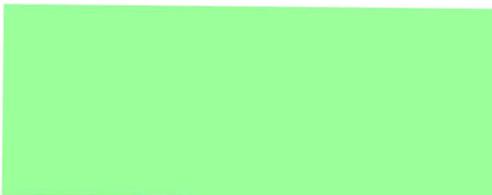


(b)(6)

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



DATE: **MAY 28 2013** OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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 AAO inappropriately applied the law in reaching its 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 motion 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 any motion to 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 Director, Texas Service Center denied the preference visa petition and dismissed the petitioner's subsequent motion to reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Georgia limited liability company that seeks to employ the beneficiary as its executive. 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, the petitioner submitted a letter dated April 30, 2011, which contained relevant information pertaining, in part, to the beneficiary's employment with both the petitioning entity and the foreign employer. The petitioner also provided supporting evidence in the form of business and financial documents pertaining to the beneficiary's U.S. and foreign employers.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for evidence (RFE) dated January 28, 2012, informing the petitioner of various evidentiary deficiencies, and requesting that it provide more detailed information regarding the beneficiary's proposed duties, an updated detailed organizational chart, additional information regarding duties performed by subordinate employees, and evidence of wages paid to employees. The director also requested similar evidence to establish that the beneficiary was employed in a qualifying managerial or executive position abroad for the petitioner's claimed affiliate.

In response to the RFE, the petitioner provided supplemental evidence including an additional job description for the beneficiary's position with both the U.S. petitioner and the foreign employer and some tax and payroll documents. The petitioner resubmitted many previously submitted documents including undated organizational charts.

On April 25, 2012 the director denied the petition concluding that the petitioner failed to establish that the beneficiary had been employed abroad or would be employed in the United States in a qualifying managerial or executive capacity. In denying the petition, the director determined that the petitioner failed to submit a sufficiently detailed description of the beneficiary's duties and failed to establish that he has sufficient personnel to relieve him from performing the non-managerial functions of the petitioner's retail business. Furthermore, the director found that the record did not establish the beneficiary's foreign employment in a managerial or executive capacity because it appeared the beneficiary served as a first-line supervisor of non-professionals. The petitioner filed a timely motion to reconsider, and the director dismissed the motion without disturbing the initial denial.

On appeal, counsel asserts that the director's decision was arbitrary and the reasoning inconsistent. Counsel states that the director failed to properly review the evidence of record and failed to explain why the evidence by itself and when viewed in its totality failed to meet the preponderance of the evidence standard. Counsel submits a legal brief in support of the appeal.

The AAO finds that counsel's assertions are not persuasive and thus fail to overcome the director's adverse decision. A comprehensive analysis of the AAO's findings is provided in the discussion below.

I. The Law

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available ... to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

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

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

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. U.S. Employment in a Managerial or Executive Capacity

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

The AAO gives primary consideration to the petitioner's description of the beneficiary's proposed position, 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 (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 petitioner's 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 support of the Form I-140 filed on December 27, 2011, the petitioner provided a letter dated April 30, 2011 which included position descriptions for the beneficiary, a manager, an assistant manager and the cashier/clerks for the petitioner's gas station and convenience store business. The petitioner listed nine general responsibilities for the beneficiary and indicated a percentage of his time to be spent on each, as follows:

- Set corporate financial goals and objectives. (10%)
- Company representative on all tax and legal matters. (5%)
- Procure and invest corporate funds. (20%)
- Analyze the Market for gasoline cost, availability and demand. (5%)
- Review cost analysis, market survey, and other reports prepared by accountant. (15%)

- Authorize expenditures for costs related to direct services/products. (15%)
- Authorize expenditures for costs related to subcontracted services/products. (15%)
- Negotiate, execute contracts and lease purchases. (10%)
- Oversee Managerial and subordinate Staff. (10%)

In a separate statement, the petitioner further described the beneficiary's duties as follows:

President

- Managing the store
- Analyze the market for gasoline cost, availability and demand
- Authorize expenditures for costs related to subcontracted services/products
- Handling payroll for all of his employees
- Making sure all adequate taxes are paid
- Give opportunity to people including Hiring [*sic*] new employees
- Making sure all the bank deposits are been [*sic*] made on timely manner
- Overlooking the staff and maintaining discipline
- Looking for areas of improvement
- Most important customer satisfaction

