

(b)(6)

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

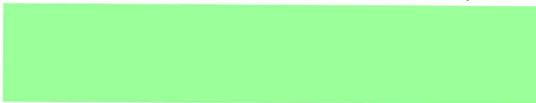


DATE: **FEB 25 2014**

OFFICE: TEXAS SERVICE CENTER

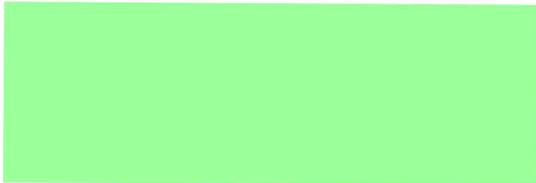
FILE: 

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 of the Texas Service Center ("the director") denied the preference visa petition. The matter was subsequently reopened on service motion at which time the director issued the first of two Notices of Intent to Deny (NOIDs). Following the issuance of the second NOID, the director denied the petition and certified the decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed and the petition will be denied.

The petitioner filed a Form I-140, Immigrant Petition for Alien Worker, 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 limited liability company, stated on the Form I-140 that it operates a media production business with seven employees. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition based on a finding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. The director certified his decision to the AAO pursuant to 8 C.F.R. § 103.4(a)(5) and advised the petitioner that it had 33 days to submit a brief. The petitioner timely filed a brief and additional evidence in response to the notice of certification.

Upon review of the entire record of proceeding, the evidence of record does not overcome the director's grounds for denying this petition. Accordingly, the director's decision to deny the petition will be affirmed.

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.

II. Procedural History

The petitioner filed the Form I-140 on May 4, 2011. The director subsequently issued a request for evidence (RFE) on September 12, 2011 and, after reviewing the petitioner's response, denied the petition in a decision dated January 9, 2012.

The director subsequently determined that the original decision was deficient in that it failed to comply with the provisions at 8 C.F.R. § 103.3(a), requiring the director to cite the specific reasons for denial. Therefore, the director reopened the matter on service motion on November 27, 2012. The director simultaneously issued a NOID, informing the petitioner that the evidence of record did not establish that: (1) the petitioner has a qualifying relationship with the beneficiary's foreign employer; (2) the foreign entity continues to do business; (3) the beneficiary was employed abroad in a qualifying managerial or executive capacity; (4) the beneficiary will be employed in the United States in a qualifying managerial or executive capacity; or (5) the petitioner had the ability to pay the beneficiary's proffered wage as of the date the Form I-140 was filed.

After U.S. Citizenship and Immigration Services (USCIS) received the petitioner's response to the first NOID, the director determined that further evidence and/or information was still needed in order to determine the petitioner's eligibility for the benefit sought. Accordingly, on February 26, 2013, the director issued a second NOID, indicating that he was "unconvinced" that the petitioner has a qualifying relationship with the foreign entity or that the beneficiary had been employed abroad, and would be employed in the United States, in a qualifying managerial or executive capacity.

The petitioner responded to the second NOID with a statement from counsel, dated April 5, 2013, along with several supporting documents, which established the continued existence of the beneficiary's former employer abroad. Counsel challenged the director's use of the term "unconvinced," which counsel contended was synonymous to raising the standard of proof beyond the preponderance of the evidence standard.

After reviewing the petitioner's submissions, the director determined that the petitioner failed to establish eligibility for the immigration benefit sought. Specifically, the director concluded that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. The director therefore denied the petition for a second time in a decision dated

April 29, 2013, which is currently under review as a result of the director's decision to certify it to the AAO. The director expressly asked the AAO for clarification in determining whether the petitioner's claim - that the beneficiary spends the majority of her time performing executive job duties - is credible in light of evidence showing that the petitioner's support staff is primarily comprised of part-time employees.

In response to the Notice of Certification, counsel submits a brief disputing the merits of the director's decision. A comprehensive discussion of counsel's arguments and other relevant evidence is included in the analysis portion of this decision.

III. Managerial or Executive Capacity

The primary issue to be addressed is whether the petitioner established, by a preponderance of the evidence, that it will employ the beneficiary in a qualifying managerial or executive capacity.

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.

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.

In general, when examining the executive or managerial capacity of the beneficiary, USCIS reviews the totality of the record, starting first with the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the 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). USCIS will then consider this information in light of other relevant factors, including the size of the petitioner's staff, job descriptions of the beneficiary's subordinates and other employees who carry out the petitioner's daily operational tasks, the nature of the business conducted, and any other facts that may contribute to a comprehensive understanding of the beneficiary's actual role within the petitioning organization.

