



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **APR 03 2014** OFFICE: NEBRASKA 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, Nebraska Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the Immigrant Petition for Alien Worker (Form I-140) to classify the beneficiary as a multinational executive or manager 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 Washington corporation, states that it engages in the import and wholesale of seafood products with six current employees and a gross annual income of "\$3 million +." The petitioner seeks to employ the beneficiary as its chief marketing officer.

The director denied the petition on two alternate grounds, concluding that the petitioner failed to establish that 1) the beneficiary was employed in an executive or managerial capacity for at least one year during the three-year period preceding his admission to the United States; and 2) the beneficiary will be employed in a qualifying managerial or executive capacity in the United States.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner contends that the beneficiary was employed in an executive capacity at the foreign entity and will be employed in an executive capacity in the United States. 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.

## II. THE ISSUE ON APPEAL

### A. Employment Abroad in an Executive or Managerial Capacity

The first issue addressed by the director is whether the petitioner established that the beneficiary was employed in an executive or managerial capacity for at least one year during the three-year period preceding his admission to the United States.

The petitioner filed the Form I-140 on June 26, 2012. In support of the petition, the petitioner submitted a letter describing the beneficiary's position abroad as follows:

His work experience includes: Sales Manager (5/2003-7/2005) and General Director (7/2005 to 7/2006) of [REDACTED], a fishing company in Russia. Following this, he served as the General Director of [the foreign entity] (a fishing company and qualifying affiliate of [the petitioner]) between July 2006 and October 2007, including twelve months as the company's representative in Tokyo, Japan from September 2006 to September 2007, where he helped to establish [REDACTED] and implement the Marketing Agreement between [the foreign entity], [REDACTED], and other US agents. Between October 2007 and May 2008, [the beneficiary] was on loan from the [REDACTED], a Washington fishing company, while he coordinated the start-up of [the petitioner]. He has served as the Chief Marketing Officer of [the petitioner] since May 2008.

\* \* \*

Prior to his assignment to the United States, [the beneficiary] served as the General Director of [the foreign entity] from July 2006 to October 2007. As the General Director, [the beneficiary] was responsible for:

- Manage and direct the work of 13 subordinate managers, including exercising hiring, firing and evaluation of work performance with concurrence of [REDACTED]
- Oversee daily operations, reporting to the [REDACTED] Chairman on revenues and sales growth;
- Oversee set-up of affiliate, [REDACTED] in Japan and direct sales activities pursuant to marketing agreement between [REDACTED] and [the foreign entity];
- Research and review regular reports of company financial transactions, and monthly, quarterly and annual financial goal management;
- Direct and participate in acquisition and growth activities to support overall business plan;
- Research and report on import/export regulations to facilitate planning of company's market strategy; and
- Plan and manage overseas sales through distributors and other sales outlets.

On August 15, 2012, the director issued a request for additional evidence ("RFE") in which he specifically instructed the petitioner to submit a description of the beneficiary's duties abroad, to include what actual

specific, day-to-day tasks were involved with the completion of each duty and an estimate of the percentage of time the beneficiary dedicated to each specific duty. The director also specifically requested a detailed organizational chart for the beneficiary's foreign employer, including the names and detailed descriptions of the job duties for the beneficiary's immediate supervisor and subordinate employees.

In response to the first RFE, counsel for the petitioner submitted a letter listing the beneficiary's duties abroad almost identical to the description provided at the time of filing. Counsel for the petitioner described the beneficiary's duties at the foreign entity as follows:

Beneficiary was employed as the General Director of [the foreign entity] from July 2006 to October 2007, prior to his current employment with [the petitioner] in the United States. His detailed job duties with an approximate percentage of time spent for each duty are as follows:

Manage and direct work of 15 subordinate managers, professionals and staff, including exercising hiring, firing and evaluation of work performance with concurrence of [redacted]	25%
Oversee daily operation, reporting to [redacted] on revenues and sales growth.	35%
Oversee set-up of affiliate, [redacted] in Japan, and direct sales activities pursuant to marketing agreement between [redacted] and [the foreign entity].	10%
Research and review regular reports of company's financial transactions, and monthly, quarterly and annual financial goal management.	5%
Direct and participate in acquisition and growth activities to support overall business plan.	10%
Research and report on import/export regulations to facilitate planning of company's market strategy.	5%
Plan and manage overseas sales through distributors and other sales outlets.	10%

