



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **APR 03 2014** OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center ("the director"), denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker (Form I-140), to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(1)(C). The petitioner, a Florida corporation, is engaged in the business of shipbuilding and repair and employs seven personnel. It seeks to employ the beneficiary as its president. 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, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary met and continues to meet the eligibility criteria for the requested classification, since he is an alien worker with executive and managerial duties.

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.

II. Facts and Procedural History

The record shows that the petitioner filed the Form I-140 on October 23, 2012 and submitted a number of supporting documents in an effort to establish eligibility for the above stated immigration benefit. The

petitioner's supporting documents included sales invoices, payroll and wage documents, yearly and quarterly tax returns, three supporting statements, and the petitioner's organizational chart. In an undated statement submitted in support of the instant petition and signed by [REDACTED] the majority owner of the petitioner and the foreign entity, [REDACTED] identified the proposed position as a "General Manager" position and provided the following information:

In order to achieve growth, [the beneficiary] will continue to:

- Establish and ensure execution of policy in accordance with Corporate Charter.
- Coordinate functions and operations between stores.

[The beneficiary] will continue to be responsible for supervising, hiring, firing employees in all locations. He manages a subordinate staff of supervisory personnel.

[The beneficiary's] considerable skill and experience are required to orchestrate transactions and the accompanying subtleties. He will:

- Negotiate with suppliers.
- Be responsible for Strategic Planning and marketing duties.
- Acquire new sources of revenue and expand Insurance Restoration side of business.
- Delegate tasks to supervisory personnel accordingly.¹

An additional undated statement, also signed by [REDACTED] added that the beneficiary will act as liaison and representative for the petitioner and will manage the overall performance of the operation via supervision of subordinates. This letter included overlapping information with regard to the beneficiary's discretionary authority, his policy- and goal-setting role, as well as his supervisory authority over subordinates.

In a third document, also on the petitioner's letterhead but with no signature, the petitioner listed the duties of the beneficiary and the vice director (assistant manager). The petitioner indicated that the beneficiary would select vendors and showroom locations, act as a liaison between the petitioner and its foreign affiliate, assess outside subcontracting, represent the petitioner in business matters with other corporations, coordinate with the Colombian supplier to facilitate installations in the United States, negotiate with suppliers, assume responsibility for strategic planning and marketing, and acquire new revenue sources to expand the insurance restoration side of the business. The petitioner indicated that the vice director (assistant manager) would assist the beneficiary in the running of the business, in selecting products, and in supervising the petitioner's internal and external personnel. The petitioner further noted that it employed an additional "Five Operative personnel, Administration and Sales," and used external personnel for administrative duties, such as accounting, payroll, and tax obligations.

The petitioner's organizational chart depicted the beneficiary in the position of general manager and identified an assistant manager as over three sales representatives. The chart also depicted an operation and production division with one employee who supervised unidentified bookkeeper(s) and independent contractors. The

¹ In a second version of this letter, [REDACTED] indicated that the beneficiary would also "set growth targets."

chart also included a secretarial position.² The petitioner's Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, issued in 2011 corresponded with individuals identified in the positions of assistant manager, sales representatives, secretary, and the beneficiary's position of general manager. The petitioner's UCT 6-A, Florida Department of Revenue, Employer's Quarterly Reports, for 2011 and the first two quarters of 2012 also listed the individual employed in the operation and production division.

On January 14, 2013, the director issued a request for evidence (RFE), indicating that the record did not contain sufficient evidence of eligibility to warrant approval of the petition. The director instructed the petitioner to provide, in part, evidence establishing that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director asked the petitioner to list the beneficiary's specific daily job duties and to indicate the percentage of time the beneficiary would allocate to each item listed. The director also asked the petitioner to disclose the full- or part-time status of its employees and to provide, if applicable, evidence showing the number of contractors used and the duties they performed.