At the time of filing, the petitioner described the beneficiary's duties as follows:¹

- Formulating and directing all policies and procedures in addition to planning and directing the company's expansion and selection of new business and marketing opportunities (20%);
- Developing staffing plans and establishes and implements work strategies and schedules for each phase of expansion (15%);
- Reviewing project proposals and determines methods and procedures for accomplishing these objectives (10%);
- Planning and developing cohesive marketing and public relations policies designed to improve the company's image and relations with customers, suppliers, employees and the public in general (5%);

¹ The petitioner provided the same list of duties in a letter dated November 18, 2011, which was submitted in response to the director's initial RFE. The percentages allocated to each duty were added at that time.

- Reviewing operations reports, sales reports and financial statements to determine progress and status in attaining objectives (10%);
- Representing the company at trade shows and conventions (10%);
- Exercising wide latitude in discretionary decision making and holds the authority to hire, dismiss and recommend the appropriate personnel actions (10%);
- Assisting with product development in order to ensure that the company is kept abreast of current conditions and trends (5%); and
- Overseeing the Creative Team and providing final decisions on product quality (15%).

The petitioner's response to the RFE also included the following list of job duties for the same position:

- Implement Policies 10%
Administration Consultation
- Follow-up on contracts and new business leads 30%
Managing investments and finances
Review all the activities of the TV production and design
- Define roles for employees and oversee day-to-day activities 20%
- Approve all creative projects 20%
Create Concepts
Review Technical Progress
- Oversee international business development 20%

In response to the first NOID, the petitioner submitted the initial list of job duties for a third time, but altered the percentage of time allocated to most of the listed areas of responsibility. Specifically, the petitioner stated that the beneficiary will allocate 30% of her time formulating and directing policies and procedures; 10% of her time developing staffing plans and implementing work schedules; 10% of her time reviewing project proposals; 12% of her time planning and developing marketing and public relationship policies; 15% of her time reviewing operations reports, sales reports and financial statements; 1% of her time representing the company at trade shows; 10% of her time exercising wide latitude in discretionary decision making; 5% of her time assisting with product development; and 7% of her time overseeing the creative team.

Upon review, the initial job description failed to clarify how the beneficiary would allocate her time among qualifying and non-qualifying duties. Several of the job duties, such as "establishing wide latitude in discretionary decision-making" and "formulating and directing all policies," paraphrased the statutory definition of executive capacity at section 101(a)(44)(B) of the Act. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof.

Fedin Bros. Co., Ltd. v. Sava, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Other duties, such as "assisting with product development" and "providing final decisions on product quality," were poorly defined and cannot be readily classified as qualifying managerial or executive duties.

Therefore, the director reasonably issued an RFE in which he requested a list of "all specific daily duties (rather than categories of duties)" and the "percentage of time spent on each duty." The petitioner responded to the RFE with the same list of duties that the director had already reviewed and found to be lacking in specificity. Therefore, to the extent that the petitioner failed to add any detail to the initial position description, the job description was non-responsive to the director's request. 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. at 1103, *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In addition to failing to fully respond to the RFE, the petitioner introduced a significant inconsistency into the record by providing a second description of the beneficiary's duties that bears little resemblance to the one submitted simultaneously. The petitioner provided no explanation for the dissimilar job descriptions and did not attempt to reconcile how the beneficiary would allocate 100% of her time to each of two different sets of duties. For instance, whereas the first job description allocated 20% of the beneficiary's time to overseeing and implementing policies and procedures and directing expansion, the second job description indicated that 10% of the beneficiary's time would be allocated to implementing policies and "administration consultation." The petitioner did not indicate what specific steps the beneficiary would take to implement policies or what the beneficiary's responsibility for "administration consultation" would entail. The petitioner did not translate these broad and ambiguous statements into actual daily tasks; nor did the petitioner explain how these responsibilities pertain specifically to its media and advertising business.

The petitioner initially indicated that the beneficiary would allocate 15% of her time to managing marketing and advertising plans and strategies, while the second percentage breakdown stated that the beneficiary would allocate 30% of her time to following up on contracts and business leads, managing investments and finances, and reviewing television production and design activities - responsibilities that appear to be unrelated to the oversight responsibility provided in the first job description. The beneficiary's responsibility for following up on business leads is indicative of a sales-based task and thus cannot be readily identified as a task that would be performed within a qualifying managerial or executive capacity.