The petitioner submitted an undated organizational chart for the foreign entity depicting the beneficiary at the highest tier of management as general director. The beneficiary directly supervises the "deputy of general director for maritime safety," who supervises the "general vice-director of maritime safety," who supervises the technical director. The technical director then supervises the chief engineer, general accountant, chief economist, "inspector of personnel department," chief of legal department, communications engineer, and the "head of extraction department." The chief engineer supervises an engineer of safety arrangement and precaution, and the general accountant supervises a deputy of general accountant, chief accountant, and two accountants.

The petitioner also provided a brief list of job duties for the general director, deputy general director for maritime safety, chief engineer, engineer of safety arrangement and precautions, general accountant, deputy general accountant, chief accountant, accountant, chief economist, inspector of personnel department, chief of legal department, communications engineer, head of extraction department, general vice-director of maritime safety, and the technical director. The brief list of job duties for the general director, the beneficiary's position, is identical to the list of job duties submitted at the time of filing the petition.

On July 8, 2013, the director issued a second RFE in which he specifically instructed the petitioner to submit corporate records to support the claim that the beneficiary's employment from July 2007 to October 2007 was in an executive capacity.

In response to the second RFE, the petitioner submitted an Employment Agreement, dated July 18, 2006, between the foreign entity and the beneficiary. The agreement states that the foreign entity employed the beneficiary as "Director of Marketing for the execution of works in accordance with the job description." The agreement again references the job description stating, "the employee agrees to assume the duties, specific in job description from July 18<sup>th</sup>, 2006;" however, the petitioner failed to submit the referenced job description with the agreement. The beneficiary's actual duties aligned with this employment agreement remain unknown.

The petitioner also submitted a list of employees at the foreign entity in 2006 and 2007, indicating that each of the individuals listed on the organizational chart was employed at that time. The petitioner also submitted payroll records from April 2006 to October 2007 with a list of employees during that time and the beneficiary's pay stubs from July 2006 to May 2008.

On November 21, 2013, the director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary was employed in an executive or managerial capacity for at least one year during the three-year period preceding his admission to the United States. In denying the petition, the director found that the duties presented by the petitioner for the beneficiary's employment abroad were either generalized, or did not qualify as executive or managerial. The director observed that the foreign entity's organizational structure contained staff to relieve the beneficiary from performing accounting and ship operations and safety duties, but as the beneficiary was also director of marketing, it failed to demonstrate that there were other marketing and sales staff to relieve the beneficiary from performing the actual day-to-day tasks associated with the marketing and sales functions of the company. The director further found that, as the beneficiary was the foreign entity's representative in Tokyo, Japan from September 2006 to September 2007, to help establish [REDACTED] and implement marketing agreements, the petitioner failed to demonstrate that the staff at [REDACTED] relieved the beneficiary from performing the administrative tasks required to organize a legal entity and establish an operating presence in a foreign country or implement any marketing strategies or agreements, thus this second set of duties while in Japan also does not meet the executive capacity criteria.

On appeal, counsel for the petitioner asserts that the beneficiary was employed by the foreign entity in an executive capacity. Counsel states that the petitioner's response to the first RFE indicates that the beneficiary devoted 60% of his time to managing the operations of the foreign entity and 40% of his time to establishing [REDACTED] and "creating the marketing apparatus to perform the marketing agreement between [the foreign entity] and [REDACTED], and other related activities." Counsel states that the beneficiary does perform some operational duties, however the documentation shows that "research and planning" amounts to just 20% of his time, including managing sales through distributors and other sales outlets. Counsel further states that the beneficiary was general director of the foreign entity during the entire relevant period in 2006-2007, and served as the executive with overall responsibility for the operations of the company, which took up 60% of his time. During the same period, he also served as marketing director and was located in Japan for 12 months to establish an affiliate company that would perform the marketing functions for the foreign entity, which took up 40% of his time.

