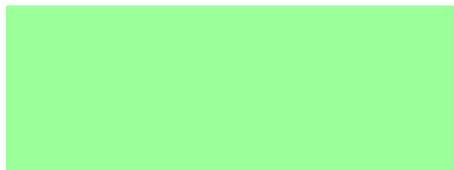




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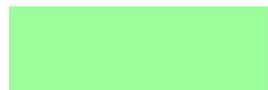


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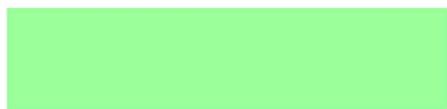
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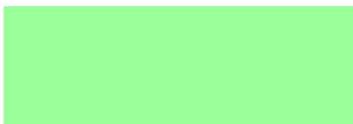
Petitioner:

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 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 New Jersey corporation engaged in the wholesale trade of apparel. The petitioner states that it has a qualifying relationship [REDACTED] located in Bangladesh. It seeks to employ the beneficiary as its chief executive officer. 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 four independent grounds of ineligibility, concluding that the petitioner failed to establish: (1) that it has a qualifying relationship with the beneficiary's foreign employer; (2) that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity for at least one year in the three years preceding his admission to the United States as a nonimmigrant; (3) that it will employ the beneficiary in the United States in a qualifying managerial or executive capacity; and (4) that it has the ability to pay the beneficiary's proffered wage of \$100,000 per year.

On appeal, counsel asserts that the petitioner has submitted sufficient evidence to meet all requirements for eligibility. Counsel submits a brief and 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--

- (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. Qualifying Relationship**

The first issue to be discussed in the present matter is whether the petitioner has established that a qualifying relationship exists between the petitioner and the foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The pertinent regulation at 8 C.F.R. § 205.5(j)(2) defines "affiliate" and "subsidiary" as follows:

*Affiliate* means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

\* \* \*

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988);

see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on June 4, 2012, but did not include evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer, nor did it identify the beneficiary's foreign employer. Accordingly, the director issued a request for evidence (RFE) instructing the petitioner to submit relevant evidence to establish the ownership and control of the U.S. and foreign entities.

In response to the RFE, counsel stated that the petitioner "is a part of [REDACTED] which is comprised of three other companies, all located in Bangladesh. Counsel indicated that the other group companies include [REDACTED] and [REDACTED]. The petitioner submitted evidence to establish that the beneficiary owns 700 out of 1,000 issued shares in both [REDACTED]. With respect to [REDACTED], the petitioner submitted a memorandum of association dated February 14, 2002 that reflected the following share ownership: (1) [REDACTED] (300 shares), (2) the beneficiary (250 shares), (3) [REDACTED] (250 shares), and (4) [REDACTED] (200 shares). The petitioner also provided articles of association for [REDACTED] also dated February 14, 2002, which indicates the following share ownership: (1) the beneficiary (350 shares), (2) [REDACTED] (350 shares), and (3) [REDACTED] (300 shares). Counsel stated that the beneficiary has been employed as the directing manager and CEO of [REDACTED].

With respect to the petitioner's ownership, counsel explained that the petitioner "sold 200 shares of its stock authorized and outstanding to [REDACTED]" to become "a wholly owned subsidiary company of the [REDACTED]."

The petitioner submitted its New Jersey Certificate of Incorporation indicating that it is authorized to issue 100 shares with no par value. The petitioner also provided the minutes of its organizational meeting dated April 9, 2009 reflecting that the directors of the corporation resolved to issue 200 shares to "[REDACTED] [REDACTED]" for \$50,000. This document was not signed by the company directors. Finally, the petitioner submitted a separate resolution also dated April 9, 2009, indicated that the petitioner would receive a wire transfer in the amount of \$50,000 from [REDACTED] as consideration for the stock purchase.

The director denied the petition, concluding that the petitioner failed to establish that the petitioner and foreign entity have a qualifying relationship. In denying the petition, the director noted inconsistencies in the record regarding the ownership of the beneficiary's claimed foreign employer, [REDACTED], [REDACTED]. Further, despite counsel's assertion that the stock was issued to [REDACTED], the

director acknowledged the petitioner's company resolutions regarding the issuance of stock to [REDACTED]. The director emphasized that the petitioner failed to establish that it issued stock to, or received consideration for the issuance of stock, from this entity. The director also observed that the petitioner did not provide any evidence establishing the existence of a company called [REDACTED]. Finally, the director noted that the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Returns for the years 2009-2011 indicate that the beneficiary, and not a foreign entity, is the majority shareholder of the company.

