

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: **JUL 02 2014** OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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. The matter first came before the Administrative Appeals Office (AAO) on appeal, which was summarily dismissed. We will hereby reopen this proceeding, *sua sponte*, in order to address evidence that was previously submitted in support of the petitioner's appeal.¹ The appeal will be dismissed.

The petitioner is a Delaware corporation that seeks to employ the beneficiary as its CEO. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition, concluding that the petitioner failed to establish that (1) the petitioner and the beneficiary's foreign employer have a qualifying relationship; and (2) the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

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

¹ The regulation at 8 C.F.R. § 103.5(a)(5)(ii) states that a Service officer, on his or her own motion, may reopen a Service proceeding or reconsider an adverse Service decision and issue a new decision that is adverse to the petitioner.

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 and Facts

The record shows that the petition was filed on May 22, 2013 with a supporting statement, which described the U.S. entity as one of several subsidiaries that are part of a worldwide organization that operates as a full-service trade finance system vendor. The petitioner's supporting statement contained the following description of the beneficiary's proposed employment in the United States:

As Chief Executive Officer, [the beneficiary] is responsible for the direction and coordination of activities and operation of the corporation, planning, formulating, and implementing administrative and operational policies and procedures, engaging in long-range planning and identifying business opportunities in the U.S. and international markets, and supervising other managers and professionals.

[He] will use his independent discretion and authority in identifying and cultivating new information resources, and developing strong and mutually beneficial relationship [sic] with new and prospective clients in the field of sales and customer service. [The beneficiary] will direct the organization's financial goals, objectives, and budgets, oversee the investment of funds and manage associated risks and supervise cash management activities. In addition, [his] duty [sic] will include formulating company policies, managing daily operations, and planning the use of materials and human resources.

[The beneficiary] will also meet with staff members to direct the identification of opportunities for modification or new applications development that will improve [the petitioner's and its affiliates'] system capabilities to meet client needs. This includes providing guidance in the development of system objectives for the banking application, and obtaining management's commitment of resources to move the project forward. In addition, [the beneficiary] will oversee the establishment of requirements, deadlines, and deliverables, and ensure proper communication of these to the resource project team. Once the application is modified or developed, [the beneficiary] will oversee the establishment of training programs and materials for [the petitioner]'s personnel and clients, and will conduct presentations and customized training sessions when needed for current and prospective clients.

The petitioner also provided supporting evidence in the form of a stock certificate, showing that the petitioner issued 100 shares of its stock to [redacted] as well as a corporate tax return for 2011, including supplemental Form 5472, which listed [redacted] as the petitioner's foreign shareholder and the following six related corporations: (1) [redacted]

(2) [redacted] (3) [redacted] (4) [redacted]
(5) [redacted] and (6) [redacted]. Each page of the Form

5472 named [REDACTED] as the petitioner's foreign shareholder and stated that [REDACTED] located in Bermuda, was an indirect foreign shareholder, thus indicating that the latter entity directly owned [REDACTED]. Lastly, the petitioner provided corporate documents pertaining to [REDACTED]. Showing that [REDACTED] owned 4,800 shares, [REDACTED] owned 1,920 shares, [REDACTED] owned 1,200 shares, and [REDACTED] owned 4,080 shares of [REDACTED].

After reviewing the petitioner's submissions, the director determined that the petitioner did not provide sufficient evidence to establish that approval of the petition was warranted. Accordingly, on June 28, 2013, the director issued a notice requesting additional evidence (RFE). Among the issues addressed in the RFE was that of the petitioner's qualifying relationship with [REDACTED] the beneficiary's employer abroad. Namely, the director instructed the petitioner to provide evidence establishing that the petitioner and the beneficiary's employer abroad are similarly owned and controlled. The petitioner also addressed the beneficiary's proposed employment in the United States, instructing the petitioner to provide a statement describing the beneficiary's specific daily job duties and to indicate what percentage of time the beneficiary would allocated to each individual duty. The director also instructed the petitioner to provide its organizational chart identifying the beneficiary's subordinates by name and position title and listing each subordinate's job duties and level of education. The petitioner was expressly instructed to disclose its use of contract labor, if any, and to submit evidence of such use and establish the job duties they performed. In addition, the director instructed the petitioner to provide copies of degrees/diplomas for each of the beneficiary's subordinates along with the petitioner's quarterly tax returns for 2012 and 2013.