On appeal, the petitioner submitted a letter restating counsel's assertions and corporate documents relating to [REDACTED]

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary was employed in an executive or managerial capacity for at least one year during the three-year period preceding his admission to the United States.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The AAO will then consider this information in light of other relevant factors, including (but not limited to) job descriptions of the beneficiary's subordinate employees, the nature of the business conducted by the entities in question, the size of the subordinate staff of the entity in question, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the foreign entity.

The petitioner's description of the beneficiary's duties fails to establish that the beneficiary was primarily employed in a qualifying executive position. The petitioner provided a very broad and vague list of job duties for the beneficiary's position abroad that did not indicate what actual specific day-to-day tasks were involved with the completion of each overall duty. When asked to describe the duties in much greater detail, and advised not to group several tasks together, the petitioner again submitted the same list of duties and simply attached percentages to each of them. The petitioner did not break down the beneficiary's daily duties or elaborate on any of the groups of duties listed. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. *See* 8 C.F.R. § 103.2(b)(8). The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather simply allocated specific percentages to each grouping of duties. When asked to submit corporate records in support of the beneficiary's executive position, the petitioner submitted an employment agreement stating that the beneficiary would perform the duties listed in the job description; however, the job description referenced in the employment agreement was not submitted. On appeal, counsel and the petitioner claim that the list of job duties with percentages indicates that the beneficiary spent 60% of his time devoted to executive duties managing the overall operations of the foreign entity, and 40% of his time devoted to actual marketing functions and establishing [REDACTED] in Japan. However, absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In the instant matter, the petitioner indicated that the beneficiary spent 12 months in Japan establishing [REDACTED] to perform the marketing functions of the foreign entity. The petitioner further indicated that the beneficiary was not only working on establishing [REDACTED] but also continued to carry out his duties as general director of the foreign entity while in Japan, thus retaining his position in an executive capacity at the foreign entity. However, the lack of specificity for each of the beneficiary's listed duties raises doubts as to the actual tasks being carried out by the beneficiary. Although the organizational chart contains various

departments and managers, there are no employees listed to carry out any of the marketing and sales functions of the foreign entity. The list of job duties and corresponding percentages indicate that the beneficiary only devoted 25% of his time to duties related to marketing and sales; however, without detailing the tasks specifically associated with those duties, and without having any subordinate staff to assist with any tasks related to marketing and sales, it cannot be determined that the beneficiary's time is primarily devoted to executive duties. Furthermore, the broad duties determined by the petitioner to qualify as executive capacity, such as "oversee daily operation, reporting . . . on revenues and sales growth" 35%; "direct and participate in acquisition and growth activities to support overall business plan" 10%; "research and review regular reports of company's financial transactions . . ." 5%; and "manage and direct work of 15 subordinate managers, professionals, and staff . . ." 25%, do not describe the beneficiary's actual role in the foreign entity with any specificity. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.*

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

Due to the deficiencies outlined above, it cannot be determined that the beneficiary was employed in an executive or managerial capacity by a qualifying foreign entity for at least one year during the three-year period preceding his admission to the United States. Accordingly, the appeal will be dismissed.

#### B. Employment in an Executive or Managerial Capacity in the United States

The second issue addressed by the director is whether the petitioner established that the beneficiary will be employed in an executive or managerial capacity in the United States.

In support of the petition, the petitioner submitted a letter describing the beneficiary's position in the United States as follows:

[The beneficiary's] primary responsibility as the Chief Marketing Officer is to help [the petitioner] and the entire [redacted] meet the challenges we face in competing in the current economy. As the Chief Marketing Officer of [the petitioner], [the beneficiary] is responsible for all economic analysis and marketing issues, while also directing the implementation of marketing strategies. Reporting to the Chairman, [redacted] he is responsible for researching and developing reports and strategies for domestic and foreign markets for [the

petitioner], [REDACTED] and all of the companies of the [REDACTED] and for directing the implementation of all marketing strategies. In the absence of the President and CEO, he is also responsible for directing the day to day affairs of the company. His job duties are as follows:

