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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: NOV 2 7 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition. The petitioner subsequently filed a motion to reopen with the director. The director granted the motion, but affirmed the prior decision denying the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Nevada corporation that seeks to employ the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition on February 5, 2010 and affirmed the decision on motion on May 25, 2010. In the most recent adverse decision, dated April 26, 2011, the director affirmed the prior decisions based on a finding that the petitioner failed to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director's determination was incorrect as a matter of fact and law. Counsel submits a brief rebutting each of the director's findings, as well as additional evidence, in support of the appeal.

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 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--
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> (i) manages the organization, or a department, subdivision, function, or component of the organization;
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> (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;
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> (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--
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> (i) directs the management of the organization or a major component or function of the organization;
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> (ii) establishes the goals and policies of the organization, component, or function;
>
> (iii) exercises wide latitude in discretionary decision-making; and
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> (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

II. Procedural History

The record shows that the petitioner filed the Form I-140 on July 14, 2008, claiming five employees and a gross annual income of $34,322. The petitioner submitted supporting evidence, including various tax, bank, and business documents as well as organizational charts pertaining to the beneficiary's former and prospective employers. The petitioner also provided a supporting statement dated July 10, 2008 discussing the beneficiary's proposed employment with the U.S. entity. The petitioner stated that the beneficiary develops and implements the board's plans and policies, explores and develops new business opportunities, directs company growth through increased market share, establishes new contacts, controls costs and ensures that profit goals are met, presents necessary actions before the board, manages staff and controls hires, promotions, and discipline of staff, leads the organization, establishes and manages procedures to protect company funds and assets, ensures that the company acts within the confines of the law, identifies business contacts and sources necessary for the company's continued operation, coordinates with the parent company to ensure proper international distribution, approves budgets, allocates funds, and presents the budget for the board's approval. The petitioner provided no information about the beneficiary's former employment for the foreign entity other than to state that the beneficiary held the position of "director."

The petitioner's organizational chart shows the beneficiary at the top of the organization's hierarchy with a sales manager and an office manager as her two direct subordinates. The chart identifies no subordinates under the sales manager's position and shows a secretary and an engineer as the office manager's subordinates. Although the petitioner also provided an organizational chart on the foreign entity's letterhead, the chart does not depict the beneficiary in her former position with the foreign entity. Rather, the chart depicts three affiliate entities, including the petitioner, which is located in the United States, the parent entity, which is located in Singapore, and a third affiliate located in China. The chart only identifies the beneficiary's current position with the U.S. entity, but does not include the beneficiary in the foreign entity's organizational hierarchy to show which position she held at the time of her employment overseas.

After reviewing the petitioner's submissions, the director determined that the petition did not warrant approval. Accordingly, on February 25, 2009, the director issued a request for evidence (RFE) instructing the petitioner to provide, in part, supplementary job descriptions for the beneficiary's former employment abroad as well as her proposed employment with the U.S. entity. The director instructed the petitioner to provide a list of the beneficiary's actual daily tasks and to assign an estimated percentage of time that the beneficiary allocated to her assigned tasks during her former employment and the percentage of time she would allocate to her assigned tasks with the petitioning U.S. entity. The director expressly asked the petitioner to avoid aggregating tasks together into broad areas of responsibility. Finally, the director requested the petitioner's quarterly tax documents showing wages paid to employees during the second and third quarters in 2008.

The petitioner's response included a brief introductory letter from counsel, dated May 19, 2009, and a separate letter from the petitioner, dated May 15, 2009, addressing certain issues outlined in the director's RFE. With regard to the beneficiary's proposed employment, the petitioner provided a job description claiming that 10% of the beneficiary's time would be spent developing and implementing plans and policies, presenting information and making recommendations to the board, and providing the board with quarterly reports about the petitioner's business, budgets, policy changes, and prospects for future growth. The petitioner indicated that another 45% of the beneficiary's time would be spent exploring new business