The petitioner's response included a supplemental description of the beneficiary's proposed position with a percentage breakdown, which restated portions of the previously provided job description and added other tasks. The petitioner listed the following general duties:

- Act as liaison between the subsidiary and the parent company reporting to the president of the subsidiary company on a continuing basis (4%)
- Analyzes the reports of the administrative area of the company in order to take decisions and approve any changes that the company may need (2%)
- Approves the weekly administrative – operational reports of the subsidiary company in order to send them to the Parent Company (2%)
- Assist sales personnel in obtaining business for the company (14%)
- Manage all the process of contracts with clients and supervises its completion until the and [sic] of the contract (2%)
- Directs the processes of contracts with clients (1%)
- Evaluate daily the tasks assigned to the assistant of sales (2%)
- Calculates the real demand on the marked [sic] and makes an approximation of sales, in order to set objectives with the assistant of sales (1%)
- Set limits in each territory (Commercial and Residential) and establishes the quota on sales for the assistant in order for him to accomplish those goals (5%)
- Establishes goals and objectives of the assistant of sales, the long range goals and the short term goals, assigning short and long term tasks to the assistant of sales (1%)
- Evaluates the analysis of cost of sales of the company in the performance of the plan of sales (1%)
- Evaluates the performance of the assistant of sales, comparing the up to date period with old periods of performance (5%)
- Prepares surveys for the clients to be performed by the assistant of sales, looking always to satisfy the client (2%)

² Although the organizational chart did not identify the secretary by name, other documentation in the record identified the individual employed in the position of secretary.

- Monitors the assistant of sales, [i]t is a mission of the manager to look after all the process of sales, in order to do it in the best manner and that the assistant of sales gets to be a good corporative citizen. (1.5%)

The petitioner added that the beneficiary would spend six percent of his time designing and managing the preparation of manuals and contracts that will allow the establishment of franchises in other localities. The petitioner described duties associated with the task of establishing a franchise and accorded twenty percent of the beneficiary's time to these duties. The petitioner also indicated that the beneficiary would (paraphrased and bullets added for clarity):

- Evaluate the efficiency of existing policies, creating and implementing ones to meet market conditions and long-range goals (3%)
- Insure that policies and procedures are implemented and observed by subordinate personnel (7%)
- As business requires, hire direct labor being responsible for the retention and termination of all personnel (4%)
- [Be] Responsible for the overall performance of the company with daily supervision insuring the completion of each project to client's satisfaction (13%)
- Authorize decisions that exceed the authority of the staff by meeting with them when the need arises or during daily briefings (7%)

The petitioner noted that the beneficiary would spend three percent of his time to "contract the services of sub-contractors to cut on operating costs;" but then listed additional duties pertaining to this heading that consumed eight percent of the beneficiary's time. Similarly, the petitioner indicated that the beneficiary would spend 22 percent of his time insuring the performance of each member of the staff on a daily basis but noted that the tasks pertaining to this duty would consume only 18 percent of the beneficiary's time. Likewise the petitioner claimed that the beneficiary would represent the company in business with other corporations and official entities eight percent of the time but indicated that the tasks pertaining to this duty would consume 17 percent of the beneficiary's time. Finally, the petitioner noted that the beneficiary would spend nine percent of his time coordinating the preparation and dissemination of all marketing materials but required the beneficiary to spend 11.5 percent of his time doing so.

The director reviewed the petitioner's submissions and determined that the record lacked sufficient evidence to establish that the beneficiary would be employed by the U.S. petitioner in a qualifying managerial or executive capacity. The director found that the beneficiary's job description was vague and that the evidence did not establish that the beneficiary would oversee a subordinate staff of professional or managerial employees. The director also noted that while the petitioner submitted foreign documents as supporting evidence, not all documents were accompanied by English language translations and even where translations were submitted, they were not accompanied by the required certification. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the director issued a decision dated September 4, 2013 denying the petition.

