contractors carry out the functions of the organization, even though those employees may not be directly under a function manager's supervision; therefore, the petitioner is obligated to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary. The record as presently constituted does not establish who would perform non-qualifying duties associated with research and development, such that the beneficiary would be free to primarily perform managerial duties associated with this function.

Accordingly, the petitioner has not established that the beneficiary would be employed in a primarily executive or managerial capacity for the petitioner. For this additional reason the appeal will be dismissed.

Finally, the AAO notes that the petitioner claims to be currently and solely manufacturing its products in the United States; however, the petitioner also states that it plans to open its first manufacturing plant in Salt Lake City by the end of 2011. Since the petitioner claims to manufacture the product it is unclear where the product has been and continues to be manufactured. 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). Furthermore, with the opening of this plant and other plants, the petitioner hopes to employ over 500 more employees as represented on its organizational chart. However, as noted above, the petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. at 49.

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition as required pursuant to 8 C.F.R. § 204.5(j)(3)(i)(D). The regulation at 8 C.F.R. § 204.5(j)(2) states that "doing business" means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." The petition in this matter was filed on October 28, 2011. On the Form I-140, the petitioner stated that the company was established on June 1, 2010; however, but no substantiating evidence was submitted to confirm this date. In fact, the petitioner's Articles of Organization were filed on January 5, 2011, the Internal Revenue Service (IRS) Employer Identification Number Notice was dated January 31, 2011, the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return for 2011 reflects an incorporated date of January 5, 2011, and all business licenses and documents are

consistent with that timeframe. The evidence in the petition suggests the petitioner has been eligible to do business for just under 10 months. Therefore, the evidence does not establish that the petitioner was doing business for at least one year prior to filing this petition on October 28, 2011.

Furthermore, not only has the petitioner not been doing business for at least one year prior to filing the petition but it does not appear the petitioner has been doing business, as defined above, since its establishment in January 2011. The petitioner's IRS Form 1120 reflects minimal sales ($9,655) and operating expenses ($9,868) for 2011, and thus it is questionable whether the company was operational at the time the petition was filed in October 2011. For these additional reasons, the petition cannot be approved.

Additionally, although not addressed by the director, the record contains insufficient evidence to establish that the petitioner maintains a qualifying relationship with the beneficiary's foreign employer. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States." A multinational executive or manager is one 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." Section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). The foreign company that employed the beneficiary must continue to exist and have a qualifying relationship with the petitioner at the time the immigrant petition is filed. 8 C.F.R. § 204.5(j)(3)(i)(C).

In this matter, the petitioner's evidence reflects that the foreign company employs only three individuals, including the beneficiary. These same three individuals are also identified as the U.S. petitioner's employees at the time the petition was filed, and USCIS records reflect that the petitioner has filed immigrant petitions on behalf of all three employees. The petitioner has provided no evidence to establish who, if anyone, was working for the foreign company to keep it operational and there is no evidence in the record to establish that the foreign company was actually doing business at the time the petition was filed, such that it maintains the claimed qualifying relationship with the petitioner. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.