In response, the petitioner provided the following documents addressing the issue of the petitioner's qualifying relationship with the beneficiary's foreign employer:

1. A share purchase agreement between [REDACTED] and [REDACTED] showing the former entity's sale of its shares in [REDACTED] to the latter entity.
2. A written resolution issued by [REDACTED] agreeing to transfer its holdings in [REDACTED] to [REDACTED].
3. The petitioner's certificate of incorporation.
4. A stock subscription agreement, dated March 8, 2000, showing the petitioner's sale of 100 shares of its stock to [REDACTED] accompanied by a stock certificate, also dated March 8, 2000, conveying the same information.
5. Corporate documents pertaining to [REDACTED] establishing its corporate existence on the Islands of Bermuda.

With regard to the beneficiary's proposed position with the U.S. entity, the petitioner also provided a copy of its organizational chart depicting a hierarchy comprised of eight positions with the beneficiary's position depicted at the top of the hierarchy. The chart depicted three positions – a project services director, a business development director, and a support manager – as the beneficiary's three direct subordinates. The chart provided the names, job duties, and educational credentials for the business

development director and support manager, indicating that the position of project services director was vacant, despite naming two consultants as the direct subordinates of the project services director position.

The petitioner also provided the following percentage breakdown of the beneficiary's "major responsibilities" as the petitioner's CEO:

1. Direction and coordination of activities and operation of the company in the United States of America, Canada and some South American countries, among others[,] operational budget and cash flow management, supervision of sales and marketing initiatives, customer support, customer engagements, administrative issues, office management, etc. – 30%
2. Identifying business opportunities in the U.S. and international markets, ensure [sic] that these opportunities are addressed appropriately and aggressively. – 30%
3. With Sales Director, review current/existing Prospect and Sales engagements, authorize assignment of resources and budgets. – 12%
4. With Project Directors and Managers, evaluate existing customer engagements, project progress, risks and new opportunities for business. – 10%
5. With the Support Manager, review existing KPIs, Customer and Project issues, Response times, escalations and risks. – 7%
6. Supervising other managers and employees, including hiring and firing resources, interviewing staff and performing staff assessments. – 3%
7. To adjust all employees' salary [sic] by evaluating their performance as well as decide each employee's bonus allocation accordingly at the end of each year[.] – 2%; [sic]
8. Planning, formulating, and implementing administrative and operational policies and procedures for [the petitioner]. – 2%
9. With the Technical Department[,] ensure smooth operational ability, budgeting and cost effectiveness, including hardware and software asset management, online systems . . . , administrative system[s], staff materials, etc. – 2%
10. Reporting to [redacted] board of directors, including financial goals, objectives, and budgets, investment of funds, associated risks and cash management activities. – 1%

The petitioner also provided a separate list of the beneficiary's daily job duties without time allocations. That list consists of the following:

1. Meet [s]upport and [t]echnical team, ensuring that the support operation is:
 - a. Running in accordance to the SLA's established with [the petitioner's] customers[.]
 - b. Evaluate risks and ensure mitigating actions are being taken.
 - c. Assess if escalations are required to CS Corporate Second Line support[.]
 - d. Follow up on existing escalations, determine[,] with the support manager[,] what actions to take.

2. Meet [s]ales staff, discuss the current initiatives and prospects. Ensuring [sic] that all sales opportunities are being covered appropriately, discuss current status, sales strategies and approaches to each and every opportunity.
3. Meet [p]roject [m]anagers, and[,] if required[, c]onsultants, to evaluate current status of customer engagements/projects[, e]nsuring:
 - a. Projects are on track and customers are being invoiced on time[.]
 - b. Projects are on budget and correctly staffed[.]
 - c. Evaluate existing projects risks and ensure these are being addressed[.]
 - d. Discuss any issues that would require intervention from CS Corporation [d]evelopment [c]entre[.]
 - e. Address any project escalations[.]
 - f. Assess new business opportunities and actions to take.
4. Travel and meet [c]ustomers, follow up on existing projects, discuss new opportunities, inform them of [the petitioner's] initiatives in the market and answer any questions they find relevant.
5. Participate in [s]ales and [m]arketing initiatives where this is deemed strategic or relevant to [the petitioner's] business.
6. Plan marketing initiatives such as road shows, conferences and other events [the petitioner] will participate [in]. Review materials and discuss/assign resources.
7. Meet with the company secretary and accountant to review [the petitioner's] [c]ash [f]low, P&L, [i]nvoices and [r]eceivables. Follow up on [a]ccounts [r]eceivable, ensuring these are followed up and paid on time; [sic]
8. Interview new employees.
9. Review staff assessments, review staff financial packages and decide on pay raises and bonuses[.]
10. Report to CS Corporation CEO, providing:
 - a. [The petitioner's] financial status, including [c]ash [f]low, and [p]rofit & [l]oss, [r]eceivables, [r]isks and [i]ssues[.]
 - b. Sales forecasts[.]
 - c. Marketing initiatives and results[.]
 - d. Issues and [e]scalations[.]
11. Participate in annual CS Corporate Management meetings, prepare [the petitioner's] status and presentations, [and] discuss company strategy and current initiatives.
12. To [sic] monitor daily, weekly, monthly, quarterly, semi-annual and annual business reports generated by each department to ensure the completeness, accuracy and compliance by signing on the related reports; [sic]
13. . [sic] Additional daily and weekly activities include:
 - a. Attending additional meetings with the CEO and Senior executives when required[.]
 - b. Reporting and analyzing weekly financial performance for board report.
 - c. Making presentations, developing and updating current strategies for CEO reporting.
 - d. Independent authority regarding personnel hiring and firing.