- Research, prepare and review regular reports of fisheries stock, company inventory, and global market conditions to determine best sources of product and best markets for sale of product on a periodic basis (daily, weekly, monthly, quarterly, annually, and longer term);
- Research, plan and direct implementation of day-to-day marketing operations of the company, including its employees, all financial planning for marketing operations, procurement and investment of funds;
- Research and plan economic and financial forecasts for marketing operations, including checking exchange rates between foreign currencies, both current and future markets;
- Research and prepare periodic marketing analysis and economic forecast reports for Senior Management of [the petitioner], [REDACTED] [sic]; and
- Review and implement negotiating strategy for supply, marketing and distribution contracts and agreements with distributors in the U.S.A. and abroad, make recommendations with respect to pricing, including consideration of competitors pricing strategies.

The petitioner went on to state that it has hired seven full-time employees to include: [REDACTED] president and CEO; [the beneficiary], chief marketing officer; [REDACTED] general manager; [REDACTED] receptionist.

The petitioner submitted an undated organizational chart for the U.S. company depicting the beneficiary as vice president supervised by [REDACTED] the general manager, who then supervises [REDACTED] the logistics manager. Parallel to the beneficiary is [REDACTED] the chief financial officer, supervising [REDACTED] the senior accountant, who supervises [REDACTED] the receptionist.

The petitioner provided a document dated May 2012, briefly listing the job duties for the president, vice president, chief financial officer, general manager, senior accountant, logistics manager, and receptionist. The beneficiary's duties as vice president were described as follows:

- Responsible for establishing the company's brand and presence within the marketplace for its products and/or services.
- Plans, develop and enforce policies and objectives for the organization to [e]nsure it maintains its values and meets established goals.
- Involved in representing the company and its future potential to a variety of potential and existing customers, investors, and others.
- Establishes the company's product roadmap, given their intimate knowledge of needs, wants, and trends within the marketplace.
- Directs, and manage company's sales, and may even include responsibility for ongoing customer support in some instances.

The director issued an RFE in which he specifically instructed the petitioner to submit a description of the beneficiary's proposed duties in the United States, to include what actual specific, day-to-day tasks are involved with the completion of each duty and an estimate of the percentage of time the beneficiary will dedicate to each specific duty. The director also specifically requested a detailed organizational chart for the U.S. company reflecting its structure at the time of filing the petition, including the names and detailed descriptions of the job duties for the beneficiary's immediate supervisor and subordinate employees.

In response to the first RFE, counsel for the petitioner submitted a letter specifically describing the beneficiary's duties in the United States as follows:

Since May 2008, Beneficiary has been employed by [the petitioner] as the Chief Marketing Officer and was also promoted to Vice President in July 2012. He is responsible for all economic analysis and marketing issues, while directing the implementation of marketing strategies for [the petitioner] and the [redacted] companies. He also directs the day-to-day affairs of [the petitioner] in the absence of [redacted] the President and CEO. His detailed job duties with an approximate percentage of time spent for each duty are as follows:

Research, prepare and review regular reports of fisheries stock, company inventory, and global market conditions to determine best sources of product and best markets for sale of product on a periodic basis (daily, weekly, monthly, quarterly, annually, and longer term as needed).	25%
Plan and direct implementation of day-to-day marketing operations of the company, including its employees, all financial planning for marketing operations, procurement and investment of funds.	30%
Research and plan economic and financial forecasts for marketing operations, including checking exchange rates between foreign currencies, both current and future markets.	10%
Research and prepare periodic marketing analysis and economic forecast reports for Senior Management of [the petitioner], [redacted]	10%
Plan and implement negotiating strategy for supply, marketing distribution contracts and agreements with distributors in the U.S.A. and abroad, make recommendations with respect to pricing, including consideration of competitions pricing strategies.	25%

The petitioner submitted the same organizational chart for the U.S. company and brief list of job duties for its employees in the United States. Both documents are identical to those previously submitted except that each document changes the beneficiary's title from "vice president" to "vice president and chief marketing officer."

