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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: OCT 28 2013

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:  
[REDACTED]

INSTRUCTIONS:

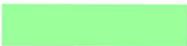
Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

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 nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a limited liability company organized in the State of Florida seeking to employ the beneficiary as its operations manager. The petitioner states that it is an affiliate of Dolphin Consultants and Services, C.A. located in Venezuela. 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 based on three independent grounds of ineligibility. First, the director found the petitioner failed to establish that the beneficiary's proposed employment with the petitioner would be in a qualifying managerial or executive capacity. The director also concluded the petitioner had not demonstrated with sufficient evidence that the beneficiary was employed for at least one year in a managerial or executive capacity abroad in the three years prior to his entry into the United States as a nonimmigrant. Lastly, the director found that the petitioner had not established that it has the ability to pay the beneficiary his proffered wage.

On appeal, counsel asserts that the director's conclusions are erroneous. Counsel states that the beneficiary was employed abroad and will be employed in the United States as a function manager. Further, counsel submits the petitioner's 2012 Internal Revenue Service (IRS) Form 1065, Return of Partnership Income, not previously submitted on the record, and asserts that this evidence establishes the petitioner's ability to pay the beneficiary's wage.

**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.

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

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

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

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

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

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

The term "executive capacity" means an assignment within an organization in which the employee primarily--

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

### **I. The Issues on Appeal**

#### **A. U.S. employment in a managerial or executive capacity**

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

In denying the petition, the director noted the petitioner's failure to differentiate between the beneficiary's qualifying and non-qualifying duties. The director found that based on this deficiency, the petitioner failed to establish that the beneficiary would primarily perform executive or managerial duties. The director also discussed various unresolved discrepancies on the record with respect to the petitioner's staffing levels and organizational structure and observed that the evidence failed to establish that the beneficiary would supervise professionals.

On appeal, counsel asserts that, while the beneficiary does in fact supervise professionals, the petitioner established that the beneficiary will also be a function manager based on his management of the essential operational function within the petitioner's organization. Counsel cites non-precedent AAO decisions involving beneficiaries who were found to qualify as function managers. Counsel also states that the director failed to appropriately articulate and substantiate his conclusions in the decision.

The AAO does not find counsel's assertions persuasive. Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity.

In order to determine whether the beneficiary would be employed in a qualifying executive or managerial capacity, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In support of the petition, the petitioner generally explained the beneficiary's duties in the United States in his capacity as operations manager as follows:

Under the supervision of the stockholders board, coordinates the generation and application of production plans for the manufacturing facility. It's [*sic*] responsible for the production and quality aspects of the end products made at the facility. It's [*sic*] directly responsible for the training and operations of all the personnel related to the manufacturing facility. Gives final approval of the end products ready for sale and/or export.

The petitioner also explained various other duties for the beneficiary, including but not limited to: (1) planning, organizing and controlling the usage of raw materials, (2) planning and executing training programs for the operations department, (3) leading and supervising the construction and maintenance of all tooling used in the manufacturing facility, (4) assisting operators in the correct usage and operation of equipment, (5) maintenance of production performance records, (6) planning and executing all diagnostic processes, and (7) planning and coordinating all manufacturing personnel in their job performance.

The director found that the duty description submitted with the petition was insufficient to establish that the beneficiary primarily performed qualifying executive or managerial duties. As such, the director requested that the petitioner submit a more definitive description of the beneficiary's job duties in the United States including a listing of all specific daily duties and the percentage of time the beneficiary will spend on each duty. In response, the petitioner provided the following job duty description:

ACTIVITY 1: Administrative Tasks:

- 1.1- Management and coordination of production orders.
- 1.2- Establish the resources needed for a particular job order; instruct the Purchase/Sales department for the required acquisitions.
- 1.3- Production reports compilation from all the work stations of the factory. Review and make charts for cost analysis and control of time per equipment used, to have the monthly production report for the shareholders.
- 1.4- Revise and control the quality assurance manual of the production Facilities, amend and monitor the changes needed to comply with the construction codes and regulations for security glass manufacturing.

ACTIVITY 2: Human Resources:

- 2.1- Has the final decision in the selection of the production and maintenance personnel being hired for the plant operations.
- 2.2- Recommend and approve salary wages based on the interview and capacity of the individuals as well as their performance in the jobs assigned.
- 2.3- Has the ability to hire and fire production and maintenance personnel, based on his/her qualifications and commitments with the tasks assigned.

2.4- Trains the production and maintenance personnel in the use of the production equipment and the processes required to accomplish a perfect piece of glass, meeting the customer requirements.

ACTIVITY 3: Engineering Tasks:

3.1- Based on the custom glass to be made, designs the mold and tooling required for the satisfactory completion of the piece of pieces to be made. Establish the type and shape of the molding for each particular piece. Monitors the construction of the molds with the outsourced personnel assigned the job.