On appeal, counsel asserts that the director's decision is in error. Counsel first contends that the petitioner was improperly advised as to the preparation of the supporting documents and RFE response by an individual who was neither an attorney nor a specialist on immigration matters. Counsel asks that the AAO review the

additional evidence submitted on appeal in order to address the evidentiary deficiencies cited in the director's decision. In addressing the deficiencies in the description of the beneficiary's proposed employment, counsel provides a supplemental description and percentage breakdown of the beneficiary's duties as follows:

- Supervising, Coordinating and Planning: [The beneficiary] supervises 2 employees; the Assistant Manager and Director of the Operations and Production Division. Furthermore he supervises 3 lower level employees under the Assistant Manager, and various independent contractors. [The beneficiary] oversees the development and establishment of the company's policies and goals. In addition, as head of the Company, [the beneficiary] oversees the coordination of the different company areas; this is in charge of overseeing the alignment of work between different departments he supervises in order for them to work toward the company's goals. Furthermore, [the beneficiary] oversees the planning of projected services, especially those of big importance of the Company. (50% of the working time dedicated to this function)
- Budget and Finance: [The beneficiary] oversees and coordinates the organization's financial and budget obligations, which are delegated to an external accountant and book keeper. As the head of the Company he is involved in making sure that operations are well funded, and increase efficiency. In addition, [the beneficiary] oversees the preparation of budgets. (15% of the working time dedicated to this function)
- Human Resources: Ensure that all company's policies and procedures are followed by subordinate employees. Time spent on this task is only when necessary, since most of this [*sic*] duties are delegated on [*sic*] the Assistant Manager[.]. However, due to [the beneficiary's] expertise as an architect, designing interiors for yachts he usually participates in the process of selecting those contractors who will provide direct services. Responsible for hiring and fire [*sic*] employees; according to the needs of the other managers are required to hire or to dismiss any professional who does not meet expectations (10% of the working time dedicated to this function)
- Definition and Oversight of Sales Plan, plus overseeing negotiation of related important contracts: [The beneficiary] ultimately approves the sales plans proposed by the Assistant Manager. He oversees the issuance of the sales and inventory reports. He reviews weekly sales price, gross margin, profit & loss, and volume projections report of all products to help set accurate and achievable revenue goals. Furthermore he oversees the execution of the sales plan, by the Assistant Manager and Sales Representatives. (15% of [the beneficiary's] time is spent on this task)
- Legal and Compliance: [The beneficiary] is the official representative of [the petitioner] whether it may be in any legal proceeding or before any government entity. [The beneficiary] has complete authority to act on behalf of the best interest of the Company and to intervene in any aspect of the operations in order to ensure compliance with applicable internal policies as well as legal regulations (10% working time dedicated to this function)

Counsel asserts that the beneficiary's duties are managerial in nature and that the subordinate managers, professionals, and outsourced professionals perform the day-to-day operations. The petitioner also provided descriptions for the beneficiary's subordinates. The petitioner indicated that the assistant manager:

Prepares sales plans to be approved by [the] General Manager. Performs accounting reports and bank conciliations; keeps control of accounts receivable and payable. Oversees the work of the sales representatives and the external book keeping of the company, as well as supervises the work of the secretary. Reviews quotes and proposals from suppliers and subcontractors; in charge of managing contracts, executing day to day general contracts, some of them needing authorization from General Manager. In charge of Human resources matters including payroll, hiring, and executing company policies.

The petitioner stated that the director of the operations and production division:

Oversees, supervises and directs the tasks performed by the independent contractors under her supervision and of the secretary. Coordinates with contractors everything related to the work to be executed. Oversees the projects of the Company as to progress and time frames established for completion. Keeps track of time spent by subcontractors. Orders and supervises repair of equipment. Prepares reports to General Manager as to projects being managed. Fully responsible for overseeing the process of the distribution of material, and performs complex buying strategies to purchase and arrange timely deliveries of those materials to customers and clients.

The petitioner noted that the secretary would perform clerical, receptionist, filing, and administrative duties. The petitioner indicated that the sales representatives visit customers, search for new customers, maintain files of sales orders, and stay abreast of market trends. The petitioner also noted that the sales representatives reported to the assistant manager. The petitioner indicated "He also indirectly supervises independent contractors (designers, carpenters and architects), and an external accountant." It is not clear from the placement of this statement whether counsel is referring to the beneficiary's or the assistant manager's position.