The director issued a second RFE in which he specifically instructed the petitioner to submit its records to support the claim that the prospective position will constitute employment in an executive capacity. The director also addressed the petitioner's claim that the beneficiary will also perform work for "other [redacted] companies" and instructed the petitioner to submit corporate records from each such company in order to establish the amount of time required of the beneficiary in connection with that employment.

In response to the second RFE, the petitioner further described its current employee and staffing arrangement as follows:

While [the petitioner] has only 6 employees, these employees are supported by a large group of employees of the two affiliates, one in [redacted] and several hundred employees in [the foreign entity], as well as the other 6 companies of the [redacted]. In addition, we are supported by the large network of contractors, suppliers, and professionals who provide the day to day work of [the petitioner] and its sister companies . . . [redacted] consists of three companies which are affiliates by the definition used by the immigration law – three companies, [the petitioner – [redacted] – Japan, and [the foreign entity] – Russia, are owned in the same ratio by the same three shareholders: [redacted] . . . [The petitioner] and [redacted] were established to market and trade in the crab and other seafood caught or supplied by [the foreign entity] and our other companies which primarily own and operate Russian-flagged crab and other fish processing ships, and to purchase provisions and bunker fuel for the fleet, as well as spare parts, arrange repair and other support services for the fleet. The [redacted] employs about 500 employees, primarily in the fleets, and enjoys gross annual revenues in excess of \$50 million.

In a letter submitted by the petitioner's counsel in response to the second RFE, counsel describes the beneficiary's position in the United States as follows:

. . . [the beneficiary's] responsibilities are to manage the entire marketing function of [the petitioner] (\$16 million a year), with the support of [redacted] and [redacted], the Senior Accountant, as well as a host of contractors who provide support services to the company, such as import certification and licensing, laboratories for testing and safety certification, international shipping, forwarding, storage, import support services, customs brokers, financial services, payroll services, printing, translation, media services, mail, transport, lawyers and CPAs. . . [The beneficiary] is responsible for ensuring that the seafood fetches the best prices on the global markets. . . He is required to travel frequently to visit the suppliers, to negotiate supply contracts, to attend trade shows around the world, while managing the operations staff, each of whom is a professional with a college degree. The day to day work that is described in the Service's RFE is performed by [redacted] and [redacted] who supervise and direct the staff of the many contractors, agents and service providers.

\* \* \*

[The beneficiary] is employed by [the petitioner] as a full-time executive –in fact he regularly puts in 60-80 hours a week. Even while he serves as a director of other [redacted] companies, he is at all times acting on behalf of [the petitioner] and coordinates with them on behalf of [the petitioner] . . . . Thus any time he spends on behalf of the other companies is incidental to his primary duties for [the petitioner], which as noted here require more than full-time (60-80 hours a week) of his attention. [The beneficiary] manages an essential function of [the

petitioner], with the support of two professional staff, and numerous contractors and service providers.

\* \* \*

[The beneficiary], the Chief Marketing Officer (CMO) assures the filing of all legal and regulatory documents and monitors compliance with relevant laws and regulations. He provides general oversight of all marketing activities, manages the day-to-day delegation of responsibilities, and ensures that operators [*sic*] are consistent with the policies made by [REDACTED]. [The beneficiary] contributes to the development of annual goals and objectives. He is responsible for ensuring that the company operations flow smoothly and economically, and that necessary work is done properly and on time. [REDACTED] and [the beneficiary] share that same great knowledge of the fishing business, as a result, [the beneficiary] manages every aspect of marketing products to customers. Acting as the primary spokesperson for the company, [the beneficiary] frequently travels abroad to communicate with clients and operational staff from other companies within the [REDACTED]. [The beneficiary's] language abilities allow him to communicate with all [of the petitioner's] personnel and clients. [The beneficiary] communicates closely with [REDACTED] regarding the operation of transportation of goods and financial functions outside of the United States.