3.2- Develop the thermal parameters and heating profiles for the furnace operator to be able to bend the glass and monitors with him the results obtained. Adjust as needed based on the results.

3.4- Perform the cutting maps of the patterns to be made, and perform all the compensation calculations for the size and shape to obtain final bent shape needed. Laminated bent glass is composed of two or more pieces bent together; the final shape has to match the customer template given, or AutoCAD drawing design.

3.5- Create the technical data sheet of the glass product, and indicate the quality assurance check parameters for the production personnel. Every piece is custom made, the technical data sheet parameters are exclusive of each one, based on the final use of the glass, code compliance, security needed, etc.

3.5- Manages and designs the modifications needed to be done to the production equipment in order to obtain a custom made glass as required by the customer.

ACTIVITY 4: Operational Tasks:

4.1- Monitors directly all the operational processes of the production personnel, solving day-to-day occurrences with the products being manufactured.

ACTIVITY 5: Production Maintenance tasks:

5.1- Instructs the maintenance personnel on the correct operation of the machinery, including all the deviations that have occurred and diagnostics to be made in order to be able to correct the fault.

5.2- Selects the maintenance contractor for the assessment of the fault needed to be corrected, such as electrical, mechanical, etc.

ACTIVITY 6: Marketing Tasks:

6.1- When requested, visit customer's projects to advise on solutions for specialty glass needs, designs, codes compliance, local regulations, and specialty applications.

6.1- Trains customers in the techniques to take measurements for bent glass manufacturing. Help them with the limitations, correct used of materials, and availability of them in the US market.

6.3- Assists customers in projects to substitute imported specialty glass from abroad, with glass made in the plant, with the warranty that lead time and problem solving is immediate.

The petitioner also provided an hourly breakdown of time spent by the beneficiary in a typical work day on the various "activities" listed above. The petitioner indicated that the beneficiary also performs after-hours "operating of the autoclave (extra cycles)" at times, "depending on customer request."

On appeal, counsel contends that the beneficiary qualifies as a function manager in his capacity as operations manager. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). 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 *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

In this matter, the petitioner has not established that the beneficiary will be employed as a function manager as the duty description presented includes primarily non-qualifying operational duties. Also, 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 lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to meaningfully quantify the time the beneficiary spends on each type of task. Although the petitioner provided a listing of daily duties and percentages of time spent on tasks, the tasks indicated in the daily breakdown were only the general categories of tasks listed herein, such as "engineering tasks" or "operational tasks," which included many non-qualifying day-to-day operational duties. Indeed, non-qualifying duties predominate the beneficiary's duty description, including the following listed duties: establishing resources for job orders, creating production reports, training personnel in the use of equipment, designing molds and tooling, developing thermal parameters and heating profiles and adjusting them as needed, performing the cutting maps for glass patterns, matching glass shapes to customer specifications, creating technical data sheets, and visiting customer sites in order to provide goods and services. Therefore, the AAO cannot determine whether the

beneficiary is primarily performing the duties of a function manager since the petitioner has provided a duty description that includes many day-to-day operational duties without specifying how much time is spent on these tasks. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). In fact, given the job duty description presented, the AAO finds it more likely that the beneficiary primarily performs non-qualifying operational duties. Again, 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).

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 manager position.

As noted by the director, there are unresolved discrepancies in the record regarding the petitioner's staffing levels and organizational structure. For this reason, it is unclear whether the petitioner's operations department has sufficient employees to relieve the beneficiary from performing primarily non-managerial duties. The petitioner has provided inconsistent information regarding its staffing levels. The Form I-140, Immigrant Petition for Alien Worker, was filed on August 16, 2012 and the petitioner must therefore establish eligibility as of that date. On the Form I-140, the petitioner indicated that it had eight employees, while a support letter submitted concurrently stated that the petitioner employed nine employees. Also, the organizational chart submitted in support of the petition reflected that the petitioner employed ten employees. Despite these claims that the company had eight to ten employees, the petitioner's IRS Form 941 Employer's Quarterly Federal Tax Return from the second quarter of 2012, the quarter preceding the filing of the petition, shows that the petitioner employed only five employees. The petitioner's Florida Department of Revenue quarterly wage report for the fourth quarter of 2012 indicates that the petitioner employed a total of four employees. However, in contradiction, the petitioner's organizational chart submitted in response to the director's RFE in the first quarter of 2013 indicates that the petitioner employed twelve employees. 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. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, the petitioner's payroll documentation does not corroborate its employment of the beneficiary's claimed subordinates. The petitioner's initial organizational chart submitted in August 2012 indicates that the beneficiary has the following subordinates: (1) [REDACTED] - Laminated Department, (2) [REDACTED] - Cutting Department, (3) [REDACTED] - Laminated Department, (4) [REDACTED] - Furnace Operator. The chart also showed an open position for an "Autoclave Operations" position. The chart submitted in response to the RFE showed the same personnel and indicated that the [REDACTED] had filled the open position in [REDACTED]. The petitioner submitted weekly payment stubs confirming its employment of Mr. [REDACTED] and Mr. [REDACTED] as of the date of filing and through November 2012. However, the submitted payroll documentation reflects that Mr. [REDACTED] has not been paid since June 2012 and Mr. [REDACTED] had not been paid since April 2012. The petitioner did not claim to employ Mr. [REDACTED] at the time of filing and it is unclear when or if this employee was hired. Based on the payroll documentation, another employee who received wages as of August 2012 when the petition was filed was [REDACTED] however, he did not appear on either organizational chart. Mr. [REDACTED] was identified in an employee list as a cutting operator who reports to the beneficiary but his absence from the organizational chart has not been explained.