On appeal, counsel asserts that the petitioner is a "wholly-owned subsidiary of [REDACTED]" which consists of the aforementioned three companies in Bangladesh, and that the petitioner was established to distributing the apparel products manufactured by the foreign companies. Counsel re-asserts that the beneficiary owns 70% of both [REDACTED] and 25% of [REDACTED]. Counsel further states that the petitioner sold 200 shares to [REDACTED].

Upon review, counsel's assertions are not persuasive. The petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer.

To demonstrate eligibility, the petitioner must establish that the beneficiary's foreign employer, [REDACTED], and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary"). However, the petitioner has submitted a memorandum of association and articles of association for the foreign employer, both dated February 14, 2002, which reflect different ownership of shares in the foreign entity. As such, the actual ownership in the foreign employer is not established on the record. Further, regardless of the actual ownership of [REDACTED] the record does not establish that this company owns a majority interest in the petitioner, or that it shares sufficient ownership and control with the petitioner to establish an affiliate relationship.

The petitioner also presents conflicting and insufficient evidence with respect to ownership of the petitioner. The petitioner's certificate of incorporation limits the company's authorized shares to 100 shares. As noted above, counsel asserted that the petitioner issued 200 shares to [REDACTED] while the petitioner's organizational meeting minutes and company resolution indicate that it issued 200 shares to [REDACTED] which has not been established as a separate legal entity. Rather it appears that this name refers to the [REDACTED], which includes the petitioner, the foreign employer, [REDACTED].

As noted by the director, the petitioner's IRS Form 1120 U.S. Corporation Income Tax Returns for 2009, 2010, and 2011 state that the petitioner is owned by the following parties holding the indicated percentages of stock: (1) the beneficiary (60%) and (2) [REDACTED] (40%). 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, 591-92 (BIA 1988).

Further, the petitioner did not submit evidence directly requested by the director relevant to establishing ownership in the petitioner. For instance, the petitioner failed to submit its stock certificates, a stock ledger or supporting evidence that consideration of \$50,000 was paid by the [REDACTED] in exchange for 200 shares in the petitioner. 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). As such, based on the conflicting and insufficient evidence presented, the actual ownership in the foreign employer and the petitioner cannot be determined.

Regardless, even if the AAO were to accept the asserted ownership in the foreign employer and the petitioner, the petitioner would not have established the required qualifying relationship. The petitioner indicates that [REDACTED] is the beneficiary's current foreign employer. The evidence submitted indicates that [REDACTED] is owned by three to four separate shareholders, in varying degrees, with no individual owning a majority interest in the company. The petitioner indicates that it is wholly owned by the [REDACTED]. Therefore, the petitioner's claims could not support a finding that the two companies have a parent-subsidiary relationship.

Further, the petitioner failed to establish that [REDACTED] actually exists as a legal entity capable of owning the petitioner or any property. The petitioner has not submitted articles of incorporation or association, by laws, shares or membership interests issued, or other similar evidence of the existence of [REDACTED] as a separate legal entity. The petitioner does not specify the ownership of [REDACTED]. Indeed, the preponderance of the evidence suggests that the [REDACTED] is merely an association of foreign companies with similarly interested parties holding varying degrees of ownership in the associated companies. Of the four companies, only [REDACTED] appear to have sufficient common ownership to be considered affiliates. The petitioner has not established the requisite common ownership and control between the petitioner and the beneficiary's foreign employer.

In conclusion, the petitioner's ownership claims with respect to the U.S. and foreign entities are not consistent with a qualifying relationship as defined by the regulations. Further, the petitioner has submitted insufficient and inconsistent evidence regarding the ownership in the petitioner and the foreign employer thereby hindering the AAO from reaching any conclusions as to the actual ownership in the foreign employer and the petitioner. For this reason, the appeal must be dismissed.

**B. Foreign employment in a managerial or executive capacity**

The next issue to be addressed is whether the petitioner has established that the beneficiary was employed in a qualifying managerial or executive capacity with the foreign employer in one of the three years preceding his entry into the United States as a nonimmigrant.

The pertinent regulation at 8 C.F.R. § 205.5(j)(3)(i) states that the petitioner must submit the following evidence to qualify the beneficiary as a multinational executive or manager:

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

\* \* \*

- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity

The director concluded that the petitioner had not submitted sufficient evidence to establish that the beneficiary acted in a managerial or executive capacity abroad prior to his entry into the United States. The director noted that the petitioner had failed to submit a detailed description of the duties the beneficiary performed.

