



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: FEB 05 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 preference visa petition was denied by the Director, Texas Service Center, and the Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. The matter is now before the AAO on a motion to reconsider and a motion to reopen. The motion will be granted and the previous decision will be affirmed.

The petitioner filed this petition seeking 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 petitioner, a New Jersey corporation, operates a convenience store in Georgia and a wholesale distribution business based in New Jersey. It seeks to employ the beneficiary as its Executive Director.

The director denied the petition on September 10, 2010, concluding that the petitioner failed to establish it would employ the beneficiary in a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal. The AAO dismissed the appeal and concurred with the director's determination that the petitioner had not established that it would employ the beneficiary in a qualifying managerial or executive capacity. The AAO also concluded that the petitioner failed to establish that the beneficiary was employed by the petitioner's foreign parent company in a managerial or executive capacity prior to his admission to the United States to work for the petitioner as a nonimmigrant.

The petitioner now files a motion to reopen and reconsider the AAO's decision.

The purpose of a motion to reopen or motion to reconsider is different from the purpose of an appeal. While the AAO conducts a comprehensive, *de novo* review of the entire record on appeal, the AAO's review in this matter is limited to the narrow issue of whether the petitioner has presented and documented new facts or documented sufficient reasons, supported by pertinent precedent decisions, to warrant the re-opening or reconsideration of the AAO's decision to dismiss the petitioner's previous appeal.

The regulation at 8 C.F.R. § 103.5(a)(2) states:

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

8 C.F.R. § 103.5(a)(3) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

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.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

II. Managerial or executive capacity with the petitioner

A. Facts and Procedural History

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on July 1, 2008. The petitioner explained that it is engaged in operating a convenience store/gas station in Georgia and a granite and ceramic tile import/export business in New Jersey. The petitioner stated on the Form I-140 that it had eight (8) employees as of that date. It did not provide a detailed description of the beneficiary's duties in support of the petition. In response to the director's request for evidence, counsel provided a statement that described the beneficiary's duties as follows:

The beneficiary's position during his three years of employment with the company abroad and seven years employment with the U.S. entity has remained constant, with the exception that during the last three years, the beneficiary has spent greater time developing the wholesale activities of the company in New Jersey than managing, directing or overseeing the employees at the retail sales location, with respect to which the beneficiary has developed and coordinated operations in such a manner that the business is operating fairly independently of the beneficiary. The beneficiary is engaged, therefore, in a position much more akin to that which he held with the foreign entity prior to coming to the U.S., differing primarily in size and scope, conditions which hopes to gradually eliminate over the next few years.

[The petitioner] operates a wholesale distributorship in New Jersey and a retail sales business in Georgia. Although the beneficiary is physically present at the Georgia location for approximately 60% of the year and physically present at the New Jersey location for approximately 40% of the year, of the 60% of time he is physically present in Georgia, 40% is spend on developing the wholesale operations carried out in New Jersey.

The foreign entity's director also provided a letter dated July 2, 2010 in which it described the beneficiary's duties abroad as a marketing/sales executive. The director stated that the duties described therein "also describe, on a smaller scale, what [the beneficiary] does with the export portion of the business in the United States." The listed duties included: conducting market research based on knowledge of customers' purchasing needs; maintaining extensive knowledge of the company's products, components, functions and manufacturing processes; formulating sales goals with the support of the sales team and quality control team; preparing reports to outline status and market-worthiness of products; active participation in and cooperation with the quality control team; serving as a liaison between customers and company directors; concentrating on technical aspects of products through the quality control team; concentrate on marketing and selling products through sales team; and working with the research and development department and quality control officers on product development.

With respect to the company's staffing and organizational structure, the petitioner submitted an organizational chart at the time of filing indicating that the beneficiary is the CEO/President of a "New Jersey wholesale" business and a "Georgia Convenient [*sic*] Store." According to the organizational chart, the beneficiary supervises a manager, a sales officer and an administrative assistant in the New Jersey wholesale office. In addition, the chart indicates that the beneficiary supervises a manager, an assistant manager, a cashier and a part-time cashier located in the convenience store/gas station located in Georgia. A total of eight employees were identified on the chart; however, the petitioner indicated on its IRS Forms 941, Employer's Quarterly Federal Tax Return, that it had six to seven employees throughout 2008.