In response to the RFE, instead of providing additional details regarding the beneficiary's duties already provided, as requested by the director, the petitioner offered an undated letter with another list of the beneficiary's duties indicating that such duties require 40 hours of his time per week. This third duty description is as follows:

- I. Store Management: Establish & direct company goals and policies.
 - Responsible for overall appearance of the sales environment, including internal and external appearance and safety and compliance with all codes and regulations. Must regularly inspect and monitor front and back of store, fuel areas, and the like, assign and review.
 - Responsible for overall placement of regular and promotional merchandise, execution of special promotions. Liaise with food, tobacco, and fuel vendors. Must be familiar with competitors, with customer preference, with traffic patterns.
 - Responsible for security and shortage policies.
 - Personnel administration. Overall HR monitor of staffing, hiring and firing.
 - Development of policies that comply with Fair and Legal Employment Act.
 - Develop and implement, monitor dress odes [*sic*], auditor duties, harassment policies, nondiscrimination policies, emergency procedures.
 - Implement and supervise regular staff meetings to ensure best performance by employees.
- II. Financial administration.
 - Anticipate product trends and react with strategic purchase of appropriate merchandise.

- Communicate with vendors about sales analysis, price negotiations and sell-through mark-down issues.
- Apply the elements of financial forecasting and allocation.
- Identify stock issues and opportunities, maintain appropriate assortment and stock levels, actual vs. plan.
- Review all sales data and cost data.
- Prepare reports for analysis to maximize net profit.
- Monitor payroll, tax issues.

Based on the various descriptions provided, it is unclear what duties the beneficiary would perform on a day-to-day basis. The initial duty description provided percentages of time allocated to a variety of duties for the beneficiary but the third description provided in response to the RFE conflicted with the first. The AAO is not in a position to determine which position description most accurately reflects the beneficiary's actual duties. 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).

Further, the description provided in response to the RFE includes types of duties that would not fall within the larger categories of duties contained in the first description. Moreover, many managerial type duties included in the first description are not reflected in the third description. The descriptions are different and the third one has no specific amount of time allocated to any of the duties and many of the duties are non-qualifying. The petitioner further confused the matter by asserting that the duties in the third description accounted for the full 40 hour work week suggesting that it was a comprehensive description. Given the conflicting documents, it is unclear how the beneficiary would spend his time. The first description included duties involving supervisory and management tasks whereas the third description included many tasks consistent with direct daily oversight and operations. Duties requiring the beneficiary's involvement with providing a service or product such as inspecting and monitoring the store, purchasing merchandise or preparing reports are not managerial or executive tasks. 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).

As noted above, beyond the required description of the job duties, USCIS reviews the totality of the record when examining the beneficiary's claimed managerial or executive capacity, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

According to the Form I-140, the petitioner indicated it currently had 15 employees but it also indicated that the number of employees "may vary." In support of the petition, the petitioner also provided an undated organizational chart with 15 employees. The chart placed the beneficiary at the top and identified him as the "executive manager." Three named individuals were depicted as directly subordinate to the beneficiary and they held the positions of accounting/finance, assistant

manager and inventory management. The chart further showed that three named shift managers and eight named employees were subordinate to the assistant manager. The lower-level staff included four cashiers, two security employees, one maintenance employee and one deli department employee.

The chart was accompanied by brief position descriptions for the following employees: [redacted] (accounting manager); [redacted] (inventory manager); [redacted] (assistant manager); [redacted] (assistant manager); [redacted] (assistant manager); and [redacted] (cashier). The AAO notes that [redacted] and [redacted] are both identified as "shift manager" on the chart.

In the RFE, the director instructed the petitioner to provide a detailed organizational chart including names, job titles, educational levels, number of hours worked and brief descriptions of job duties for all employees. The director also requested evidence of wages paid to employees including copies of IRS Forms W-2, Wage and Tax Statement, and IRS Forms 941, Employer's Quarterly Federal Tax Returns, for 2011.