- e. To evaluate subordinators' [sic] performance.
- 14. Prepare support for [c]orporate/[s]trategic sales initiatives, manage preparation and test of demo systems and ensure remote access.

Lastly, the petitioner provided the requested quarterly tax returns, including the tax return for the 2013 second quarter during which the petitioner filed its Form I-140. The tax return shows that the petitioner paid wages to a total of four employees during that quarter, thus indicating that the petitioner had no more than four employees at the time of filing.

After reviewing the petitioner's submissions, the director determined that the petitioner failed to establish eligibility for the immigration benefit sought herein. First, the director concluded that the petitioner failed to establish that it had a qualifying relationship with the beneficiary's foreign employer. The director observed that the petitioner provided a sale and purchase agreement regarding the sale and purchase of share capital of [REDACTED] without explaining how this transaction relates to either the petitioner or the beneficiary's foreign employer. Second, the director concluded that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director determined that the petitioner's limited organizational hierarchy – comprised of the beneficiary, five employees, and two consultants – would require the beneficiary to perform operational tasks that are outside the realm of what would be deemed as being within a qualifying managerial or executive capacity. The director therefore denied the petition.

Counsel, on behalf of the petitioner, filed an appeal seeking to overcome the director's findings. Upon review, and for the reasons stated below, we find that the petitioner has failed to establish that it has a qualifying relationship with the beneficiary's employer abroad or that the beneficiary will be employed in a primarily managerial or an executive capacity.

III. Issues on Appeal

As indicated above, there are two primary issues that will be addressed on appeal. First, we will determine whether the petitioner provided sufficient evidence to establish that the petitioner and the beneficiary's employer abroad have a qualifying relationship. Second, we will address the beneficiary's proposed position with the U.S. entity to determine whether the petitioner provided sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

A. Qualifying Relationship

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally*

§ 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

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

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

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

In addition, the regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Assoc. Comm. 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362. Without full

disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

In the present matter, the petitioner states that it is an affiliate of [REDACTED] the beneficiary's foreign employer, based on the claim that both entities are wholly owned subsidiaries of [REDACTED] the common parent entity. However, the record in the present matter does not support this claim.

The supporting evidence includes a stock subscription agreement and corresponding stock certificate, both of which identify [REDACTED] as the petitioner's owner. Specifically, the stock certificate indicates that the petitioner issued 100 shares of its stock to [REDACTED] which, according to Form 5472 of the petitioner's 2011 and 2012 tax returns, is located in [REDACTED] United Kingdom. The record indicates that [REDACTED] and [REDACTED] are two separate entities. This is demonstrated in the corporate documents pertaining to [REDACTED], which indicate that the latter is an entity that is located in Bermuda and whose shares were previously owned by four individuals in various proportions. The record does not contain evidence to establish a relationship between [REDACTED] which the petitioner claimed as its owner in its October 26, 2012 supporting statement, and [REDACTED] which the above noted documents name as the petitioner's owner; nor does the record establish that the two names apply to the same company. In addition, the record contains no other evidence, such as a stock certificate ledger or stock certificate registry belonging to the petitioner, to establish that the petitioner did not issue shares beyond those issued to [REDACTED]. We find it reasonable to inquire into other potential stockholders, given that the petitioner's stock certificate clearly indicates that the petitioner is authorized to issue a total of 3,000 shares and has provided a single stock certificate to show that only 100 of those shares have been issued.