opportunities by attending trade conferences and other public functions, directing company growth and establishing new business contacts, developing business relationships, working to increase growth and revenues, controlling costs by forging relationships with new suppliers, planning and developing marketing and advertising methods to expose the petitioner's products to customers overseas, and negotiating contracts with growers, suppliers, and customers. Lastly, the petitioner indicated that the remaining 45% of the beneficiary's time would be allocated to managing staff, administering programs and business operations, leading the organization, establishing and managing procedures to protect and ensure proper use of the company's funds and assets, approving the company's budget and procedures for allocating funds and controlling costs and for approving expenses, making personnel decisions that include hiring, promoting, and disciplining employees as well as training employees and setting standards for work and conduct, ensuring that the company complies with laws and regulations, coordinating international distribution and networking with the petitioner's parent and affiliate entities abroad regarding local market conditions, orders, and deliveries of goods, reviewing and analyzing company finances to ensure that the petitioner has sufficient funds for wages and business expenses, creating a budget and allocating funds, and setting operations policies that are in compliance with legal requirements and with the board's objectives.

The petitioner further noted that it employs five employees in addition to the beneficiary and listed job descriptions for one sales manager, one office manager, one secretary/receptionist, one quality control engineer, and one sales representative. The petitioner also provided its quarterly contribution and wage report for the 2008 third quarter, which shows that the petitioner had a total of four employees in July and August of 2008. The report indicates that a fifth employee was added in September 2008, two months after the Form I-140 was filed. The petitioner did not provide requested information pertaining to the beneficiary's employment abroad.

The director reviewed the additional evidence and determined that the petitioner failed to establish eligibility for the immigration benefit sought herein. Specifically, the director observed that the petitioner failed to provide the requested information pertaining to the beneficiary's former employment overseas and therefore failed to meet the foreign employment requirement specified in the statute and regulations. The director further emphasized the petitioner's failure to adhere to instructions that were expressly included in the RFE where the petitioner was asked to refrain from assigning time restrictions to groups of job duties and instead instructed the petitioner to assign time constraints to individual tasks. The director observed that the beneficiary's employment with the U.S. entity consists of both qualifying and non-qualifying tasks as well as tasks that cannot be ascertained due to the general terminology the petitioner used in the job description.

The director went on to list additional deficiencies, noting that the petitioner's description of its staffing does not correspond with the payroll information that was submitted as part of the RFE response. Namely, the director observed that throughout the third and fourth quarters of 2008, the petitioner's staff included a part-time employee and that during the first two months of the 2009, the petitioner had only three employees, one of whom received wages that were commensurate with those of a part-time employee. The director also pointed out that even though the petitioner provided job descriptions for an office manager and a sales representative, its staff did not include a sales representative and while the petitioner employed an office manager during certain points of operation, the position was vacant when the petition was filed. In sum, the director determined that the petitioner failed to establish that the beneficiary was either employed abroad or

that she would be employed in the United States in a qualifying managerial or executive capacity and therefore denied the petition in a decision dated February 5, 2010.

In response to the adverse decision, the petitioner filed a motion to reopen and reconsider to be reviewed by the director. In support of the motion, counsel offered a brief in which he asserted that the beneficiary's position abroad as the foreign entity's director was in an executive capacity. Counsel briefly described the foreign position, claiming that the beneficiary directed the company's business management and planned, developed, and implemented business plans. He further referred to the foreign entity's supporting statement, dated February 25, 2010, which stated that the beneficiary was responsible for developing and implementing strategies to improve the company's profitability, expand the business, exercise control over the company's finances and resources, and direct purchases, storage, wholesale, and retail of produce between China and Singapore.

With regard to the beneficiary's proposed position, counsel asked the director to review a separate statement from the foreign entity, also dated February 25, 2010, which represents an offer of employment. The letter provided another percentage breakdown, different from the one provided earlier in response to the RFE, attempting to breakdown the job description into smaller time increments than those offered in the prior job description. Counsel also reviewed the list of positions he claimed were filled at the time the petition was filed and provided an updated employee list and corresponding job descriptions. Counsel stated that in 2008 the petitioner employed the beneficiary as general manager, a sales manager, an office manager, a quality control engineer, and a secretary/receptionist. It is noted that counsel's list of employees is not consistent with earlier submissions claiming six employees or with the petitioner's 2008 third quarterly wage report, which indicates that the petitioner had only four employees at the time of filing and further shows that whom counsel identified as the petitioner's office manager, was not among the petitioner's employees at the time of filing.