In response to the RFE the petitioner re-submitted the same organizational chart provided at the time of filing. 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). Accompanying the organizational chart with 15 named employees, the petitioner submitted copies of its IRS Forms W-3, W-2 and 941 for 2011. While this evidence reflects that the petitioner paid a total of 14 workers in 2011, the petitioner's IRS Form 941 and Georgia Employer's Quarterly Tax and Wage Report for the fourth quarter indicate that the petitioner had only four employees in the month of December 2011 when the petition was filed, and only five employees during the months of October and November 2011. Specifically, during the fourth quarter of 2011, the petitioner paid wages to the following individuals:

Employee Name	Wage reported in 4 th Quarter of 2011	Organizational Chart - Position
[redacted]	\$2,900.00	Accounting/Finance
[redacted]	\$2,000.00	Shift Manager
[redacted]	\$ 500.00	Inventory Management
Beneficiary	\$10,500.00	Executive Manager
[redacted]	\$1,950.00	None
[redacted]	\$3,000.00	None

The petitioner offered no explanation for its submission of an organizational chart with 15 employees in December 2011 at a time when the company had only four employees on staff. Moreover, six of the 15 employees identified in the chart did not receive wages from the petitioner at all in 2011. The chart clearly did not represent the petitioner's actual staffing levels at the time of filing or at the time it responded to the RFE in March 2012.

Only on appeal does the petitioner acknowledge that only four individuals, including the beneficiary, were employed at the time the petition was filed. The petitioner explains that both prior to and after filing the petition, the company had more employees. However, 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).

Further, the petitioner has not supported its claim that the petitioner experienced only a temporary decline in its staffing levels, as it did not submit copies of any Federal or state quarterly returns for any other quarters of 2011 or any 2012 documentation. While the AAO recognizes that a retail store may experience turnover among its hourly employees, the petitioner has not provided any reasonable explanation for its statement on the Form I-140 that it approximately 15 employees when it actually had only four, nor has it explained why it submitted an organizational chart with 15 named employees when most of those employees were not actually working for the company. 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.* at 591.

Based on the information provided it is unclear exactly which four employees were employed at the time the petition was filed. Also, in view of the low wages paid to some of the workers, it is unclear whether the employees were full time, part time or intermittent workers. Nevertheless, the one employee responsible for managing the employees and performing many of the daily operational activities was identified as the assistant manager and the individual identified in that position on the organizational chart was not employed with the petitioner during the 4th quarter when the petition was filed. Furthermore, the shift manager's wages do not reflect full time employment and since the claimed assistant manager was not employed by the petitioner at the time the petition was filed it is unclear who else would perform the assistant manager's duties in his absence.

In support of a previous motion to reopen or reconsider the director's decision, the petitioner submitted a professional opinion letter from Professor [REDACTED] of the [REDACTED] at the [REDACTED]. Professor [REDACTED] opined that the beneficiary functioned in a managerial position as a "Financial Manager" with the foreign company and would serve in a managerial position with the U.S. petitioner. In support of his opinion, Professor [REDACTED] recited duty descriptions attributed to the beneficiary. Notably, Professor [REDACTED] opinion attributed duties to the beneficiary that were not reflected in the record and he based his opinion on the petitioner's unsupported claim that it has a 15-person staff. Therefore, Professor [REDACTED] opinion relied, in part, on inaccurate information and evidence outside of the record.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron Int'l.*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.*; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated or is in any way questionable. *Matter of Caron Int'l.*, 19 I&N Dec. at 795.

As noted by the director, the petitioner has not established that it is adequately staffed to ensure the beneficiary is free to primarily perform managerial and executive duties. With a total of four employees including the beneficiary, the petitioner has failed to explain why its business requires the services of someone who will primarily perform managerial or executive level tasks or how it is successfully able to relieve the beneficiary from having to perform daily operational tasks. The petitioner failed to adequately establish the nature of company's work force at the time the petition was filed in order to allow an understanding of the beneficiary's actual duties on a day-to-day basis. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act.

Counsel correctly asserts that company 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 U.S. Citizenship and Immigration Services (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 would 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). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* In this matter, it is the petitioner's burden to establish that the beneficiary would be functioning in an executive or managerial capacity. The petitioner has not met that burden.