The petitioner submitted copies of pay stubs for all of its employees in the United States for 2012 and 2013. The petition was filed on June 26, 2012 and according to the pay stubs, the petitioner employed the following individuals at that time: [REDACTED] and the beneficiary. The very first pay stub for [REDACTED] was issued on April 22, 2013, and, although he appears on the very first organizational chart submitted by the petitioner, there were no pay stubs submitted for [REDACTED].

The petitioner submitted another list of duties for the beneficiary's position in the U.S. and which is almost identical to its response to the first RFE, which included percentages of time for each duty. Although the petitioner did not include the percentages in the new list of duties, it did add the following two duties to the previously submitted list:

- Responsible for all economic analysis and marketing issues, while also directing the implementation of marketing strategies.

\* \* \*

- Provide daily reports regarding the new loads and offloads from our fleet of Russian flagged crab and fishing vessels.

The petitioner also submitted another brief list of job duties for the president and CEO, the chief financial officer, [REDACTED] (listed as senior accountant in organizational chart), and [REDACTED] (listed as logistics manager in organizational chart). The list of job duties for the president and CEO and the chief financial officer are greatly elaborated from the previous list. The list of job duties for [REDACTED] is

identical to the one previously provided except that one duty from the previous list has been removed. The list of job duties for [REDACTED] is almost identical to the previous list; however, one duty has been removed from, and two duties have been added to, the current list.

The petitioner submitted a new, undated organizational chart for the U.S. company depicting the beneficiary as chief marketing officer supervised by [REDACTED] the president/CEO. The beneficiary appears to be linked to the foreign entity, [REDACTED] "other crab and other seafood suppliers, [REDACTED], [REDACTED], "global customers," and "U.S. customers." The beneficiary directly supervises [REDACTED] the logistics manager, [REDACTED] the senior accountant, and the following services: "marine documentation," "brokers/shipping agents," "brokers/marketing agents," "forwarding agents," "importers/distributors," "technical advisors," "fishing boat/gear supplier & brokers," banks/financial services," "lawyers," and "CPAs." It also appears that [REDACTED] also supervise "banks/financial services," "lawyers," and "CPAs." Parallel to the beneficiary is [REDACTED] the chief financial officer, who also directly supervises [REDACTED] directly supervises [REDACTED] the receptionist, and "Insperty PEO," the payroll service company.

The petitioner also provided a list of third-party brokers and agents it uses; however, failed to submit copies of any contracts or agreements with those parties to establish that they carry out day-to-day functions of the U.S. company.

In a supplemental response to the July 8, 2013 RFE, the petitioner submitted a letter, dated October 7, 2013, specifically describing the beneficiary's duties in the United States as follows:

[The beneficiary's] duties as Chief Marketing Officer is a full-time job which often requires that he work long hours – (60-80 hours a week) and travel extensively. Upon approval of his green card, we will ensure that any duties he performs on behalf of related companies will be incorporated into his duties with [the petitioner] and compensated through a service agreement. Reporting to [the president of the petitioner], [the beneficiary] is responsible for researching and developing reports and strategies for domestic and foreign markets for [the petitioner] (while considering the situation of [REDACTED] our sister company in Japan, and the many suppliers who are all companies of the [REDACTED]), and for directing the implementation of all marketing strategies. He also serves on the Board of Directors of [the petitioner]. In my absence, he is also responsible for directing the day to day affairs of [the petitioner]. [The beneficiary] is assisted in the performance of his duties by [REDACTED] [REDACTED] the Logistics Manager and [REDACTED] the Senior Accountant, each of whom is an experienced professional with a college degree. However, the day to day work of the company is performed not only by these two professionals, but by a whole host of service providers.

In a separate letter, the petitioner adds the following to the above information:

. . . a diagram showing the various functions managed by [the beneficiary], as Chief Marketing Officer, our product suppliers, and the many companies who provide the day to day functional support, under the immediate direction of [REDACTED] under

[the beneficiary's] overall direction. These include seafood brokers, agents, distributors, customs brokers, forwarders, shippers, storage providers, quality and safety inspection laboratories and certifiers, packaging and documentation companies, financial services, CPAs, and lawyers.