Counsel went on to assert that the petitioner's organization and staffing structure were reasonable in light of its purpose and stage of development. However, counsel used the present tense to refer to the beneficiary's immediate subordinates since the filing of the petition and referred to the sales and office managers as the beneficiary's two subordinates. Counsel claimed that the sales manager was overseeing a sales representative at the time the motion brief was written.

On May 25, 2010, the director issued a second adverse decision, affirming the original denial. Although the director granted the petitioner's motion, she concluded that the petitioner failed to establish that the beneficiary was either employed abroad or that she would be employed in the United States in a qualifying managerial or executive capacity. With regard to the beneficiary's former employment overseas, the director determined that the job description offered in the foreign entity's prior statement was overly vague and provided no insight as to the specific tasks the beneficiary performed on a daily basis. In her discussion of the beneficiary's proposed employment, the director stated that the updated percentage breakdown, which the petitioner previously provided in support of its motion, was inconsistent with the job description that was originally provided in response to the RFE. The director further found that the more recent percentage breakdown still lacked specific information about the beneficiary's actual daily tasks and thus was unsuccessful in curing the deficiencies that were previously observed in the director's original denial. The director pointed out that the petitioner's staffing at the time of filing is of utmost relevance and based on the

evidence submitted, the petitioner appears to have employed a limited support staff, which was not comprised of managerial, supervisory, or professional employees for the beneficiary to oversee.

In a second attempt to overcome the denial, the petitioner filed a second motion to reopen. The record shows that the petitioner obtained new counsel, who submitted a supporting brief in which he asserted that the petitioner was the victim of ineffective assistance of counsel. Current counsel claimed that the petitioner's prior counsel provided unreliable information, including an organizational chart that listed positions that were not part of the petitioner's organizational hierarchy as well as a job description that did not reflect what the beneficiary would actually be doing on a daily basis. Counsel claimed that the petitioner met the three-prong test cited in *Matter of Lozada*, which outlines the required documentation one must provide when basing a motion or appeal on a claim of ineffective assistance of counsel. 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). In support of this claim, the petitioner provided copies of email correspondence between the beneficiary and the petitioner's prior counsel as well as a copy of the complaint that the petitioner filed with the State Bar of California, where prior counsel was licensed to practice law.

Turning to the merits of the petitioner's eligibility claim, counsel explained the circumstances that resulted in the temporary departure of the petitioner's office manager directly prior to the filing of the Form I-140 and that employee's return back to assume the same position by March 2009. Counsel offered another description of the beneficiary's proposed employment in the form of an hourly breakdown, which indicated that the beneficiary would distribute her time in the following manner: two to four hours would be allocated to setting company goals, including sales objectives; six to eight hours per week would be allocated to making strategies and plans, such as dealing with U.S. fruit growers to arrange to export fruit overseas, in order to achieve the company's overall plan; two to four hours would be allocated to hiring and firing staff as the beneficiary allegedly did when she hired and fired the sales and office managers; another two to four hours would be spent making rules and regulations for the company's management; eight to twelve hours would be spent supervising the sales and office managers; four to six hours would be spent reviewing agreements and making final decisions regarding which sellers' products to purchase; five to seven hours would be spent reading and listening to reports from the sales and office managers; and the remaining two to four hours would be allocated to attending business meetings outside of the company, traveling to meet with existing and potential business partners, and negotiating deals with business partners.

Additionally, counsel quoted the job description the foreign entity's CEO provided in an affidavit, which addressed the beneficiary's former employment abroad. The CEO indicated that he was the beneficiary's sole supervisor and claimed that the beneficiary was charged with providing plans and strategies to achieve goals set by the CEO, making business decisions such as whom to do business with, making pricing decisions depending on the market, making personnel decisions, listening to reports provided by her immediate subordinate, and attending meetings with business partners.

Although not previously provided, the petitioner also submitted the foreign entity's organizational chart, which reflected the staffing structure at the time of the beneficiary's employment abroad. The chart shows a CEO at the top-most level of the organization, followed by the beneficiary as his immediate subordinate. The beneficiary is shown as having had one subordinate, a director/vice general manager, followed by a financial manager and sales manager as his two subordinates. The bottom tier of the organization is shown to include a

quality control inspector, overseen by the sales manager, and a secretary, who appears to have been supervised by both the financial and the sales managers.