The petitioner also failed to specify the beneficiary's role or daily tasks associated with managing investments and finances or explain how her role would be different from the role of the finance manager. Moreover, there was an inconsistency between (1) the petitioner's originally submitted organizational chart, which identified [REDACTED] as a finance manager, and (2) [REDACTED]

job description as offered in the RFE response, in which this individual's position was identified as that of finance assistant rather than finance manager.

In addition, while the petitioner initially stated that the beneficiary would oversee the creative team and provide final decisions on product quality, the job duties submitted in response to the RFE indicated that the beneficiary would have a more significant involvement in the creative process that would include creating concepts and reviewing technical progress, activities which would require 20% of her time. Finally, the petitioner added a new responsibility for "international business development" which was not articulated in the initial job description. The petitioner did not further elaborate regarding what specific duties the beneficiary would perform in this regard, but indicated that these activities would require another 20% of her time. None of the information provided in the record indicates that the petitioner engages in international business, and thus this area of responsibility is too poorly defined to be classified as managerial or executive in nature.

In response to the first Notice of Intent to Deny, after the director once again observed that the list of nine duties provided at the time of filing was lacking in specificity, the petitioner essentially re-submitted the same list of job duties. However, without explanation, the petitioner changed the percentages of time allocated to each of the nine areas of responsibility. The petitioner added a brief explanatory statement for each duty but failed to provide the level of specificity required to convey what the beneficiary would do on a day-to-day basis. For example, the petitioner stated that the beneficiary's responsibility for "overseeing the Creative Team and providing final decisions on product quality" requires her to "approv[e] all final products prior to completion and submission to the client." Again, 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, *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In sum, the petitioner had multiple opportunities to provide additional information regarding the beneficiary's proposed duties. It is reasonable to expect that the additional information would be consistent, or at least not be inconsistent, with any of the petitioner's prior submissions addressing the same position within its organization. The petitioner's simultaneous submission of two disparate job descriptions for the same position in the same RFE response undermines the probative value of both descriptions. Further, the petitioner's assignment of two different percentage breakdowns to the same list of duties further undermines the petitioner's claims regarding how the beneficiary allocates her time. 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). Finally, none of the position descriptions submitted subsequent to the date of filing add any significant additional specificity to the list of duties initially submitted.

Bearing in mind the statutory requirement that a multinational manager or executive allocate the primary portion of his or her time to performing tasks within a qualifying managerial or executive capacity, a petitioner cannot establish a beneficiary's eligibility by providing inconsistent job

descriptions or by providing information that is so general that the beneficiary's specific daily tasks cannot be easily ascertained and understood within the context of the petitioner's business operations. Based on the current record, the AAO is unable to determine whether the claimed managerial duties would constitute the majority of the beneficiary's duties, or whether the beneficiary would primarily perform non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish with any consistency what proportion of the beneficiary's duties would be managerial in nature, and what proportion would actually be non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

While the statutory provisions do not require any beneficiary 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 in the proposed position would be only incidental to the position in question. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In the present matter, the job descriptions offered by the petitioner are deficient for all of the above stated reasons and fall significantly short of establishing that the beneficiary's proposed employment would, more likely than not, primarily entail the performance of tasks within a qualifying managerial or executive capacity.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

In addition to the deficiencies and inconsistencies described above with regard to the content of beneficiary's job descriptions, the record also contains inconsistent evidence regarding the petitioner's staffing levels and organizational structure. The petitioner stated on the Form I-140 at Part 5 that it had seven employees at the time of filing. The petitioner's initial evidence included an organizational chart, which depicted a total of eight employees, including the beneficiary. The chart showed the beneficiary directly overseeing one employee - the production and marketing manager - who was depicted as overseeing the following six staff members: a sales and PR manager, a cinematographer, a technical and administrative manager, a sales assistant, a finance manager, and an administrative assistant.

The petitioner's RFE response included an organizational chart that depicted an altered organizational hierarchy with an additional managerial employee, despite the fact that both charts listed the same eight employees. In the updated chart, the beneficiary was shown as directly overseeing two managerial employees - the production and marketing manager as well as the

technical and finance manager, the latter of which was not previously identified as a managerial employee other than in position title. The production and marketing manager was shown as overseeing three employees - a sales and PR manager, a sales assistant, and a videographer - while the technical and finance manager was shown as overseeing a finance assistant and an administrative assistant.