The director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. In denying the petition, the director found that based on the petitioner's statements and organizational chart, the beneficiary's position entails conducting research, planning, preparing reports, and making recommendations, which are primarily operational duties. The director observed that the petitioner's organizational chart does not include any marketing or sales staff to perform the day-to-day operational duties of the marketing and sales function, thus requiring the beneficiary to perform the actual duties required to carry out the function rather than managing it. Additionally, the director observed that the beneficiary will also perform duties on behalf of the petitioner's related entities within the [REDACTED] (some of whose affiliations to the petitioner have not been established). The director found that the evidence indicates that the proposed position at the U.S. company will entail significant non-qualifying duties, to include both day-to-day wholesale marketing/sales duties as well as work performed on behalf of entities other than the petitioner. The director noted that the record lacks corporate records of the foreign entities that document the duties the chief marketing officer will be obligated to perform on their behalf, in addition to those performed at the U.S. company and foreign entity.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed by the petitioner in an executive capacity. Counsel states that the beneficiary manages and directs the most important function of the company, the marketing function. Counsel states that the beneficiary "directs an internal professional staff . . . consisting of a logistics manager, and the general manager (currently vacant) and senior accountant." Counsel further states that the beneficiary also "directs the work of a network of support staff at [REDACTED] and [the foreign entity] . . . as well as other affiliated companies." Counsel states that the beneficiary also "directs the work of his subordinate staff who direct the work of numerous contractors and service providers." Counsel states that the evidence shows that the beneficiary spends 55% of his time devoted to managing the marketing function of the U.S. company and the remaining 45% of his time collecting the necessary economic data needed to implement the marketing plans. Counsel contends that the U.S. company has sufficient support staff, affiliates, and independent contractors and service providers who support the marketing and financing functions of the petitioner. Counsel further contends that the beneficiary will not perform duties on behalf of the affiliated entities, but rather manage staff located at those entities to assist in carrying out the day-to-day tasks associated with the beneficiary's marketing function in the United States.

Upon review, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity.

Again, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). As discussed above, a detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. As stated above, the AAO considers this information in light of other relevant factors, including (but not limited to) job descriptions of the beneficiary's subordinate employees, the nature of the business conducted by the entities in question, the

size of the subordinate staff of the entity in question, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioning entity.

The petitioner's description of the beneficiary's duties fails to establish that the beneficiary will be employed in a qualifying executive position. The petitioner has not provided sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify him as an executive. At the time of filing the petition, the petitioner characterized the beneficiary as an executive and identified his job duties as: "responsible for establishing the company's brand and presence within the marketplace for its products and/or services"; "plans, develop and enforce policies and objectives for the organization"; "involved in representing the company and its future potential to a variety of potential and existing customers, investors, and others"; "establishes the company's product roadmap"; "directs, and manage company's sales, and may even include responsibility for ongoing customer support in some instances." Such duties are not indicative of a position that is executive or managerial in nature.

When asked to submit a detailed description of the beneficiary's duties, including the actual specific, day-to-day tasks involved with the completion of each duty, the petitioner submitted a new list of job duties for the beneficiary's position in the U.S. and allocated percentages of time to each. The petitioner provided a broad and vague list of job duties that again did not indicate what actual specific day-to-day tasks were involved with the completion of each overall duty. The petitioner described the beneficiary's duties as: "research, prepare and review regular reports of fisheries stock, company inventory, and global market conditions" 25%; "plan and direct implementation of day-to-day marketing operations of the company, including its employees, all financial planning for marketing operations, procurement and investment of funds" 30%; "research and plan economic and financial forecasts for marketing operations" 10%; "research and prepare periodic marketing analysis and economic forecast reports for Senior Management" 10%; and "plan and implement negotiating strategy for supply, marketing distribution contracts and agreements with distributors in the U.S.A. and abroad, make recommendations with respect to pricing, including consideration of competitions pricing strategies" 25%.

The petitioner did not break down the beneficiary's daily duties or elaborate on any of the groups of duties listed. Again, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. *See* 8 C.F.R. § 103.2(b)(8). The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather provided a new set of job duties loosely related to those previously submitted. When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978).