In response to a request for evidence (RFE), the petitioner submitted another organizational chart. Counsel indicated that the new chart was current as of the date the petition was filed. However, the chart appeared to pre-date the chart provided at the time of filing. The chart included 2006 salary

information for the listed employees, and identified two employees who did not receive wages after 2007. Notably, on the original organizational chart, the petitioner indicated that [REDACTED] is the manager of the New Jersey business, with an \$18,000 annual salary, and [REDACTED] is the administrative assistant. In the chart submitted in response to the RFE, the petitioner indicated that [REDACTED] is the general manager of the New Jersey business, and [REDACTED] is the administrative assistant.

The petitioner's 2008 IRS Forms W-2, Wage and Tax Statement, confirmed wages paid to the following employees named on the convenience store side of the original organizational chart: the beneficiary, [REDACTED] (store manager -\$18,000); [REDACTED] (assistant manager - \$4,200); [REDACTED] (part-time cashier - \$3447.27); [REDACTED] (part-time cashier - \$10,265). There was no Form W-2 issue to this individual in 2008. On the New Jersey wholesale business side of the organizational chart, the petitioner submitted IRS Forms W-2 reflecting payments to: [REDACTED] (manager - \$6,000); [REDACTED] (sales officer - \$13,698); and [REDACTED] (administrative assistant - \$13,704). The petitioner also submitted a 2008 Form W-2 for one individual ([REDACTED] [REDACTED]) who was not identified on the organizational chart submitted at the time of filing.

The organizational chart included brief descriptions of job duties for the beneficiary's subordinates. The petitioner indicated that both managers "oversee, manage, direct, coordinate day to day activities of company" and "hire/fire and supervise support personnel." The petitioner stated that the store assistant manager is responsible to "provide assistance to manager, manage clerical functions, provide customer support, and supervise subordinate personnel," although the chart depicts no subordinates for this position. With respect to the wholesale business, the petitioner stated that the sales officer is required to "oversee, direct, coordinate the distribution of merchandise to the customers as well as establish quotas and goals for the staff." Finally, the petitioner stated that the administrative assistant performs administrative and clerical duties.

The director denied the petition on September 10, 2010, concluding that the petitioner had submitted a vague duty description for the beneficiary's proposed position that failed to establish what he would be doing on a day-to-day basis. The director also noted that the petitioner had a limited number of employees which made it unclear whether the beneficiary would be acting primarily in a managerial or executive capacity. In addition, the director noted that according to the IRS Forms 941, Employer's Quarterly Federal Tax Return, for 2009, "the wages paid to seven employees are substantially low to be considered fulltime or professionals." In sum, the director concluded that the petitioner had failed to demonstrate that the beneficiary would allocate a majority of his time to executive or managerial duties.

The AAO affirmed the director's decision and dismissed the petitioner's appeal. The AAO determined that the position description provided for the beneficiary was too general, included several non-qualifying duties, and failed to explain what he would primarily do on a day-to-day basis as the chief executive of a company operating wholesale and retail businesses in two different states. The AAO also questioned whether the petitioner's retail business, which appeared to be staffed by four part-time employees, had sufficient personnel to relieve the beneficiary from performing non-qualifying duties associated with its routine operations.

On motion, counsel asserts that although the petitioner is a smaller company, the beneficiary qualifies as an executive as he directs and coordinates the operational activities of the company.

Furthermore, counsel contends that the AAO, in considering the petitioner's staffing levels, erred by listing the salaries of the petitioner's employees for 2006 rather than for 2008, the year in which the current I-140 was filed. Counsel explained that in response to the director's request for evidence, the petitioner provided salary information for all of the petitioner's employees for 2008 and 2009, and thus these new figures should have been considered by the AAO in reaching its determination.