The only other employee who been documented is a "sales logistics" employee, [REDACTED] who was listed on the petitioner's Florida Employer's Quarterly Report in the fourth quarter of 2012. In sum, the incomplete and inconsistent payroll documentation submitted on the record further suggests that the petitioner employs far fewer employees than asserted in the provided organizational charts. 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).

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial or executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the cited non-precedent decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, non-precedent decisions are not similarly binding. Further, the major deficiencies in this matter are the petitioner's failure to provide consistent information regarding the number and types of employees working for the company at the time of filing, as well as the prevalence of non-qualifying duties in the petitioner's description of the beneficiary's duties. This determination decision does not rest on the size of the petitioning company.

In conclusion, the petitioner has submitted a duty description for the beneficiary that suggests he is primarily engaged in the performance of non-qualifying day-to-day operational duties. Further, the petitioner provided inconsistent evidence related to its staffing levels and thus has not established that it employs operational employees necessary to relieve the beneficiary from primarily performing non-qualifying duties. As such, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity. For this reason, the appeal must be dismissed.

**B. Employment with the foreign employer in a managerial or executive capacity**

The next issue to be addressed is whether the petitioner has established that the beneficiary was primarily employed in a qualifying managerial or executive capacity with the foreign employer.

As noted, the director concluded that the petitioner had not demonstrated that the beneficiary was employed for at least one year in a managerial or executive capacity in the three years preceding his entry into the United States on nonimmigrant status. Specifically, the director emphasized that the petitioner had not established that the beneficiary's subordinates were professionals, managers or supervisors.

On appeal, counsel asserts that the director's conclusion is erroneous since the beneficiary managed an essential function within the foreign employer and therefore qualified as a function manager consistent with the statutory definition of "managerial capacity." Counsel further states that the director failed to articulate and substantiate why the evidence presented was insufficient.

The AAO does not find counsel's assertions persuasive. Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity.

In order to determine whether the beneficiary was employed in a qualifying executive or managerial capacity, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the RFE, the director requested that the petitioner submit additional evidence relevant to the beneficiary's foreign employment, including a definitive statement from the foreign company describing the specific daily duties of the beneficiary and the percentage of time he spent on each duty. In response, the petitioner submitted the following duty description for the beneficiary in his capacity as manager of the foreign employer's operation department:

- Addressing the projected business plan of the Company as it is approved at the Board of Directors Annual Meeting (of which he forms part).
- Planning, organizing, and controlling the usage of raw materials and technical resources to achieve maximum yield of end products.
- Meeting with potential customers for business opportunities and evaluation of projects.
- As a member of the Board of Directors, he discusses and reviews the Company Policies regarding the Industrial Safety (for both equipment and personnel), Quality Assurance Policies, and the evaluation of new Projects.
- Reviewing monthly performance records of production prior to discussion with the Board of Directors.

- Working together with the Administration and Human Resources department to evaluate the performance of the employees under his supervision and directing the administration and human resources department to hire or fire personnel.
- Approving the salary rises or modifications of working conditions proposed by his supervised personnel.
- Working together with the Engineering Department and Sales and Logistic Department, planning and controlling maintenance procedures, Repair Orders, and general maintenance.
- Verifying the monthly reports on production and directing the appropriate modifications if required to increase production.
- Reviewing the coordination of the Training Program proposed for the workers, for assessment of new standards and new equipment, in-house or with outside companies.
- Controlling and approving Purchase Orders, acquisition of new Equipment and Materials for different Departments and manufacturing processes.
- Dictating the policies of maintenance for preventative and predictive maintenance programs of the equipment and tooling.
- Supervising and Controlling the standards of Quality obtained, to comply with the Quality Assurance Policies of the Company.
- Working together with the Legal and Administrative Departments, for changes and assessment of any legal issues and personnel concerns.
- The supervised personnel in the department he runs are mainly professionals who have been working for the company for several years now; they are all full-time workers.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The petitioner was directly requested by the director to submit a detailed list of daily duties, including the percentage of time spent on each duty with the foreign employer. However, the petitioner did not submit the percentages of time the beneficiary spent on each task listed above. 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).