In addition, counsel's assertion on appeal that the director failed to properly apply the correct standard is not persuasive. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

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

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

the claim is probably not true, deny the application or petition. In this matter, the director properly requested additional evidence but found the evidence to be inconsistent and insufficient to support the claim.

When examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary or the beneficiary's subordinates perform the actual day-to-day tasks of operating the fuel and convenience store. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

Based on the petitioner's failure to provide a consistent, detailed description of the beneficiary's duties and its inability to document the company's claimed organizational structure, it has failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

B. The Beneficiary's Foreign Employment

The second issue addressed by the director is whether the beneficiary was employed by the foreign employer in a managerial or executive capacity. The director found that based on the beneficiary's duty description, and the qualifications and requirements of the employees subordinate to him, that the beneficiary performed, at most, as a first-line supervisor of non-professional workers.

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). Despite the beneficiary's stated position as "general manager," in a letter dated April 30, 2011 the petitioner stated that the beneficiary was responsible for financial management. In particular, he was required "to prepare all financial reports, to manage the cash flow of the business, to develop financial strategies to maximize our financial position, and to help us manage our financial resources in order to achieve maximum profits." His duties were listed as follows:

- Review income and expenses and compare to prepared budget: 5 hours per week;

- Review income and expenses, compile and prepare data, analysis and reports for senior manager, including projections, balance sheets, p/l statements: 15 hours per week;
- Review income and expenses, authorize expenditures in accordance with or beyond budget: 5 hours per week;
- Establish and control accounting procedures: 5 hours per week;
- Supervise payroll duties: 5 hours per week;
- Develop and direct pricing/sales, credit and collection policies for vendors and customers: 5 hours per week.

In a subsequent undated letter provided in response to the RFE, the petitioner further detailed many duties above and listed them under the headings "Review income, expenses: 25 hours per week"; "Establish and control accounting procedures: 5 hours per week"; "Supervise payroll duties: 5 hours per week"; and "Develop and direct pricing/sales, credit/collection policies for vendors & customers: 5 hours per week." Despite an allocation of hours assigned to each of the four headings, the individual tasks under the headings were not assigned an allocation of time. Many of the tasks were non-qualifying, with at least one non-qualifying duty under each heading making it impossible to determine if the beneficiary was primarily engaged in managerial or executive duties.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner listed the beneficiary's duties as including both managerial and administrative or operational tasks and failed to adequately quantify the time the beneficiary spent on them. This failure of documentation is important because several of the beneficiary's daily tasks already noted do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary was primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Notwithstanding the description above, the petitioner provided an organizational chart that identified the beneficiary as "general manager." The petitioner stated that the beneficiary reported only to the top executive and that three senior-level employees reported directly to the beneficiary. The three employees included a sales executive, a supervisor and an accountant/cashier. The beneficiary's curriculum vitae reflected his work experience while employed with the foreign company as a general manager and it stated that he was "[m]ainly responsible to manage and organize administrative procedures and review evaluate and implement new procedures along with other duties."

Despite the petitioner's assertion that the beneficiary held the position of a "general manager" the petitioner also submitted evidence that described the beneficiary's area of responsibility as financial management. Titles aside, the beneficiary's duties as listed by the petitioner do not mention the actual supervision or management of any personnel. Only the supervisor's undated curriculum vitae relates that he "reported to the general Manager." 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).

As noted by the director, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involved supervising employees, the petitioner must establish that the subordinate employees were supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. Evidence provided by the petitioner establishes that the sales executive's duties were focused on sales related activities which did not include managing or supervising others. The accountant/cashier employee's tasks indicate he performed cashier duties such as issuing receipts and change to customers, maintaining the cleanliness of the checkout area, and processing merchandise returns and credits. Finally, according to the petitioner, the supervisor's duties included monitoring shelf stock and displays, recording sales and order information, and customer development. The petitioner had not shown that any of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a higher education degrees by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the executive sales position or the supervisor position although both of these individuals claim higher degrees. The director found, and the AAO agrees, that the petitioner failed to establish the educational requirements of the beneficiary's subordinates in order to qualify them as professionals. Therefore, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Alternatively, the director requested evidence to establish the beneficiary as a functional 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. at 604.

