

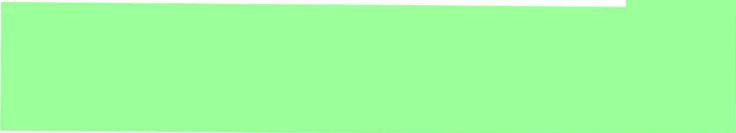


U.S. Citizenship
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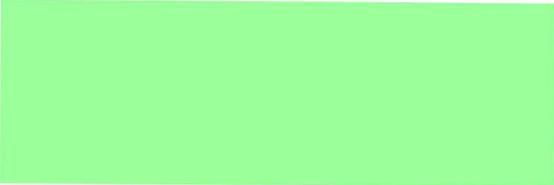


DATE: **JUN 23 2014** OFFICE: TEXAS SERVICE CENTER FILE: 

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:

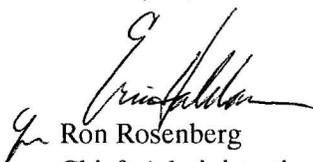


INSTRUCTIONS:

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, Texas Service Center denied the immigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed an Immigrant Petition for Alien Worker (Form I-140) 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 seeks to employ the beneficiary as the sales and marketing director for its interior renovations business.

The director denied the petition on the following grounds of ineligibility: (1) the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity; (2) the petitioner failed to establish that the beneficiary's employment abroad was within a qualifying managerial or executive capacity; (3) the petitioner failed to establish that it has been doing business; (4) the petitioner failed to establish that the foreign company is doing business and, (5) the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel asserts that the director abused his discretion and erred in applying the relevant law to the facts of this case. The petitioner submits a brief from counsel and additional documentary evidence in support of the appeal.

I. THE LAW

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

II. MANAGERIAL OR EXECUTIVE CAPACITY (UNITED STATES)

The first issue to be addressed is whether the petitioner established that it would 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), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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.

A. Facts

The petitioner filed the Form I-140 on November 30, 2012. The petitioner indicates that it was established in 2005 to support local distributors in selling and marketing its Italian parent company's contemporary furniture products in the U.S. market.

The petitioner stated on the Form I-140 that the beneficiary has been offered employment as "sales and marketing director." In the petitioner's accompanying letter, it stated that the beneficiary's position will be "sales and marketing manager" and described his proposed duties as the following:

- Conduct market research and planning;
- Evaluating potential business opportunities;
- Developing essential strategy and business development plans;
- Providing strategic direction for business promotion;
- Identifying and evaluating potential products to be offered;
- Researching and analyzing prevailing market trends and conditions in the industry;
- Assessing new market opportunities;
- Performing data analysis in order to provide recommendations regarding the enhancement of the existing product line;
- Compiling reports on recommendations regarding timing and required financial structuring to further expand business operations;
- Directing and coordinating company sales and marketing functions;
- Directing and overseeing the company marketing function to identify and develop new customers for products and services;
- Researching and developing strategies and plans which identify marketing opportunities, direct marketing, and new project development;
- Analyzing and evaluating the effectiveness of sales, methods, costs, and results;
- Developing and managing sales and marketing budgets, and overseeing the development and management of internal operating budgets;
- Directly managing major and critical developing client accounts, and coordinating the management of all other accounts;
- Participating in the development of new project proposals;
- Supervising the planning and development of company marketing and communications materials; and

- Representing the company at various community and/or business meetings to promote the company.

The petitioner stated that the beneficiary would be responsible for overseeing "our entire sales and marketing function" and would eventually be responsible for supervising, hiring and firing future personnel. In addition, the petitioner stated that "ALL administrative duties are handled by administrative staff and outsourced professionals" such that the beneficiary is "completely relieved of any non-managerial duties." Finally, the petitioner stated that the beneficiary will "control the work of other supervisory, professional or managerial level employees" and will not function as a first-line supervisor or be engaged in the performance of a service or other non-qualifying duties. The petitioner provided a copy of its payroll journal for the first eight months of 2012 which identified the beneficiary as the company's only employee.

The director issued a request for evidence (RFE) advising the petitioner that the initial evidence was insufficient to support the petitioner's claim that the beneficiary will be employed in an executive capacity. The director requested a description of the beneficiary's specific daily duties and the percentage of time he spends on each duty, as well as evidence of wages paid to employees. The director specified that, if the petitioner uses contract labor, it should submit evidence to document the number of contractors used, the duties they perform or services they provide, and evidence of payments to them. Finally, the director advised the petitioner that it should specify the essential function the beneficiary manages if he does not supervise employees.