In addition, the petitioner submitted inconsistent evidence regarding the number of employees working for the company at the time of filing.² Although the petitioner claimed seven employees on the Form I-140 and submitted organizational charts with eight employees, its IRS Form 941, Employer's Quarterly Federal Tax Return for the second quarter of 2011 indicated that the petitioner had no more than five employees at the time of filing. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Here, the inconsistencies are numerous, commencing with the claim the petitioner made in the Form I-140, continuing on to a different claim as indicated in the petitioner's organizational chart, and ending with an entirely different set of facts as presented in the petitioner's quarterly tax return for the relevant time period. The petitioner has neither acknowledged nor provided evidence to resolve the inconsistencies concerning the number of employees the petitioner had at the time the petition was filed. In a brief submitted on certification, counsel states that the petitioner employed four to eight workers in 2010 and between three and six workers in 2011. Accordingly, the petitioner's two organizational charts depicting eight workers did not provide an accurate illustration of the company's actual staffing levels, and the petitioner makes no effort to clarify who was actually working for the company as of the date of filing. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

While the director reached an adverse determination by focusing on the number of full-time employees the petitioner had at the time of filing, an equally critical concern is the inconsistent evidence the petitioner provided to establish exactly which specific positions were filled and which were vacant when the petition was filed.

Further, while the petitioner did issue IRS Form W-2 Wage and Tax Statements to a total of eight workers in 2010, six of the employees earned annual salaries of \$2,500 or less, while only the beneficiary and the production and marketing manager earned salaries commensurate with full-time employment. There is no evidence to suggest that the petitioner's lower-level employees converted to full-time status between the end of 2010 and March 2011 when the petition was filed. Again, the

² The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

petitioner provided no evidence to confirm which employees were actually on its payroll at the time of filing.

Counsel fails to acknowledge the significance of the vacancies in the staffing hierarchy, as evident by his general assertion that regardless of the fluctuation in the numbers of support staff, "the record reflected that the Petitioner had an adequate number of staff employed during 2010, 2011, and 2012 to perform the non-qualifying duties" However, there is a considerable distinction between a staff of five employees and a staff of eight. If the distinction were truly insignificant, it is doubtful that the petitioner would continue to consistently depict eight employees on its organizational chart when in fact it likely had no more than five at the time the petition was filed. It is unclear why the petitioner did not indicate the proper number of employees when completing part 5 of the Form I-140. Moreover, the evidence on record does not clarify how an organization of four supporting employees would be effective in relieving the beneficiary from having to primarily perform non-qualifying tasks.

As required by section 101(a)(44)(C) of the Act, 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. However, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15.

At the time of filing, the petitioner submitted copies of six nearly identical consulting agreements with the following clients:

None of the agreements had expired as of the date of filing and these contracts were submitted as evidence of the petitioner's ongoing business activities. The petitioner, as the consultant, agreed to allocate on average "20 hours per Consultant seek [sic] in the performance of services pursuant to this Agreement" in exchange for a set monthly fee ranging from \$2,000 to \$5,000 from each client.³ The services the petitioner agreed to provide include: "monitoring of the Media Campaign for the products"; "write concepts and scripts for the ads on the launched products in the US"; "monitoring of publicity of all nature and genre"; "decide the graphics, design, of the campaigns"; and "in case of events invite the performance artists and groups from India and direct the stage performance and productions."

³ The petitioner's agreement with [redacted] is similar to the other agreements in content, but states: "the Consultant shall work on average 20 hours per Consultant per week."

The evidence suggests that the petitioner has agreed to allocate, on average, 20 hours per client per week, for a total of 120 hours per week, to client services alone. However, based on the petitioner's evidence, it has not established that it has the subordinate staff to allocate 480 hours per month to its clients' projects (requiring a full-time, subordinate staff of at least 12 employees). Further, the job descriptions for the existing subordinate staff do not indicate that they are primarily engaged in providing these consulting services to the petitioner's clients.

The petitioner indicates that the production manager and part-time videographer/production assistant relieve the beneficiary from performing creative and production-related tasks. However, the petitioner has not documented its employment of the videographer in 2011 (he received \$2,500 in wages in 2010), or explained how a single, part-time employee could fulfill the petitioner's obligations under the terms of its consulting agreements.