On appeal, counsel asserts that the beneficiary served as managing director and chief executive officer of the foreign employer and provides a duty description. Counsel also references the provided foreign organizational chart and states that the beneficiary supervised two directors managing essential functions of the company.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary acts in a qualifying managerial or executive capacity with the foreign employer.

In order to determine whether the beneficiary has been 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 support of the Form I-140 Petition for an Immigrant Worker the petitioner did not submit a foreign job duty description for the beneficiary. As such, the director asked in the RFE that the petitioner submit a definitive statement from the foreign employer describing the beneficiary's duties including his position title, his specific daily duties, and the percentage of time he spent

on each duty. In response, the petitioner provided the following duty description for the beneficiary in his former capacity abroad as managing director and chief executive officer:

The Beneficiary oversaw the general operations [of] the company by meeting with the directors and managers. At the meeting, the Beneficiary would set goals for each department, address any issues and follow up on performances. The Beneficiary, if elected to do so, had complete discretionary authority in day-to-day operations of the companies and over the subordinate supervisors he oversaw. Besides managing internal affairs of the company, the Beneficiary also concentrated on exp[a]nding the business, such as developing new partnerships with local and overseas companies.

Although requested by the director, the petitioner did not submit percentages of time the beneficiary spent on specific tasks. On appeal, counsel now submits a duty description including percentages of time the beneficiary spent on his asserted tasks. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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

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).

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 job description offered by the petitioner is overly vague and provides little probative value as to the beneficiary's actual day-to-day activities. The petitioner indicates that the beneficiary's duties included overseeing general operations, setting goals for each department, addressing issues, following up on performance, overseeing subordinate

supervisors, managing internal affairs, expanding the business, and developing new partnerships. In each case, the petitioner has failed to provide details, specifics or supporting documentation to corroborate the vague responsibilities submitted. Given the petitioner's assertion that the beneficiary worked for the foreign entity for nine years, it is reasonable to expect a detailed discussion of his specific duties and responsibilities along with examples of his managerial or executive authority. The petitioner has provided no evidence to differentiate the beneficiary's listed duties from those of any executive or manager in any industry. 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.).

Further, certain insufficiencies and material discrepancies on the record cast doubt as to whether the beneficiary acted in a qualifying executive or managerial capacity with the foreign employer. For instance, the petitioner provided a letter from the foreign employer stating that the beneficiary worked in the capacity of managing director from April 2000 until 2009. However, the record also indicates that the foreign employer was not incorporated until February 14, 2002. 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. at 591-92.

Further, the petitioner also asserted that the beneficiary's main function was supervising two directors who in turn supervised "certain functions of the company." However, the petitioner failed to sufficiently explain the duties of the directors, or their subordinates. For example, the petitioner noted that one director was responsible for "production" and the other "whole operation and finance." It is the petitioner's burden to establish with relevant evidence that the beneficiary acted in a qualifying managerial or executive capacity abroad. Here, the duty descriptions provided for the beneficiary and his foreign subordinates are insufficiently vague to meet this burden. Otherwise, the petitioner has submitted little evidence to support that the beneficiary acted in a managerial or executive capacity with the foreign employer. 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)).

Therefore, the petitioner has not submitted sufficient evidence to establish that the beneficiary was employed in a managerial or executive capacity with a foreign employer in one of the three years preceding his

admission into the United States as a nonimmigrant. For this additional reason, the appeal must be dismissed.

### **C. Employment with the petitioner in a managerial or executive capacity**

The next 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 determined that the duties submitted for the beneficiary in the United States were overly vague, that the evidence presented suggested the beneficiary was primarily performing non-qualifying operational duties, and that the petitioner failed to submit evidence of wages paid to its employees.

On appeal, counsel asserts that the director placed undue emphasis on the size of the petitioner's business in determining that the beneficiary was not acting in a managerial or executive capacity. Specifically, counsel points to the director's conclusion that the petitioner did not appear to employ sufficient subordinate employees to relieve the beneficiary from performing day-to-day operational duties.