In the latest decision, dated April 26, 2011, the director again affirmed her original decision, concluding that the petitioner failed to overcome the grounds for denial. The director rejected the petitioner's *Lozada* claim, finding that based on the date the petitioner filed the complaint and the date the petitioner filed its motion to reopen, counsel was not given the opportunity to respond to the complaint. The director further found that even if the petitioner was able to meet the criteria required to establish ineffective assistance of counsel, the supporting new evidence would nevertheless be insufficient to establish that the beneficiary was and would be employed in a qualifying managerial or executive capacity. The director found the new lists of job duties to be overly vague and further questioned the credibility of the claim that the beneficiary would allocate two to four hours weekly to hiring and firing employees given that the petitioner had only three employees other than the beneficiary at the time the Form I-140 was filed.

The petitioner now appeals the director's latest decision and offers a brief from counsel in support of the appeal. Counsel conveys his understanding that the director "accepted the new evidence submitted with the motion as accurate" and comments on the brevity of the director's latest decision. Counsel also objects to the director's finding of the provided job descriptions as vague and asserts that a job description that is broken down into hourly segments should be sufficient to satisfy the request for a definitive statement of job duties. Counsel further contends that the director's request was vague and challenges the director's reliance on the case of *Fedin Bros. Co., Ltd. v. Sava,* attempting to distinguish the facts of the instant matter from those in the cited decision. 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Specifically, counsel claims that the facts in the present matter show that a detailed hourly breakdown has in fact been provided and that the adverse finding in *Fedin Bros. Co.* is therefore inapplicable in the present matter.

The AAO finds that counsel's brief does not overcome the conclusions previously discussed in the director's three adverse decisions. A comprehensive discussion of the petitioner's submissions and the director's findings is provided in the analysis below.

III. Analysis

A comprehensive review of the director's decisions indicates that the qualifying nature of the beneficiary's former position abroad and her proposed position in the United States is the primary issue being addressed in the director's most recent decision. Although the director did not expressly refer to the beneficiary's former employment with the foreign entity, when reviewed in the context of the director's two prior decisions, both of which included discussions of the beneficiary's former and proposed U.S. employment, the director's conclusion, that the petitioner failed to establish that the beneficiary "was or will be" employed in a qualifying capacity, must be interpreted as applying to both the beneficiary's proposed employment in the United States as well as her former employment with the foreign entity.

In general, when examining the executive or managerial capacity of a given position, USCIS reviews the totality of the record, starting first with the petitioner's description of the beneficiary's job duties. The regulation at 8 C.F.R. § 204.5(j)(5) expressly states that the petitioner must provide a job offer that clearly describes the job duties the beneficiary would be required to perform. As properly stated in all three of the

director's decisions, a detailed job description is crucial for the foreign and U.S. positions, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Additionally, the beneficiary's job description will be considered in the context of other relevant information, including the qualifying entity's organizational hierarchy, the nature of the business operation, and the number of employees the entity has during relevant time periods, which vary depending on whether the issue at hand is the beneficiary's former or proposed employment. When considering the beneficiary's former employment abroad, the focus is on the job duties the beneficiary performed for one year during the three years prior to her entrance to the United States to work for same employer or an affiliate, parent, or subsidiary of the beneficiary's proposed employer in the United States. When considering the beneficiary's proposed employment, the focus is on whether the petitioner established that it would employ the beneficiary in a qualifying managerial or executive capacity at the time of filing. Providing evidence that the petitioner will have the ability to employ the beneficiary in a qualifying capacity at a future date is not sufficient to meet the statutory requirements. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

In the present matter, the petitioner provided several versions of the beneficiary's job description, first in response to the director's RFE, followed by another job description in support of the petitioner's first motion, and a third job description submitted in support of the petitioner's second motion. All three job descriptions were deficient in their respective failure to provide specific information regarding the beneficiary's proposed tasks.

The petitioner's current counsel asserts that the change in job descriptions was the result of ineffective assistance of prior counsel, which caused the petitioner to submit information that more accurately depicts the beneficiary's former and proposed employment. However, the record does not support counsel's claim. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner in the matter at hand did not satisfy the criteria outlined in *Matter of Lozada,* which states that any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. 19 I&N Dec. 637.