Moreover, the beneficiary's resume lists her personal achievements in the United States as: "launched and produced program[s] for [REDACTED]"; "launched and produced news, current and community affairs progra[m] in [REDACTED]"; "produced program for [REDACTED] and individuals"; "initiated action for the brides in [REDACTED] community"; and "research and video documentation on [REDACTED]". None of these responsibilities are listed among the beneficiary's stated duties. Further, this information, when considered in light of the totality of the evidence submitted, suggests that the beneficiary will more likely than not be involved in the creative and production tasks necessary for the petitioner to provide its services. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

While counsel refers to a holding in an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity even though he was the sole employee, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the non-precedent decision. Thus, counsel has not established that the holding in the non-precedent decision may be applied to the matter at hand. Furthermore, 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.

The petitioner has consistently claimed that the beneficiary will be employed in an executive capacity. However, for the reasons discussed above, the evidence fails to support the petitioner's claim. 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.*

Although the petitioner has consistently indicated that the beneficiary would be at the most senior-level employee in the petitioner's organizational hierarchy as its majority owner and president, it has failed to provide a probative, consistent description of her duties or consistent evidence documenting the number and types of employees working for the company at the time of filing. Therefore, the petitioner has not established that the beneficiary would primarily perform qualifying duties or that it has sufficient support staff to relieve the beneficiary from involvement in the day-to-day operations of the company.

In light of the considerable deficiencies of the job descriptions offered in support of this petition and the petitioner's failure to consistently and accurately describe its actual staffing levels at the time the petition was filed, the petitioner has failed to establish that the beneficiary will more likely than not be employed in a managerial or executive capacity.

IV. Preponderance of the Evidence

A remaining issue in this matter is whether the director applied the appropriate standard of proof in adjudicating this petition. Counsel asserts that the petitioner established by a preponderance of the evidence that the beneficiary would allocate more than half of her time to the performance of "purely executive duties." Further counsel contends that the director applied a higher standard of proof in concluding that "it is difficult to credit that the beneficiary can dedicate over 50% of her time to purely executive or managerial duties."

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I. & N. Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In keeping with this standard of proof, each piece of evidence must be examined for its relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. *Id.*

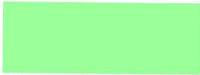
Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (discussing "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Here, the petitioner did not establish by a preponderance of the evidence that the beneficiary would more likely than not be employed in the United States in a qualifying managerial or executive capacity. As previously discussed, while the petitioner has provided a number of job descriptions pertaining to the beneficiary's proposed position, they lacked the necessary detailed information regarding the beneficiary's actual duties. Moreover, a comparison of the various job descriptions that were submitted in response to the director's RFE and NOID shows that not only were those job descriptions lacking in content, but they were also significantly inconsistent in terms of the time constraints that were assigned to similar job responsibilities.

While it is expected that each successive job description may contain more information than the job description that had been previously submitted, no two job descriptions should be so distinct as to preclude USCIS from being able to identify them as belonging to the same position. As previously noted, the job descriptions provided in the present matter are inconsistent - first, indicating that the beneficiary would allocate 100% of her time to two entirely different sets of job duties and, second, subsequently assigning different percentages to the same job duties.

The petitioner further undermined the credibility of its claims by submitting documents, specifically, an organizational chart and a quarterly federal tax return, which contain different information as to the number of employees the petitioner had when the Form I-140 was filed. Given the conflicting information in the record, the AAO is unable to determine which positions were actually staffed or how the subordinate part-time employees relieve the beneficiary from performing non-qualifying tasks. Moreover, a review of the beneficiary's résumé gives the AAO cause to further question whether the petitioner's job offer for a position within a primarily managerial or executive capacity was bona fide, given that the résumé listed numerous job duties that were not included in the job descriptions that the petitioner provided in response to the RFE and NOID. A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir. 2003). However, the supporting evidence contains numerous inconsistencies regarding factors that are highly relevant to the petitioner's eligibility. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

In this case, the discrepancies catalogued above lead the AAO to conclude that the evidence of the beneficiary's claimed eligibility as a multinational manager or executive is not credible. Therefore, while the AAO does not support the director's use of undefined terminology when he concluded that "it is difficult to credit" the beneficiary with the ability to dedicate over 50% of her time to purely executive or managerial duties, the fact that the petitioner submitted inconsistent evidence to support its claims, effectively undermines the credibility of such evidence and precludes the petitioner from establishing that the beneficiary would more likely than not be employed in the United States in a qualifying managerial or executive capacity. Accordingly, the petitioner has not established the beneficiary's eligibility for the requested immigrant visa classification by a preponderance of the evidence.



V. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

ORDER: The director's decision dated April 29, 2013 is affirmed. The petition is denied.