As noted by the petitioner, the beneficiary's duties for the foreign company primarily involved financial management. Despite the identification of the beneficiary as "general manger" it appears that the beneficiary was responsible for overseeing the foreign entity's financial and accounting activities. Yet, the petitioner has not named any workers employed for the purpose of performing the functions the beneficiary is claimed to have managed. While the petitioner noted the employment of an accountant/cashier on the organizational chart subordinate to the beneficiary, the beneficiary's own inconsistent duty descriptions and the lack of a duty description for the accountant/cashier do not support the beneficiary's role as a function manager. Rather, the beneficiary's description suggests the beneficiary performed the accounting and finance function rather than managing it. 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. 1988).

Accordingly, the petitioner has not established that the beneficiary was employed in a primarily executive or managerial capacity with his foreign employer. For this additional reason, the appeal will be dismissed.

C. Qualifying Relationship

Beyond the director's decision, the petitioner has not established that it has a qualifying relationship with the beneficiary's overseas employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." See generally § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); see also 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or

control of an LLC. LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

In this matter, the petitioner claims that the foreign company owns and controls 81% of the petitioning company thus establishing a qualifying relationship. In support of its claim, the petitioner submitted evidence that it was organized within the State of Georgia as a limited liability company (LLC) on June 6, 2007. In addition, Articles of Organization were filed on June 7, 2007 listing [REDACTED] as manager of the LLC. The petitioner provided no operating agreement or membership records. However, the petitioner submitted copies of four membership certificates issued over 15 months later on September 15, 2008. Membership certificate 001 was issued to the beneficiary and represented a 51% ownership interest and membership certificate 002 was issued to [REDACTED], owner of the foreign company, and represented a 30% ownership interest. Each of these two membership certificates indicates on its face that it was voided on the same day of issuance. The petitioner provided no explanation regarding the voiding of these certificates. Membership certificate 003 represented a 19% ownership interest and was issued to [REDACTED] while membership certificate 004 represented 81% ownership and was issued to [REDACTED] the foreign company. Therefore, membership certificate 004 appears to represent a majority ownership and control of the organization by the foreign company. However, the meeting minutes approving the ownership percentage was created yet another year later on September 15, 2009, and no explanation was provided for this significant gap.

The record of proceeding contains additional unexplained inconsistencies which raise questions as to whether the foreign entity acquired a majority interest in the petitioning company. The instant petition is the third Form I-140 filed on behalf of the beneficiary. In support of the two previous petitions, the petitioner submitted a copy of its IRS Form 1120S, U.S. Income Tax Return for an S Corporation, which indicates at Schedule K-1 that [REDACTED] owns a 100% interest in the company. Further, the record indicates that in June 2008, the petitioner made an election with the Internal Revenue Service to be treated as an S corporation for federal tax purposes. However, in support of the current petition, the petitioner submitted a copy of an IRS Form 1120, U.S. Corporation Income Tax Return, for the 2008 tax year. Contrary to the Form 1120S filed with the previous petitions, this tax return identifies the foreign company as owner of 81% of the company. The Form 1120 is dated August 27, 2011, it is not an amended return, and the petitioner has not provided a certified return or a transcript as evidence that it was actually filed with the IRS. The petitioner's claims regarding its ownership and control are undermined by its submission of two different federal tax returns for the same tax year prepared on different IRS forms and indicating two different ownership structures.

Another inconsistency related to the petitioner's claim that it is owned by the foreign entity is the petitioner's submission of a document entitled "Unanimous Consent of the Shareholders in Lieu of Organizational Meeting of [the Petitioner]" dated July 21, 2008, which states that [REDACTED] and [REDACTED] were the "shareholders" of the company. Further, an undated "Consent Action of the Board of Directors of [the Petitioner] in Lieu of Organizational Meeting" referred to attached articles of incorporation and stock certificates but these were not included in the documents provided by the petitioner, neither was a stock ledger. Among the documents provided were two subscriber agreements which reflected the subscription of stock in the petitioning company by [REDACTED] and [REDACTED]. The petitioner is a limited liability company, not a corporation, and thus is not authorized to issue stock. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In this case, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of the petitioner's ownership is not credible. Accordingly, petitioner has not established that it has a qualifying relationship with the foreign entity.

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).

III. Conclusion

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.