In the present matter, while the petitioner provided evidence showing that a complaint was filed against the prior attorney, the record lacks evidence to show that the petitioner met the second criterion, which requires the petitioner to inform counsel of the complaint being registered against him. The petitioner cannot establish that former counsel has been properly informed of the petitioner's complaint merely by virtue of providing email communications between counsel and petitioner, even when the objective of the emails is to question the propriety of the attorney's actions. There is no evidence in any of the petitioner's email communications that indicate an intent on the petitioner's part to file a formal complaint against the former attorney.

Therefore, the evidence submitted by the petitioner while under the representation of prior counsel will not be disregarded. Rather, it will be considered for its sufficiency and its consistency with other evidence in the record, including documents that the petitioner submitted more recently under the representation of its current counsel.

As properly observed in the director's original denial, the job description that was submitted in response to the RFE was not in compliance with the director's express instructions, which sought to elicit a list of the beneficiary's specific daily tasks with corresponding time constraints showing the percentage of time the beneficiary would allocate to each task individually rather than to a broad area of responsibility. Moreover, the job description provides general statements that indicate that the beneficiary would make new business contacts, develop the business, meet with and visit produce growers, develop advertising methods, and negotiate contracts with suppliers and customers. Without a detailed list of tasks explaining specifically how the beneficiary plans to meet these business objectives, it cannot be concluded that the beneficiary refrain from directly engaging in the petitioner's daily operational tasks. Although the job description also indicated that the beneficiary would set and enforce policies and ensure the company's compliance with legal and regulatory requirements, the petitioner did not provide a specific list of tasks to convey a meaningful understanding of how the beneficiary would meet her policy-making role.

Moreover, the petitioner's claim that the beneficiary would manage a subordinate staff, including hiring, firing, and promoting employees must be considered in light of the petitioner's staffing at the time of filing. Based on the petitioner's quarterly wage report for the third quarter of 2008, the petitioner employed a total of four employees in July of 2008 when the petition was filed. Thus, the beneficiary's staff of direct and indirect subordinates was comprised of only three employees—a number that is inconsistent with prior counsel's statements and with the information that was provided by the petitioner at Part 5, No. 2 of the Form I-140. 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). Other than unsuccessfully raising the claim of ineffective assistance of counsel, the petitioner has not provided any evidence to resolve these considerable inconsistencies.

Furthermore, given the evidence showing the petitioner's limited organizational structure at the time of filing, it is reasonable for USCIS to question how the support staff was able to relieve the beneficiary from having to allocate her time primarily to the performance of non-qualifying tasks. In fact, if, as current counsel claims, the beneficiary was allocating two to four hours per week seeking out an employee to fill a vacancy within its organization, it cannot be deemed that such time would be spent on tasks that are within a qualifying managerial or executive capacity. Rather, seeking out and screening potential hires are more akin to daily operational tasks carried out by someone who is charged with concerns dealing in human resources. While the petitioner's needs may be accommodated when the beneficiary herself assumes these qualifying tasks, such needs cannot supersede statutory criteria which requires the petitioner to establish that the beneficiary would primarily perform tasks within a qualifying capacity. Given the facts at hand, which show the absence of an office manager at the time of filing, it is unclear who, if not the beneficiary, would assume such daily operational tasks as maintaining account records, processing invoices and bills of lading, preparing payroll and tax records, and communicating with suppliers and growers, all of which were assigned to the office manager, whose position remained vacant at the time of filing.

Although the petitioner submitted another job description in an attempt to cure the deficiencies noted in the director's original denial, that job description was also inadequate. For instance, the petitioner claimed that 30% of the beneficiary's time would be allocated to designing and developing management strategies, policy formulation, and directing of operations. These statements are overly vague and fail to specify the actual daily tasks that are associated with the beneficiary's alleged policy-making role. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Moreover, the record does not show that the petitioning organization had a managerial or professional staff at the time of filing. Rather, the petitioner employed a sales manager, who had no subordinates and thus indicating that the position title was not consistent with the actual job duties of the position. As previously indicated, despite the organizational chart and former counsel claiming that the beneficiary also managed the work of an office manager, this position was vacant at the time of filing, thus indicating that the two non-managerial and non-professional subordinates, who are listed under the vacant office manager's position, would have overseen by the beneficiary herself. The AAO therefore cannot conclude that any of time the beneficiary spent managing the petitioner's staff would have been deemed as time spent within a qualifying capacity. 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.