With respect to the import/export division of the petitioner, counsel asserts that the beneficiary "directly supervises a sales manager, who possesses a bachelor of commerce degree, and quality control manager, who possesses a bachelor of science degree, copies of which the petitioner provided in response to the request for evidence." As such, counsel asserts that the beneficiary exercises "direct authority over two separate divisions of the company, sales and quality control, each of which is headed by professionals holding a baccalaureate degree." With respect to the convenience store, counsel asserts that the petitioner established that the beneficiary would primarily engage in supervising the store manager, who in turn supervises subordinate employees. Counsel acknowledges that the beneficiary may spend 20 hours per month performing day to day tasks necessary to operate the convenience store, but is otherwise engaged in the supervision of a manger and professional employees. Finally, counsel concludes by stating that "the petitioner has explained how the reasonable needs of its organization may be met by the services of the beneficiary as president and the additional six employees of [the petitioner]."

In support of the motion, the petitioner submits an affidavit from [REDACTED] the manager of the petitioner's convenience store. [REDACTED] discusses the store's staffing levels and states that the former assistant manager, [REDACTED] quit in April and May of 2008, respectively. [REDACTED] indicates that these employees were replaced by [REDACTED] who were hired as assistant manager in charge of accounts and assistant manager in charge of inventory. [REDACTED] indicates that while she and both assistant managers also perform typical cashier duties, she is in charge of supervising, scheduling and assigning tasks to the assistant managers. [REDACTED] provides a brief description of duties for each employee.

[REDACTED] confirms that the convenience store is open seven days per week for a total of 92 hours. She indicates that the beneficiary is present at the store approximately 15 hours per week, but states that he does not operate the cash register unless all other employees are unavailable, perhaps two to three times per month. [REDACTED] indicates that the day-to-day operations of the store can be carried out by one trained employee per shift on weekdays. She provides a sample weekly schedule and indicates that employees have down time between customers to perform tasks such as inventory, stocking, purchasing and accounting.

B. Analysis

Upon review, the petitioner has not established that it would employ the beneficiary in a qualifying managerial or executive capacity.

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).

Published case law clearly supports the pivotal role of a clearly defined job description, as the actual duties themselves 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); *see also* 8 C.F.R. § 204.5(j)(5). Beyond the required description of the beneficiary's job duties, USCIS reviews the totality of the record, and takes into account the nature of the petitioner's business, the employment and remuneration of employees, the duties performed by subordinate employees, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

The petitioner has consistently failed to provide a detailed description of the duties the beneficiary performs with respect to the convenience store/gas station business. Further the petitioner has provided inconsistent information regarding the amount of time he allocates to this part of the business. The petitioner previously stated that the beneficiary spends 60 percent of his 50 hour workweek (30 hours) in Georgia. On motion, the petitioner's store manager claims that the beneficiary "is present around 15 hours per week." Therefore, it appears that the store manager's affidavit may reflect the beneficiary's current work schedule, rather than the schedule he maintained at the time the petition was filed. Regardless, the petitioner did not provide any information regarding the day-to-day duties performed by the beneficiary when he is working in the retail location, beyond acknowledging that he fills in for the operational staff for up to 20 hours per month. 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Absent a description of the actual duties the beneficiary performs with respect to the convenience store business, the AAO cannot determine that the beneficiary's duties are in a managerial or executive capacity.

The petitioner did explain that a large portion of the beneficiary's duties will be allocated to overseeing the import/export business in New Jersey. Rather than providing a description of the beneficiary's duties within the context of the petitioner's own staffing levels, the petitioner stated that the beneficiary would perform the same duties he performed as a marketing/sales executive for the foreign entity, despite the differences in his level of responsibility, his job title, the size and nature of the companies and the functions managed by the beneficiary in each capacity. As such, the description provided little insight into what managerial duties he would perform as the executive director of a granite and ceramic tile wholesale company staffed by a part-time general manager, a sales officer and an administrative assistant.

For instance, several of the beneficiary's stated duties for the foreign entity referred to his supervision of quality control staff and subordinate sales managers, which the petitioner does not claim to have. While the petitioner indicates that it has a sales officer, the petitioner indicated that this employee oversees distribution of merchandise to customers and establishes quotas and goals for

sales "staff" which the petitioner also does not claim to have. It is unclear who is actually performing the sales function for the petitioner's New Jersey wholesale business.