Further, 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 duties offered by the petitioner are vague and provide little probative value as to the beneficiary's actual day-to-day activities. For example, the petitioner stated that the beneficiary's duties included addressing the projected business plan, meeting with potential customers for business opportunities and evaluation of projects, discussing and reviewing company policies, planning and controlling maintenance procedures, reviewing the

coordination of the training program, dictating maintenance policies, and supervising and controlling standards of quality. In each case, the petitioner provides no details, specifics or documentation to substantiate how these duties qualified as managerial or executive in nature. The lack of specificity or examples in the provided duties casts doubt as to whether they represent the beneficiary's actual primary duties, particularly in light of the duties provided for the beneficiary in the United States which are predominantly comprised of non-qualifying day-to-day operational duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

On appeal, counsel contends that the beneficiary qualifies as a function manager based on his management of an essential function within the foreign employer's organization. Again, the statutory definition of "managerial capacity" allows for both "personnel managers" and a "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). 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. Again, 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. 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 manager position.

The petitioner has failed to provide a consistent description of the foreign company's staffing levels and personnel structure during the beneficiary's period of employment abroad. For instance, an original support letter submitted with the Form I-140 stated that the beneficiary had eight subordinates while employed with the foreign employer, while the provided organizational chart includes only six subordinates. Additionally, the foreign entity's financial documentation from 2010 and 2011 reflects that it paid only 26,000 [REDACTED] in salary in all of 2010 and 39,000 Venezuelan Bolivars in salary in all of 2011, casting doubt as to

whether the foreign employer supported the 21 employees listed in the organizational chart, particularly considering that the petitioner indicates that the beneficiary alone earned 18,720 [REDACTED] in 2010 and 15,600 [REDACTED] in 2011. Although the aforementioned payroll documentation is not relevant to the beneficiary's asserted period of employment as a manager with the foreign employer from August 2007 to January 2009, the petitioner has not submitted payroll or financials for the relevant period of time. However, the petitioner claims the foreign employer has undergone steady growth subsequent to the beneficiary's transfer to the United States. 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). Overall, the evidence submitted fails to illustrate the personnel structure of the company during the relevant time period abroad and does not support a finding that the beneficiary was relieved from performing non-managerial functions associated with the day-to-day duties of the operations department.

Lastly, the petitioner has submitted little documentation or details relevant to the beneficiary's claimed period of employment with the foreign employer from 2007 to 2009. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In conclusion, the petitioner has submitted a vague duty description for the beneficiary that fails to establish that he was primarily engaged in the performance of qualifying managerial or executive duties. Further, the petitioner has provided insufficient evidence related to the beneficiary's employment abroad. As such, the petitioner has not established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity. For this additional reason, the appeal must be dismissed.

### C. Ability to pay

The last issue to be addressed is whether the petitioner has established that the petitioner has the ability to pay the beneficiary's proffered wage.

The director concluded, following a review of the petitioner's 2010 and 2011 IRS Forms 1065 U.S. Return of Partnership Income, that the petitioner did not have sufficient income or assets to pay the beneficiary's proffered salary of \$54,000 per year.

On appeal, counsel submits a copy of the petitioner's 2012 IRS Form 1065, which was previously unavailable, and contends that this evidence establishes the petitioner's ability to pay the beneficiary. Counsel also provides documentation that demonstrates that the petitioner has a line of credit to supplement its income from the [REDACTED]

8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. The petitioner has not established that it employed and paid the beneficiary the full proffered wage at the time of filing or subsequently.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, precedent case law, the court held that USCIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054. After analyzing the petitioner's tax documentation from 2012, the petitioner has not established that the beneficiary has sufficient net income to compensate the beneficiary. The petitioner's IRS Form 1065 for calendar year 2012 presents a net taxable income of -\$60,395. As such, the petitioner could not pay a proffered wage of \$54,000 per year out of this income.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the

date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

To find the difference between current assets and current liabilities, USCIS looks to the IRS Form 1065, Schedule L Balance Sheets. Schedule L of the petitioner's IRS Form 1065 for 2012 reflects that the petitioner has \$41,327 in current assets and \$4,271 in current liabilities. Therefore, the petitioner has shown net current assets of \$37,056, or an insufficient amount of net assets to pay the beneficiary's proffered wage of \$54,000.

Therefore, the petitioner has not established that the petitioner has the ability to pay the beneficiary's proffered wage. For this additional reason, the appeal must be dismissed.

### III. 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.