Additionally, as previously discussed, the beneficiary's role in expanding the petitioner's business or communicating with suppliers and customers is not managerial or executive in nature. While the record indicates that the petitioner had a sales manager, who was available to carry out various sales-related tasks, the vague statements that described the beneficiary's position indicate that the beneficiary would be directly involved, if not entirely responsible for, marketing the petitioner's products and services, negotiating with growers and suppliers, and possibly assisting with the sales of the petitioner's products.

Finally, while current counsel urges USCIS to disregard the evidence submitted by the petitioner while under the representation of prior counsel, a review of the most recent affidavit that pertains to the beneficiary's proposed employment is similarly deficient in its failure to provide a detailed account of the beneficiary's day-to-day tasks. For instance, the petitioner cannot provide a comprehensive illustration of the beneficiary's role in setting the company's goals merely by stating that the petitioner attained a fiscal goal that the beneficiary set. The petitioner failed to explain what actual daily tasks the beneficiary performs in her role as the petitioner's goal and policy maker. In fact, the petitioner failed to identify any other goals that the beneficiary was responsible for setting. It is clear that the objective of any business, and thus the objective of the head of that business, is to ensure that employees work to meet the employer's fiscal objectives. However, without a specific account of the beneficiary's goal-setting tasks within the context of the petitioner's available human resources and within the scope of its sales and distribution-based business, the AAO cannot ascertain what job duties the beneficiary would perform as of the date of filing that did not involve directly engaging in the petitioner's daily operational tasks.

While the AAO acknowledges that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). Merely establishing that the beneficiary performs tasks at a professional level is not sufficient unless those tasks rise to the level of managerial or executive capacity.

In the present matter, the record contains numerous evidentiary deficiencies that preclude the AAO from concluding that the beneficiary would be employed in a qualifying managerial or executive capacity. First, the petitioner provided several deficient job descriptions that fail to consistently describe the beneficiary's proposed employment. As previously discussed, the petitioner will not prevail on its claim of ineffective assistance of counsel based on its failure to satisfy all three prongs outlined in *Matter of Lozada*. 19 I&N Dec. 637. As such, both attorneys' statements will be considered along with evidence submitted by the petitioner in support of its claim. Moreover, ineffective counsel claim aside, some of the evidence that current counsel claims is the result of ineffective assistance of counsel includes statements made by the petitioner on the petitioner's own letterhead and signed by the petitioner's director and CEO. Regardless of whatever legal advice prior counsel was providing, it cannot be assumed that information that was provided on company letterhead containing the CEO's signature was the product of former counsel.

Second, in addition to the deficient job descriptions, the petitioner provided inconsistent evidence with regard to the size of its support staff at the time of filing. While prior counsel for the petitioner indicated that the petitioner had five employees in addition to the beneficiary, the claim made in the Form I-140 as well as the petitioner's organizational chart, which was provided in support of the petition on company letterhead, both indicate that the petitioner had a total of five employees, including the beneficiary, at the time of filing. Yet, the petitioner's internally generated employee list and quarterly employer's report both indicate that the petitioner had no more than four employees at the time of filing, thus leaving the beneficiary with a total of three subordinates, none of whom have been established as being managerial, supervisory, or professional employees, other than in position title.

When considered comprehensively, the significant deficiencies discussed above lead the AAO to believe that the petitioner lacked the organizational complexity at the time of filing to relieve the beneficiary from having to dedicate her time primarily to the performance of the daily operational tasks without which the petitioner would be unable to function. While it is likely that the tasks the beneficiary was required to perform at the time of filing met the petitioner's immediate needs as such duties were likely to have been crucial to the petitioner's daily operation, the statutory provisions require the petitioner to provide evidence to show that at the time of filing it was ready and able to employ the beneficiary in a qualifying managerial or executive capacity. In the present matter, the record strongly indicates that the petitioner would have been unable to function if the beneficiary was limited to performing primarily those tasks that fit the statutory definition of managerial or executive capacity. Section 101(a)(44)(C) of the Act requires the AAO to "take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function." The reasonable needs of the petitioner will not

supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir., 2008).

Therefore, based on the evidence submitted, the AAO concludes that the petitioner has failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity and on the basis of this initial conclusion the instant petition cannot be approved.