In a letter submitted in response to the RFE, the petitioner stated that the beneficiary will allocate 60% of his time to "marketing and customer relations management." The petitioner further elaborated as follows:

[The beneficiary] will focus on quality, pricing and product differentiation based on his understanding and analysis of the specific customer environment, including customer influences, decision-makers and business challenges. He will create and retain customer loyalty and preference by establishing rapport with the customer, planning and developing customer-focused programs, overseeing the resolution of customer concerns and facilitating the delivery of goods or services to the customer. To this end, [the beneficiary] will meet with clients and discuss our products and services. He will retain information and transcribe it for our executives' review.

The petitioner further stated that the beneficiary would allocate 60% of his time to the following functions:

1. Marketing Plan
 - Design, implement and facilitate annual marketing plan for the firm.
 - Support and facilitate development and implementation of section business/marketing plans.

- Translating business unit objectives and strategies to develop brand portfolio objectives, strategies and plans to facilitate business unit growth.
 - Develop marketing strategy, based on knowledge of established policy, nature of market, copyright and royalty requirements, and cost and markup factors.
2. Marketing Budget
 - Plan and administer the firm's Marketing Operations budget;
 - Support development of regional marketing budgets.
 3. Manage Marketing Suppliers
 - Negotiate with media agents to secure agreements for translation of materials into other media.
 - Edit materials according to specific market or customer requirements.
 - Develop promotional materials including marketing collateral and print copies.
 4. Oversee Business Development
 - Direct and guide business development efforts of Sales and Marketing Manager
 - Assisting attorneys in strategic planning for client presentations, US corporate expansion, etc.
 - Offer coaching for prospective client meetings, presentations, etc.
 - Work with regional offices on designing and implementing prospecting and client contact systems.
 5. Oversee Corporate Communications Activities
 - External and internal communications and systems
 - Public relations efforts
 - External vendors and consultants.
 6. Develop and Administer Marketing Database
 - Includes client and prospect information, mailing list applications, access to financial reports, etc.
 7. Manage Marketing and Sales Department
 - Supervise Marketing Assistant, Financial Manager, Sales Manager and third party vendors.
 - Make staffing and hiring decisions within marketing department.
 - Build and develop a marketing team which is competent, commercially astute, dedicated and efficient.
 8. Develop Business Unit
-

- Develop and deliver insightful presentations and strategies to the business unit and executive committee where appropriate.
- Ensure the integration of the business unit marketing function within that of the greater group, and ensure that the business unit optimizes its use of shared and support services.
- Assist the business unit to meet its objectives, live the values and culture and to practice company policies.

The petitioner stated that the remaining 40% of the beneficiary's time would "revolve around the executive sales function" and include:

- Overseeing all hiring, training and firing of personnel involved in Sales and Marketing;
- Reviewing and approving strategic plans for the Company. He will select the marketing consultancy company and oversee the implementation and execution of our US marketing plan.
- Direct the Sales Manager and support personnel as well as additional subordinate third party vendors to achieve objectives established in the Company's Strategic Plan.
- Coordinate sales operations with all other departments/divisions of the Company.
- Responsibility for overseeing and keeping up to date on all Trade Accounts Receivables. Monitors A/R aging on a proactive basis with our Accountant, Credit Manager and Accounts Receivable.

The petitioner stated that the beneficiary will supervise the work of one professional sales manager, one additional sales support employee, as well as third party contract vendors responsible for financing and providing supplemental support in sales, marketing and logistics.

The petitioner provided an organizational chart which depicts the beneficiary as "Director of Sales and Marketing," supervising [REDACTED] - Sales and Marketing Manager; and two independent contractors including [REDACTED] - Financial Services (accounting, auditing and bookkeeping), and [REDACTED] - Sales Agent. The petitioner provided copies of two 2012 IRS Forms 1099, Miscellaneous Income, indicating that it paid \$44,234.96 in "nonemployee compensation" to [REDACTED] and \$52,269.09 to Mr. [REDACTED].

With respect to Mr. [REDACTED] the petitioner provided evidence that he was issued an E-1 nonimmigrant visa on November 22, 2012. The petitioner provided a copy of his U.S. Department of State Form DS-156E, which indicates that he was offered employment as the petitioner's "sales and marketing manager." The job description provided for this position on the Form DS-156E is nearly identical to the job description provided for the beneficiary at the time of filing.

The petitioner also provided descriptions for the positions of "sales and marketing manager," "market research analyst" and "accountant" and stated that the beneficiary's subordinates perform the duties described therein.

In addition, in a letter submitted in support of the RFE response, counsel stated that, since July 2012, the beneficiary "has been selected and entrusted to represent and serve as President of seven (7) additional project expansion LLCs the Petitioner has incorporated in Delaware." Counsel clarified that the beneficiary will serve as president for these entities until the U.S. infrastructure is finalized and all members are elected, and asserted that this role reflects his level of seniority and executive role within the organization as a whole.