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 failed to submit a description of the beneficiary's duties in the United States. As such, in the RFE, the director requested that the beneficiary submit a definitive statement from the petitioner describing the beneficiary's duties in the United States including his position title, his specific daily duties, and the percentage of time he spent on each duty. In response, the petitioner submitted the following position description:

[The beneficiary] directly supervises the vice president who takes care of the company's legal and accounting matters. The Beneficiary spends 100% of his time performing executive and managerial duties. He spend[s] approximately 25% of this time in developing new business opportunities in the U.S. and overse[a]s. 15% of his work hours are spent in resolving office matters, another 15% on establishing company budgets and approving company expenses. [The beneficiary] establishes marketing plans and budgets which account for 20% of his duties. The remaining 25% of his work is dedicated to meeting with prospective buyer executives and establishing good relationship.

Again, 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). Therefore, 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 beneficiary are overly vague and provide little probative value as to the beneficiary's actual day-to-day activities. The petitioner indicates that the beneficiary will be taking care of the company's legal and accounting matters, developing new business opportunities, resolving office matters, establishing company budgets and approving company expenses, and establishing marketing plans and budgets. In each case, the petitioner has failed to provide details, specifics or supporting documentation to corroborate the vague responsibilities provided, such as legal or accounting matters resolved, office matters resolved, or marketing plans implemented. The lack of specificity regarding the beneficiary's duties is especially questionable given that the petitioner asserts that the beneficiary currently works in the offered position. As with the vague position description provided for the beneficiary's position with the foreign entity, the petitioner has provided no evidence to differentiate the beneficiary's listed duties from those of any executive or manager in any industry. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. 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.).

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 those of 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 petitioner stated on the Form I-140 that it had five employees at the time of filing on June 4, 2012. The petitioner's initial evidence included no additional evidence regarding these employees, their job titles or duties, or evidence of wages paid to them. The petitioner submitted a copy of its IRS Form 1120 for 2011, for the fiscal year ended on March 31, 2012, which indicated only \$3,000 salary and wage expenses. Accordingly, the director requested a detailed organizational chart showing the number of subordinate managers/supervisors and other employees reporting to the beneficiary, their job titles, job duties, educational level, and whether they work full or part-time. The director also requested copies of IRS Forms W-2 as evidence of wages paid to employees, as well as evidence of payments made to contractors, if applicable.

The petitioner provided an organizational chart depicting a total of five employees subordinate to the beneficiary including a vice president, an office manager, a delivery employee, a marketing employee and a sales employee, as well as brief job duty descriptions for each employee. However, the petitioner did not provide educational credentials for the employees, indicate whether they are full- or part-time employees, or provide the requested IRS Forms W-2 or other evidence of wages paid to the claimed subordinates.

The AAO does not concur with counsel's assertion that the director inappropriately emphasized the size of the petitioner's business in concluding that the beneficiary was not acting, or would act, in a managerial or executive capacity. In denying the petition, the director appropriately referenced the petitioner's failure to respond to the RFE. Specifically, the director denied the petition, in part, based on the petitioner's failure to submit IRS Form W-2's to corroborate the employment of the beneficiary's claimed subordinates. Again, the regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Merely stating that subordinate employees exist is insufficient to establish that the petitioner actually employs a sufficient staff to relieve the beneficiary from performing non-qualifying duties.

As noted above, the petitioner paid only \$3,000 in total salaries and wages in the fiscal year that ended approximately two months prior to the filing of the petition. Accordingly, the limited evidence submitted does not support the petitioner's claim that it had five to six employees at the time of filing. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15.

Here, the evidence submitted on the record supports a finding that the beneficiary is more likely than not primarily engaged in the performance of non-qualifying operational duties. For instance, the petitioner submitted e-mails, invoices, and wire transfer documentation indicating that the beneficiary was receiving orders, paying invoices, and personally sending and receiving wire transfers. 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’r 1988)). The petitioner has not submitted evidence to overcome the aforementioned evidence on the record indicating the beneficiary’s performance of day-to-day operational duties. Further, the petitioner has not submitted evidence to support its claim that the company employs five or more individuals to relieve the beneficiary from performing non-managerial tasks. In sum, the petitioner has submitted insufficient and inconsistent evidence regarding the beneficiary’s claimed subordinates and thereby fails to establish their employment as necessary to relieve the beneficiary from primarily performing executive or managerial duties.