Lastly, turning to the beneficiary's position abroad, the record similarly lacks sufficient probative evidence to establish that the beneficiary was previously employed in a qualifying managerial or executive capacity. As with the analysis of the beneficiary's proposed position, an analysis of the beneficiary's former employment must also include a discussion of the beneficiary's job duties. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. As discussed, the first description of the beneficiary's former employment abroad was provided in a February 25, 2010 statement from the foreign entity's CEO, who broadly stated that the beneficiary developed and implemented strategic plans, managed the company's business development in a time- and cost-efficient manner, expanded the business into overseas markets, provided strategies for improving profits and expanding the business, controlled budgets and finances, was in charge of overseeing the quality and efficiency of the operation, and directed the purchase, storage, and sale of produce between China and Singapore. The petitioner did not provide a separate list of the beneficiary's specific job duties to establish the means by which the beneficiary met her broadly stated business objectives. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Although the petitioner attempted to provide a more job detailed description in an affidavit dated June 15, 2010, also from the foreign entity's CEO, this job description was also overly broad and failed to provide an account of the specific list of tasks the beneficiary performed on a daily basis. For instance, the CEO stated that two hours of the beneficiary's day was spent reporting to and taking direction from the CEO regarding business matters. However, this general statement fails to disclose the precise subject of the instruction or just how much instruction the beneficiary took from her superior such that the supervision to which the beneficiary was subjected could truly be deemed as general thus giving the beneficiary the discretionary authority to run the business as the CEO claimed she had done. The CEO also stated that the beneficiary spent 1.6 hours of her time daily planning strategies on how to meet the overall financial goals that were set by the company's CEO. The CEO provided absolutely no indication as to the underlying tasks that represented the beneficiary's agenda-making role. He was equally vague in stating that 1.5 hours of the beneficiary's day was allocated to making decisions on business, personnel, and financial matters, including choosing business partners, dealing with banks, and determining when prices need to be lowered based on market fluctuation. Again, these statements are overly broad, and while they indicate that the beneficiary made decisions regarding key issues concerning the foreign entity's financial success, they fail to pinpoint any of the beneficiary's daily tasks. Moreover, it is unclear how making personnel decisions is different from making hiring and firing decisions, which were listed separately and assigned a separate time allotment. In sum, the statements discussed above are not sufficient to provide a meaningful understanding of the tasks the beneficiary was responsible for on a daily basis, thus precluding the conclusion that the beneficiary's time was primarily allocated to the performance of within a qualifying capacity. Contrary to counsel's claim with

regard to the beneficiary's job description for her proposed position, merely providing an hourly breakdown to describe the beneficiary's position is not enough to render the job description sufficiently detailed, particularly when the content of the job description is devoid of specific daily tasks.

Despite the finding in the latest decision, where the director concluded that the petitioner failed to establish that the beneficiary was employed in a qualifying managerial or executive capacity, current counsel misinterpreted this statement and applied it to mean that the director questioned the nature of the beneficiary's past employment with the U.S. entity. As discussed previously, when read within the context of the director's two prior decisions, both of which addressed and issued adverse findings with regard to the beneficiary's employment abroad, it is not unreasonable for the director to use the phrase "was employed" as a means of referring to the beneficiary's former position abroad as was done in the most recent adverse decision.

Furthermore, when taking into account the fact that only the beneficiary's prospective employment, rather than her prior employment with the U.S. entity, is relevant for the purpose of establishing eligibility, counsel had even less reason to assume that the term "was" in the director's discussion of the beneficiary's employment was intended as a reference to her U.S. employment. The fact remains that no further information pertaining to the beneficiary's employment abroad was provided in support of the appeal. Therefore, the only information that the petitioner provided regarding the beneficiary's job duties abroad consists of two deficient job descriptions that fail to provide a specific list of the beneficiary's tasks. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives, as the petitioner has done in the matter at hand, is not sufficient. Given the supporting evidence providing in support of this petition and subsequent appeal, the AAO has no basis upon which to determine what tasks the beneficiary performed daily. Without this information, it cannot be concluded that the beneficiary's employment abroad was comprised primarily of tasks within a qualifying managerial or executive capacity. Therefore, on the basis of this second adverse conclusion, the instant petition cannot be approved.

V. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.