Counsel avers that the petitioner has now submitted specific information to establish that the beneficiary's position as president and general manager "meets the definition of multinational executive/manager."

III. Analysis

Preliminarily, with regard to counsel's assertion that the beneficiary was not assisted by an attorney but by an agent, there is no remedy available for a petitioner who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its behalf. See 8 C.F.R. § 292.1. The AAO only considers complaints based upon ineffective assistance against accredited representatives. Cf. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988)(requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel). That being said, the AAO conducts appellate review on a *de novo* basis. All evidence the petitioner submits in support of the appeal are included in that review. Therefore, despite any evidentiary deficiencies that may have resulted from the assistance of a non-attorney, the petitioner has had the opportunity to address the director's adverse findings and supplement the record with evidence of eligibility through the appeal process. As the petitioner has properly filed an appeal in the instant matter, all evidence will be duly considered to determine whether the

petitioner has met its burden of proof. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

As indicated above, the primary issue in this matter is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity.

In general, when examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the actual job duties themselves will reveal the true nature of the beneficiary's employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). However, United States Citizenship and Immigration Services (USCIS) also reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

In this matter, the petitioner initially indicates that the beneficiary's position is a managerial position; however on appeal counsel avers that the beneficiary's position meets the definition of "multinational executive/manager." The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Of note, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is claiming that the beneficiary qualifies as both an executive and a manager, the petitioner must demonstrate that the beneficiary's responsibilities meet the requirements of each capacity. On review, the petitioner's description of the beneficiary's duties fails to establish that the beneficiary will be primarily engaged in managerial or executive duties for the petitioner.

Turning to the beneficiary's proposed position with the U.S. petitioner, the record shows that several job descriptions were submitted prior to the denial of the petition. A review of the initially submitted job descriptions shows that a number of the elements were overly vague and failed to explicitly identify actual tasks that apply to the beneficiary's specific position within the specific type of business the petitioner operates. For instance, while the petitioner claimed that the beneficiary would create and implement policies, procedures, and long-range goals, the petitioner did not include any substantive context for the creation and implementation of the goals and policies within its shipbuilding, repair, and marine business. The petitioner also indicated that the beneficiary would coordinate functions and operations between stores but did not provide evidence that the petitioner operated more than one location.

In the petitioner's response to the director's RFE, the petitioner provided a supplemental job description, which included a percentage breakdown. However, the petitioner assigned time percentages in a confusing manner such that the time the beneficiary dedicated to subsets of certain broad categories were less than or greater than the time allocated to the titled category. In addition, the petitioner added information regarding the petitioner's plans to franchise its business but did not further elaborate on this plan. The vague job descriptions and the anomalies contained in the time allocations to perform the tasks precluded an analysis of the beneficiary's actual duties and the time spent performing those duties. The record before the director

failed to accurately convey how the beneficiary's time would be distributed among the qualifying and non-qualifying tasks the beneficiary would be expected to perform. This failure to consistently document the time the beneficiary would spend on his tasks is important because several of the beneficiary's tasks, such as "[a]ssist sales personnel in obtaining business for the company (14%)," ensure the performance of each member of the staff on a daily basis (18 or 22%), "prepar[e] customer satisfaction surveys (2%)" and prepare and disseminate marketing materials (9 or 11.5%), do not fall directly under traditional managerial or executive duties as defined in the statute.

The supplemental job description and percentage breakdown provided in counsel's appellate brief also does not contain sufficient information demonstrating that the beneficiary would allocate his time primarily to the performance of qualifying managerial or executive tasks. Counsel indicates that 50 percent of the beneficiary's time will be allocated to "Supervising, Coordinating and Planning." Counsel further notes, however, that the beneficiary will oversee the work of two managerial employees as well as four "lower level employees." Given that the supervision of non-managerial or non-professional employees is not work that is performed within a qualifying capacity, it is imperative that the petitioner break down the time allocation so that the precise amount of the beneficiary's time allocated to overseeing managerial employees versus those that are identified as "lower level employees" is established. In addition, counsel does not identify how much of the 50 percent of the beneficiary's time is spent overseeing the planning of projected services. Counsel also fails to describe the tasks associated with planning projected services so that USCIS may analyze and determine whether the tasks are qualifying or non-qualifying tasks.