Although the petitioner provided more documentation in its RFE response, the additional evidence did not pertain to the petitioning entity. Rather, the evidence pertained to the beneficiary's foreign employer and established that the [REDACTED] group of companies underwent restructuring, which resulted in a written resolution, dated February 6, 2013, and a sale/purchase agreement, also dated February 6, 2013, which effectively transferred ownership of the foreign entity from [REDACTED] located in [REDACTED] to [REDACTED] located in Hong Kong.

In addition, while the petitioner now provides a document titled, "Register of Members," showing that the holding company became the majority owner of [REDACTED] – the entity claiming to be the common parent of the petitioner and the beneficiary's employer abroad – as of February 24, 2012, the evidence of record does not establish that [REDACTED] is or has been an owner of the petitioning entity. As previously noted, all documentation pertaining to the petitioner's ownership named [REDACTED] of [REDACTED] U.K., not [REDACTED] of Bermuda, as its owner. 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).

We further note that the petitioner provided no documentation to establish the ownership of [REDACTED] the entity that the petitioner's stock certificate, stock subscription agreement, and the petitioner's 2011 and 2012 tax returns identified as the petitioner's owner. In addition, despite the common location of [REDACTED] and [REDACTED] the record contains no evidence that would lead to the conclusion that these names are interchangeable and pertain to the same entity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In summary, the record fails to establish that the petitioner and the beneficiary's former employer abroad have been commonly owned by the same holding company since the date the petition was filed. While the [REDACTED] name is common to the names of both entities and their respective chains of ownership, this commonality is not sufficient to establish that the petitioner's claims and the claims made in the organogram that was submitted on appeal are true. As indicated above, the evidence provided only shows that the beneficiary's foreign employer is owned by the holding company, either directly or indirectly. The same is not true, however, of the petitioner, whose ownership evidence indicates that it is owned by [REDACTED]. The record contains no evidence to establish that ownership of [REDACTED] was either transferred to or that it actually originated with the same holding company – [REDACTED].

In light of the various deficiencies and inconsistencies discussed above, we cannot conclude that the petitioner provided sufficient documentation to establish the existence of a qualifying relationship with the beneficiary's employer abroad. Therefore, on the basis of this initial finding of ineligibility the instant petition cannot be approved.

B. Managerial or Executive Employment in the United States

Next, we will address the director's second adverse finding concerning the beneficiary's proposed employment with the petitioning U.S. entity. As previously indicated, the petitioner must furnish a written job offer that clearly describes the beneficiary's proposed job duties and indicates that the beneficiary's proposed employment will be in a managerial or executive capacity. 8 C.F.R. § 204.5(j)(5).

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.

In general, when examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the petitioner's description of the beneficiary's job duties. See 8 C.F.R. § 204.5(j)(5). Published case has determined that the duties themselves will reveal the true nature of the beneficiary's employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Also critical to this analysis are factors such as staffing size, job descriptions of the beneficiary's subordinates and other employees who will 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.

Turning to the beneficiary's description of job duties, the record shows that the petitioner failed to follow the director's express RFE instructions, asking the petitioner to list the beneficiary's job duties with time constraints to establish that the beneficiary's time would be primarily allocated to tasks within a qualifying capacity. Although the petitioner provided a job description containing a percentage breakdown, large time allocations were assigned to overly generalized job responsibilities, which failed to convey a meaningful understanding of the beneficiary's daily tasks. Namely, the petitioner allocated 30% of the beneficiary's time to directing and coordinating activities, including cash flow management, supervision of sales and marketing, customer support and engagements, administrative issues, and office management. The petitioner did not expressly discuss the beneficiary's specific role with respect to any of these activities. For instance, the petitioner did not state which tasks demonstrate the beneficiary's management of the petitioner's cash flow or his supervision of sales and marketing. In addition, without further explanation, the beneficiary's direct involvement in customer support and customer engagements as well as administrative issues and office management indicates that the beneficiary would be responsible for carrying out operational tasks, which cannot be deemed as tasks performed within a qualifying managerial or executive capacity.

The petitioner similarly allocated another considerable portion of the beneficiary's time – 30% – to identifying business opportunities in international markets, which, without further explanation, also indicates that the beneficiary would be directly engaged in conducting market research – another non-qualifying operational task. We also question the validity of the claim that the beneficiary would allocate 10% of his time to meeting with the petitioner's project directors and managers to evaluate customer engagements and work progress. Given that the position of project services director was vacant when the petitioner's organizational chart was submitted and in light of the fact that the chart only depicts one other managerial position – that of support manager – it is unclear how the beneficiary would be able to fully carry out this job duty without the required staff of multiple managers and a project director.