On appeal, counsel cites *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988) to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, the AAO notes that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner’s business operations in its review of an alien’s claimed managerial or executive capacity. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *Mars Jewelers, Inc.*, the petitioner is required to establish that the beneficiary’s position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. Like the court in *Mars Jewelers, Inc.*, the director in the current matter emphasized the petitioner’s failure to establish that the beneficiary was primarily performing managerial or executive duties; and did not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

Lastly, the petitioner cites non-precedent AAO decisions as a basis to overturn the director’s decision. However, counsel has not sufficiently explained how the facts of the instant petition are analogous to those in the unpublished decisions. As previously discussed herein, the director did not inappropriately consider the size of the petitioner’s business in finding that the beneficiary was not acting primarily in an executive or

managerial capacity. Also, 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.

In conclusion, the petitioner has provided a vague and non-specific duty description for the beneficiary in his proposed capacity with the petitioner. Further, the petitioner has failed to document its employment of the stated number of subordinate employees and has not established that it has sufficient staff to relieve the beneficiary from performing non-managerial tasks. For this additional reason, the appeal must be dismissed.

#### **D. 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 of \$100,000 per year.

As noted, the director found that the petitioner had not demonstrated with sufficient evidence that the petitioner has the ability to pay the beneficiary's proffered wage. The director noted the petitioner's failure to submit evidence of wages paid to the beneficiary or, in the alternative, evidence of sufficient net income and assets to pay the beneficiary's offered wages.

On appeal, a counsel point to the petitioner's gross income indicated in IRS Form 1120's for 2009, 2010, and 2011, and asserts that this is sufficient to pay the petitioner's proffered wage. Counsel further asserts that the beneficiary is paid with funds provided from wire transfers by the foreign employer.

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. In the present matter, although the petitioner indicates that it currently employs the beneficiary pursuant to an approved L-1A nonimmigrant petition, the petitioner did not submit any evidence that it has been paying wages to him as of the date of filing.

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*, 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. As such, counsel's assertion that the petitioner's gross income from 2009, 2010, and 2011 should be considered in determining the petitioner's ability to pay is not persuasive. Indeed, even if gross income is considered, the IRS Form 1120s reflect that the gross income of the petitioner in each year was less than the beneficiary's proffered wage of \$100,000. Further, counsel states that the petitioner earned insufficient gross revenue to compensate the beneficiary and asserts that the beneficiary can only be paid through assistance from the foreign employer in the form of wire transfers.

Regardless, when analyzing the petitioner's tax documentation, the petitioner has not established that the beneficiary has sufficient net income to compensate the beneficiary. As the petition's priority date falls on June 6, 2012, and its 2012 tax return is not available, the AAO must examine the petitioner's tax return for 2011, which was filed for the fiscal year ended on March 31, 2012. The petitioner's IRS Form 1120 for fiscal year 2011 presents a net taxable income of \$5,838. As such, the petitioner could not pay a proffered wage of \$100,000 per year out of its 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 1120, Schedule L Balance Sheets. Schedule L of the petitioner's IRS Form 1120 for 2011 reflects that the petitioner had \$13,902 in current assets and \$0 in current liabilities. Therefore, the petitioner only has shown net current assets of \$13,902 for 2011, or an insufficient amount of net assets to pay the petitioner's proffered wage of \$100,000.

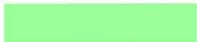
On appeal, counsel contends that the beneficiary was compensated through wire transfers, totaling \$196,000, received from the foreign employer from August 2011 through September 2012. The petitioner submits bank records to corroborate counsel's assertions. However, a review of the submitted documentation reflects the following transfers directly from the [REDACTED] (1) \$11,353 on September 6, 2012, (2) \$46,649 on August 28, 2012, (3) \$26,367 on May 25, 2012, and (4) \$12,105 on February 3, 2012. In sum, the submitted documentation indicates that \$96,474 was wired from [REDACTED] not the \$196,000 asserted by the petitioner. Other wire transfers asserted as being from the [REDACTED] make no reference to this entity, but note other entities such as [REDACTED], and [REDACTED]. The petitioner fails to explain the significance of these entities or the wire transfers. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, the purpose of the ability to pay requirement is to confirm that the petitioner has sufficient revenue and operations to compensate the beneficiary and support his intended executive or managerial role. Therefore, wire transfers from the foreign employer to compensate the beneficiary, even if in a sufficient amount, are of limited probative value to establishing that the petitioner is capable of supporting the beneficiary's position. Additionally, the petitioner has submitted no evidence to establish that the asserted wire transfer amounts were used to directly pay the beneficiary. 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)).

Therefore, the petitioner has not established that the petitioner has the ability to pay the beneficiary's proffered wage of \$100,000. 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



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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.