While employee supervision accounts for only one aspect of the job description submitted on appeal, a review of the remaining portions of the job description shows a general lack of information about the beneficiary's specific tasks. For example, counsel indicates that the beneficiary will allocate 10 percent of his time to a group of tasks labeled as human resources, which includes ensuring that company employees follow proper policies and procedures. However, it is unclear how such oversight can be distinguished from supervising and coordinating the work of subordinates to which counsel allocated a portion of the 50 percent allocation of time discussed above. Additionally, while counsel indicates that most human resources job duties will be delegated to the assistant manager, he does not clarify which tasks would be delegated and which tasks, other than weighing in on decisions concerning the hiring and firing of employees, will be the beneficiary's responsibility. Lastly, the job description submitted on appeal does not include detailed information regarding the beneficiary's role as the petitioner's legal representative on a daily or weekly basis. Lack of clarification of this overly broad claim precludes a meaningful understanding of the specific tasks that would constitute legal representation of the petitioner, a role which counsel asserts would consume another 10 percent of the beneficiary's time.

The evidence of record must show that the beneficiary will be relieved from performing non-qualifying tasks so that he may allocate his time to primarily managerial or executive duties. Therefore, we examine the beneficiary's placement within the petitioner's organizational hierarchy and staffing structure, as merely claiming that the beneficiary will be employed in a qualifying capacity is not sufficient without actual supporting evidence. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The record must demonstrate that the petitioner has employees or contractors to perform the daily operational

tasks as well as employees, other than the beneficiary, who would oversee the organization's non-managerial and non-professional staff.

Upon review of the proffered position as an executive position, we note the statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

In this matter, although the beneficiary is listed as head of the organization, the record does not include documentary evidence that the beneficiary has a subordinate level of managerial employees to direct. Although the petitioner's organizational chart depicts the beneficiary as supervising an assistant manager who in turn supervises three sales representatives, as discussed above, the petitioner provides descriptions of job duties that are inconsistent. The petitioner does not explain how much time the beneficiary dedicates to supervising the assistant manager and how much time he supervises the secretary and three sales representatives. In addition, the description of the assistant manager's duties on appeal shows this individual performing accounting functions, reviewing quotes and proposals from suppliers and subcontractors, and executing day-to-day general contracts. Upon review of the description of duties of the assistant manager's duties, it is not possible to discern that this individual primarily performs managerial duties, rather than performing routine administrative and operational tasks.

Further, the petitioner's organizational chart depicts an operations and production division with one employee. The description of duties for this position indicates that the employee oversees, supervises and directs tasks performed by independent contractors. However, the record does not include documentary evidence substantiating the petitioner's use of subcontractors. Again, 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. Moreover, the director expressly requested that the petitioner provide evidence of its use of subcontractors and the petitioner did not provide this evidence either in its response to the director's RFE or on appeal. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The record does not include evidence establishing the petitioner's use of subcontractors, the number of individuals subcontracted, and the services the subcontractors allegedly provided. As the petitioner claims to operate a shipbuilding and boat repair business, it is crucial for the petitioner to provide evidence establishing who actually carries out these key services.

The general descriptions of the duties of the assistant manager and the operations and production division's employee are insufficient to ascertain that their actual daily duties comprise primarily managerial tasks. Accordingly, the record does not establish that the beneficiary has a subordinate level of managerial

employees to direct. Finally, a review of the petitioner's descriptions of the beneficiary's duties fails to demonstrate that the beneficiary's actual duties within the organization are primarily executive duties. 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 actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Upon review of the totality of the record, including the description of the beneficiary's duties, the duties of subordinate personnel employed when the petition was filed, and the nature of the petitioner's business, the petitioner has not provided probative evidence that the beneficiary primarily performs duties in an executive capacity. The record is simply deficient in this regard.