When asked to submit corporate records in support of the beneficiary's executive position, the petitioner simply stated that it provided the available documentation, but its companies are relatively small and thus run fairly efficiently without a great deal of bureaucracy or documentation. On appeal, counsel and the petitioner claim that the list of job duties with percentages indicates that the beneficiary spends 55% of his time devoted to executive duties managing the overall marketing operations of the U.S. company, and 45% of his time

devoted to researching and preparing the necessary economic and business analysis required to prepare and execute the strategic plan. However, absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d at 24.

Furthermore, the broad duties determined by the petitioner to qualify as executive capacity, such as "plan and direct implementation of day-to-day marketing operations of the company, including its employees, all financial planning for marketing operations, procurement and investment of funds" 30%; and "plan and implement negotiating strategy for supply, marketing distribution contracts and agreements with distributors in the U.S.A. and abroad, make recommendations with respect to pricing " 25%, do not describe the beneficiary's actual role at the U.S. company with any specificity. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.*

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

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, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). Although the AAO does not find that the size of the petitioning entity served in any way as an obstacle to establishing eligibility, this factor can and should be considered for the purpose of determining who within the organization would be available to perform the necessary non-qualifying such that the beneficiary is relieved from having to allocate the primary portion of his time to tasks that are not within a qualifying managerial or executive capacity. Neither the petitioner's reasonable needs nor its stage of development can be used to justify a favorable finding when the petitioner is unable to establish that the beneficiary would spend his time primarily performing tasks within a qualifying capacity.

In the instant matter, counsel contends that the beneficiary specifically directs the marketing function of the U.S. company. In support of this claim, the petitioner asserts the beneficiary exclusively directs the function and does not perform the specific tasks necessary to carry out the function. The petitioner asserts that employees at its affiliate companies, along with third-party agents and service providers assist the beneficiary in carrying out the day-to-day operational tasks associated with the marketing function of the U.S. company. In support of this assertion, the petitioner merely submits a list of service providers and agents without any evidence of actual agreements or contracts with those parties. Absent any clear associations with those third-party agents, by way of service contracts or agreements, the AAO cannot determine that they carry out any of the required operational tasks associated with the beneficiary's listed duties. Furthermore, the petitioner failed to list any subordinate employees in the U.S. or at its affiliated companies abroad that would relieve the beneficiary from performing such day-to-day operational tasks. According to the documentation in the record, the foreign entity does not have any marketing or sales staff that could assist the beneficiary with such tasks. The petitioner has not submitted any evidence of the existence of employees abroad that would carry out these tasks. 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)).

Further, as observed above, the petition was filed on June 26, 2012 and according to the petitioner's records, the petitioner employed [REDACTED] and the beneficiary at that time. The record does not include evidence that the petitioner employed [REDACTED] when the petition was filed. Accordingly, these individuals could not relieve the beneficiary from performing non-qualifying duties when the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

On appeal, counsel refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel contends that the instant matter is similar in that "the executives of [the petitioner], each of whom performs a specific function, is assisted in the performance of their work by a concert of professionals, managers, employees of a large group of affiliated companies, unaffiliated contractors, service/product suppliers, and various professionals such as lawyers, bankers and CPAs." However, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision as the petitioner failed to submit evidence of such assistance by other individuals. 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, unpublished decisions are not similarly binding.

When examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and his subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An

individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. *See* section 101(a)(44)(A)(iv) of the Act.

Here, the petitioner indicates that the beneficiary has two direct subordinates, a logistics manager and a senior accountant. The petitioner also claims that employees at its affiliate companies, along with third-party agents and service providers, will assist the beneficiary with non-qualifying operational duties. However, due to the broad position descriptions and lists of job duties for the beneficiary, the short and vague description of job duties provided for the beneficiary's subordinates, and the lack of contracts or service agreements with any third-parties or employees abroad, it remains unclear how the subordinates will relieve the beneficiary from performing non-qualifying operational duties in marketing and sales.

Based on the inconsistencies and deficiencies described above, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States. Accordingly, the appeal will be dismissed.

### III. 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.