Furthermore, the job description provided includes several other duties which are either non-qualifying or are inconsistent with the nature of the petitioner's business and thus not credible. For example, the petitioner indicates that the beneficiary would "conduct market research based on knowledge of and familiarity with customers' purchasing needs"; "concentrate on the technical aspects of products"; "maintain extensive knowledge base of company's products"; "concentrate on marketing and selling products through the sales team"; "prepare reports to outline status and market-worthiness of existing, new or future products"; and "work with research and development department." It appears that the beneficiary is performing the duties inherent to the marketing, sales and quality control aspects of its wholesale distribution business, rather than supervising subordinate employees who perform these duties. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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).

Overall, the petitioner has failed to provide detailed, consistent descriptions of how the beneficiary will allocate his time between the petitioner's wholesale and retail businesses, and how he will allocate his time among specific tasks. As such, the evidence of record does not establish that the beneficiary's primarily duties would be managerial or executive in nature.

On motion, counsel claims that the evidence of record is sufficient to establish that the beneficiary spends the majority of his time supervising managerial and professional employees, and allocates only a small portion of his time to performing non-qualifying duties. 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.

Counsel asserts that the petitioner's store manager is a supervisory or managerial employee. Counsel also states that, within the import/export division, the beneficiary supervises a "sales manager" with a bachelor of commerce degree and a "quality control manager" with a bachelor of science degree. Counsel indicates that the petitioner provided evidence of these employees and their educational credentials in response to the RFE. However, the record reflects that the petitioner has consistently stated that the employees of its wholesale/import division include a general manager, a sales officer and an administrative assistant and it has not provided educational credentials for any employees or previously claimed that any of them are professionals. Therefore, counsel's claim that

the beneficiary will supervise two professional employees is not persuasive. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

While the petitioner does indicate that it employs a manager for its wholesale division, the petitioner has not claimed that this employee is a supervisor or professional. Further, the petitioner has not established that the store manager is a supervisory or managerial employee, other than in position title. The petitioner indicates that the store manager is responsible for staff scheduling and oversight; however, the record reflects that all three store employees are engaged in the day-to-day functions of operating the store during their scheduled shifts. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Counsel further claims on motion that the petitioner established that the beneficiary will be employed in an executive capacity because he is "clearly engaged in planning, directing and coordinating the operational activities of the company." 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.*

Based on the deficiencies in the record with respect to the beneficiary's job descriptions, the petitioner has not established that the beneficiary spends the majority of his time "planning, directing and coordinating the operational activities" of the petitioning company as claimed. As discussed, the record contains little information regarding the beneficiary's actual duties or how he allocates his time among qualifying and non-qualifying duties. Further, as discussed below, the petitioner has not established that the company's subordinate employees would relieve the beneficiary from involvement in the day-to-day operations of the wholesale and retail divisions.

The AAO notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). 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)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Here, the petitioner indicates that it has three employees working in the Georgia retail location, not including the beneficiary. At the time of filing, the petitioner indicated that its store employees included two cashiers, an assistant manager and a manager. The petitioner now makes claims that would suggest that its initial organizational chart did not reflect the company's actual staffing at the time of filing. For example, the petitioner states on motion that [REDACTED] was hired to replace former assistant manager [REDACTED], who quit in April 2008. However, the organizational chart submitted in July 2008 identified [REDACTED] as an assistant manager and [REDACTED] as a part-time cashier. The petitioner indicates that [REDACTED], a cashier, had also quit and been replaced by [REDACTED] prior to July 2008, but this change was not reflected on the chart. While the petitioner submitted evidence that all of these employees worked during 2008, the exact structure of the company at the time of filing has not been consistently documented. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner has provided a brief job description for each employee at the retail location based on the newly claimed staffing structure. The petitioner indicates that the general manager will "oversee assistant managers, assessing performance and assigning specific asks and job duties; oversee financial and accounting operations; maintain records, track expenditures and recommend budget changes; analyze financial data prepared by assistant accounts manager." The petitioner indicates that the assistant manager/accounts is responsible to "prepare deposits slips; count and verify funds in safe; reconcile lottery/lotto tickets; postage stamps; money orders, vending machines, change machines and register tills." Finally, the petitioner indicates that the second assistant manager/inventory will "inspect quality of shelved merchandise on regular basis; check quantities of stocked merchandise and notify vendor if restocking in advance of normal schedule is required." In addition, the general manager and two assistant managers will run the cash register and store in separate shifts where, during the majority of the time, there is a single employee on duty. The petitioner also explained that "customer service and operation of the cash register are an integral part of sales and are part of every employee's job, however, during the work shift, there are times when no customers are present and the employees are free to perform other tasks, including inventory, stocking, purchasing and accounting."