While the record contains a more detailed description of job duties that directly follow the percentage breakdown, the job duties are not accompanied by the requested time allocations to indicate precisely how much time the beneficiary plans to spend on each of the listed tasks. In other words, the petitioner did not follow the director's instructions, which asked the petitioner for a job description consisting of the beneficiary's specific daily job duties and their respective time allocations. Instead, the petitioner provided two separate job descriptions – one, which included the requested percentage breakdown but which was comprised largely of broad job responsibilities, and another, which while listing the beneficiary's specific job duties lacked the requested time allocations. 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).

Notwithstanding the petitioner's failure to assign time allocations to the job duties listed in the second job description, the list itself is comprised of tasks that are inconsistent with the staffing and management structure that is depicted in the organizational chart the petitioner included in its RFE response. For instance, the petitioner indicated that the beneficiary would meet with the support and technical team to ensure that the operation is running smoothly, that all risks have been properly evaluated and damages mitigated, and that further action is taken where such action is deemed necessary. The petitioner did not,

however, establish which employees comprise the support and technical team; nor is there sufficient evidence that the petitioner had such a team in place at the time the petition was filed. Similarly, the petitioner stated that the beneficiary would meet with a "sales staff" and project managers, thus indicating that it had multiple sales personnel and project managers in place within the organization at the time of filing. However, a review of the petitioner's organizational chart shows only one sales position – that of vice president/sales engineer – and does not identify even one employee in the position of project manager. Given that the petitioner's entire sales staff is comprised of a single employee and in light of the petitioner's overall lack of any project managers, it is reasonable to assume that the beneficiary would assist in carrying out the underlying operational duties of the sales function and that he would also be directly involved in project management in order to fulfill the petitioner's immediate needs in the running of its organization.

In addition to the non-qualifying tasks that the beneficiary would likely have to perform due to its limited staffing arrangement, the petitioner expressly stated that the beneficiary would carry out such non-qualifying tasks, as travel to meet with customers, participate in sales and marketing initiatives, attend road shows and conferences as a means of marketing the petitioner's services, and interview new employees. While the petitioner did not establish precisely how much of the beneficiary's time would be allocated to these and other potentially non-qualifying tasks, it cannot be assumed that the beneficiary would dedicate his time primarily to the performance of tasks within a qualifying capacity without adequate supporting evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. While no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner maintains the burden of establishing 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). Here, the petitioner has offered deficient job descriptions that fail to give a proper account of the beneficiary's qualifying job duties and the proportion of time they would consume when compared to the non-qualifying tasks that were expressly listed.

Furthermore, after assessing the beneficiary's job duties in light of the petitioner's organizational chart and other evidence of the petitioner's staffing at the time of filing, it cannot be concluded that the petitioner was adequately staffed such that it was able to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks. Merely establishing that the beneficiary performs tasks of a professional nature is not sufficient unless those tasks rise to the level of a manager or executive and are performed in an organization that is capable of supporting the beneficiary in a position where the primary portion of his time would be allocated to managerial- or executive-level tasks. In fact, 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). Furthermore, 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).

In the matter at hand, the record does not establish that the petitioner had the staffing to comprise and organizational complexity that support the beneficiary in a qualifying managerial or executive capacity. Moreover, the record contains inconsistencies as to the petitioner's staffing composition. Specifically, the Form I-140 shows that the petitioner claimed to have a total of six employees at the time of filing. However, a review of the petitioner's quarterly tax return for the 2013 second quarter, which includes the month during which the petition was filed, shows that the petitioner did not employ more than four employees at that time. Although the petitioner depicted two consultants in its organizational chart, thus indicating the possibility that they may be contractual workers rather than employees to whom the petitioner paid regular wages that would be recorded on the quarterly tax returns, the petitioner did not provide supporting evidence establishing this to be the case, despite the fact that the RFE expressly instructed the petitioner to disclose any use of contract labor and to provide documents showing the number of contractors used. As noted previously in this discussion, we cannot accept the petitioner's claims as fact when such claims are not corroborated with proper supporting documentary evidence. See *Matter of Soffici*, 22 I&N Dec. at 165. Furthermore, we find that the director's acceptance of the petitioner's claims regarding its staffing composition was premature and not warranted in light of the petitioner's failure to provide evidence corroborating the staffing hierarchy depicted in its organizational chart. *Id.*

Accordingly, based on our review of the totality of evidence that has been presented in support of the matter at hand, we find that the petitioner has failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity and on the basis of this second ground for ineligibility, the instant petition must be denied.

IV. 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.