The petitioner has also failed to establish the proffered position qualifies under Section 101(a)(44)(A)(iii) of the Act. 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). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act. If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. See section 101(a)(44)(A)(iii) of the Act.

A review of the petitioner's description of the beneficiary's duties does not reveal that the beneficiary primarily supervises and controls the work of other supervisory, professional, or managerial employees. Again, the descriptions of the beneficiary's duties are inconsistent, not detailed, and fail to establish the amount of time the beneficiary will actually spend supervising employees. As discussed above, the petitioner did not establish that the individuals in the positions of assistant manager and director of the operations and production division are managerial employees. For similar reasons, the record is insufficient to establish that either of these individuals primarily supervises other employees. That is the record is insufficiently detailed to establish that the assistant manager is primarily a first-line supervisor. Likewise, the record does not include documentary evidence that the petitioner utilizes subcontractors; thus the record does not establish that the operations and production director primarily supervises anyone. Moreover, if the petitioner is said to function on the basis of services that are purportedly provided by subcontractors that the beneficiary hires, the petitioner's failure to provide evidence showing that it in fact employed the requisite contract labor brings into question how the petitioner was able to function and who actually performed the repair and shipbuilding services that is the source of the petitioner's revenue. The petitioner has not established that the beneficiary primarily supervises and controls the work of other supervisory employees. Further, the description of duties for the assistant manager shows this individual performs the routine tasks of an accounting clerk or bookkeeper as well as other routine and non-professional operational tasks. These duties do not depict a professional position. Similarly, the duties of the director of the operations and production division are insufficiently described to establish that this employee holds a professional position. The record did not establish that their duties require a bachelor's degree and thus the record does not establish that they perform professional duties.

The petitioner has not established that the beneficiary will primarily perform the duties of a personnel manager supervising managerial, supervisory, or professional employees.

The petitioner also fails to establish that the proffered position is a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 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.

The petitioner did not articulate any specific function that the beneficiary will manage. As the petitioner has not described any particular function with specificity and has not identified who will perform the routine duties of any function with probative evidence, the petitioner has not established the proffered position as a function managerial position. The beneficiary's business acumen in performing the essential tasks to operate the business, while undoubtedly valuable to the company, is not synonymous with an individual managing an essential function(s).

We observe 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 section 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 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). In addition, a company's small size does not obviate the need to establish that a beneficiary is not primarily performing the duties of the organization. To establish such, the petitioner must fully and definitely describe the actual duties the beneficiary and his or her subordinates perform. Further, the petitioner must establish that the company currently has a reasonable need for the beneficiary to perform duties that are primarily in a managerial or executive capacity as those terms are defined in the statute. In this matter, the petitioner has failed to provide this essential evidence.

While no beneficiary is required to allocate 100 percent of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary will perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the present matter it is not clear how much of the beneficiary's time in the

proposed position will be allocated to qualifying versus non-qualifying tasks. Neither the job descriptions provided, nor the evidence of the petitioner's staffing structure offer a comprehensive illustration of the beneficiary's proposed employment such that a conclusion can be made that the primary portion of the beneficiary's time will be allocated to the performance of tasks within a qualifying capacity.

Upon review of the totality of the record including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the lack of other employees to relieve the beneficiary from performing operational duties, and the nature of the petitioner's business, the petitioner has not established that the beneficiary's actual duties incorporate primarily executive or managerial functions. Accordingly, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity.

IV. Prior Approval

The record reflects that USCIS previously approved an L-1A nonimmigrant petition filed on the beneficiary's behalf, a classification which also requires the petitioner to establish the beneficiary's duties comprise primarily managerial or executive tasks. It must be noted, however, that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava, supra*. Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Moreover, in making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). In the present matter, the director reviewed the record of proceeding and concluded that the petitioner had not established the beneficiary had been or will be employed in a primarily managerial or executive position. In both the request for evidence and the final denial, the director articulated the objective statutory and regulatory requirements and applied them to the matter at hand. If the previous nonimmigrant petition was approved based on the same evidence as submitted in this matter, the previous approval would constitute gross error on the part of the director. Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

V. Conclusion

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.