Therefore, all of the employees given managerial job titles are actually operating cash registers, ordering inventory, stocking shelves, and performing other required daily tasks, and the petitioner acknowledges that the beneficiary may also be required to perform these duties at times. In addition,

the record does not fully support the petitioner's claim that the retail business requires only one employee during most shifts. In response to the RFE, counsel for the petitioner stated that "the business premises in Georgia consist of a retail sales store with office, storage area, food preparation/dining area and restrooms." The petitioner has not indicated that any of its employees perform duties associated with food preparation, cleaning or maintenance of the premises, receipt of deliveries, or back office work. While three employees may be sufficient to allow the store to have one employee present at any given time, the petitioner has not established that this staff relieves the beneficiary from involvement in the day-to-day operations of the business during the portion of time he spends working at the store.

With respect to the wholesale business, the petitioner asserts that the beneficiary oversees a manager, a sales officer and an administrative assistant. Although the petitioner indicates that the manager receives a salary of \$18,000, he earned only \$6,000 in 2008 and 2009. Further, the petitioner fails to provide sufficient information of the duties performed by the beneficiary's subordinate employees. As such, it is not possible to determine to what extent they relieve the beneficiary from performing non-qualifying duties associated with the wholesale distribution business, such as purchasing, sales, marketing, logistics and distribution-related duties.

Based on the foregoing, although the petitioner has assigned managerial job titles to four of its six employees, it has not established that it has a reasonable need for the beneficiary to perform duties that are primarily in a qualifying or managerial capacity, or that either of its two businesses has sufficient staff to relieve the beneficiary from performing non-qualifying duties. Accordingly, the AAO will affirm its prior determination and the petition will remain denied.

III. Managerial or executive capacity with the foreign company

The second issue to be addressed is whether the petitioner established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity.

In dismissing the petitioner's appeal, the AAO determined that the petitioner did not provide sufficient evidence to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

On motion, the petitioner submits a letter from the foreign employer describing in more detail the duties performed by the beneficiary with the company. Counsel also states that the beneficiary supervised "two major subdivisions of the organization, namely, the sales division and quality control division." The petitioner submitted an organizational chart of the foreign company with the initial petition. The chart shows that the beneficiary directly supervised 5 sales officers and 3 quality control employees.

The job description submitted on motion provides a greater understanding of the duties performed by the beneficiary when employed abroad and confirms that he performed a combination of qualifying and non-qualifying duties. While the job description indicates that the beneficiary relied on his subordinates for assistance with some tasks, it is evident that the beneficiary was directly involved in

market research and sales analysis, tabulating sales reports, preparing sales forecasts, identifying sales trends, and working with the research and development department. The petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary functioned primarily as a manager. Further, the record lacks a description of the job duties performed by the beneficiary's subordinates in the foreign company. 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)).

Accordingly, the petitioner has not submitted evidence on motion to overcome the AAO's previous determination with respect to the beneficiary's foreign employment.

IV. Conclusion

The petitioner has not provided sufficient evidence and explanations in support of its motion to reconsider to overcome the AAO's adverse findings. As such, the AAO affirms its previous determination that the petitioner failed to establish that the beneficiary was employed abroad or would be employed in the United States in a qualifying managerial or executive capacity.

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, the petitioner has not met that burden. Accordingly, the previous decision of the AAO will be affirmed and petition will remain denied.

ORDER: The motion is granted. The AAO's decision dated September 19, 2012 is affirmed and petition remains denied.