The director denied the petition, concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director mischaracterized the submitted evidence and incorrectly concluded that the beneficiary would be performing non-managerial tasks. Counsel asserts that the beneficiary manages the petitioner's sales and marketing function and supervises a professional sales manager. Counsel further asserts that the beneficiary "manages team members assigned to the petitioner's entire US accounts, which includes one employee assigned to handle the sales function, as well as independent contractors which handle the administrative and accounting duties as well [as] external vendors such as [REDACTED] which also sell and distribute the Petitioner's products." Counsel maintains that the beneficiary "manages the corporate relationship between the petitioner and the American clientele including responsibility for channeling all communications between the companies, even at the top executive level."

B. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary would be employed 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).

The petitioner's initial description of the beneficiary's job duties consisted of a list of 18 duties. This list included a number of non-managerial duties which undermined the petitioner's claim that the beneficiary will primarily manage the company's sales and marketing function. The petitioner indicated that the beneficiary's duties include: conducting market research and planning, identifying and evaluating products to be offered, researching and analyzing prevailing market trends and conditions in the industry, performing data analysis to provide product line recommendations, compiling various reports, directly managing client accounts, and participating in project proposal development. While the petitioner's description also emphasized the beneficiary's authority for higher-level sales and marketing functions, the inclusion of these non-managerial duties reasonably prompted the director to request information

regarding the percentage of time the beneficiary would allocate to specific tasks. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act.

In response to the director's RFE, the petitioner, without explanation, revised a number of the beneficiary's duties and did not fully respond to the director's request that the petitioner identify the amount of time the beneficiary spends on specific tasks. In addition, the petitioner attributed 60% of the beneficiary's time to two different sets of responsibilities. On one hand, the petitioner stated that the beneficiary would allocate this portion of his time to "focus on quality, pricing and product differentiation"; "create and retain customer loyalty and preference by establishing rapport with the customer, planning and developing customer-focused programs, overseeing the resolution of customer concerns and facilitating the delivery of goods or services to the customer"; meeting with clients to discuss products, and services; and retaining and transcribing customer information for review by the company's executives. These duties, like those submitted at the time of filing, suggested that the beneficiary would be involved in sales, customer service and sales reporting duties, in addition to any managerial functions he performs. At the same time, the petitioner stated that the beneficiary would allocate 60 percent of his time to developing marketing plans and budgets, overseeing business development and corporate communications, developing the business unit, managing subordinate personnel and marketing suppliers, and developing and administering a marketing database.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The 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). The petitioner's response to the RFE did not provide additional clarity to the duties described at the time of filing, which, as discussed, included a number of non-qualifying duties. Instead, the petitioner submitted a new list of duties and two separate breakdowns of how the beneficiary allocates his time, neither of which further clarified the initial description of duties.

Further, in response to the RFE, the petitioner attributed the duties assigned to the beneficiary at the time of filing to a newly-hired employee who would serve as "sales and marketing manager." However, the petitioner clearly stated in its initial letter that the beneficiary has been offered employment in this same position. 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).

Overall, the petitioner has submitted three different descriptions of the beneficiary's duties, two of which included a number of duties indicating that he would perform non-managerial duties associated with the sales and marketing function. Absent a clear, consistent and credible breakdown of the time spent by the beneficiary performing his duties, we cannot determine what

proportion of his duties would be managerial or executive, nor can we deduce whether the beneficiary is primarily performing qualifying duties. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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 understanding a beneficiary's actual duties and role in a business.

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.

The petitioner has not established that it employed any direct staff other than the beneficiary at the time of filing, although the evidence submitted in response to the RFE does indicate that the petitioner had likely already selected Mr. [REDACTED] for his position. The petitioner has also provided evidence that it utilized the services of a contracted sales agent and a contracted financial services company. The petitioner did not provide information regarding the specific duties the independent contractors provide. Rather, it provided proposed position descriptions for positions that are not on the company's organizational chart and have not yet been filled, including a market research analyst, an accountant, a financial analyst, and a sales representative. While the petitioner indicated that the beneficiary would be responsible for hiring future employees, the petitioner did not establish at the time of filing that the beneficiary would be primarily responsible for supervising subordinate managerial, professional or supervisory employees. Furthermore, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). While the sales and marketing manager hired just after the filing of the petition may qualify as a professional employee, we cannot overlook that the petitioner initially attributed the same job duties to both the beneficiary and the newly hired worker.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a

petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Here, while the petitioner has consistently stated that the beneficiary will exercise authority over its U.S. sales and marketing function, as discussed above, it has not provided evidence that he will perform primarily managerial duties or that he will be relieved from performing non-managerial duties associated with the function. Again, the petitioner initially stated that the beneficiary would be involved in market research, data compilation, assisting in project proposals and performing other non-qualifying duties, and later added that he would spend 60 percent of his time performing customer-facing duties which include meeting with clients to discuss products and service and transcribing information for review by executives. The only documented subordinate sales and marketing employee are a contracted sales agent whose duties have not been defined and a sales and marketing manager whose duties overlapped almost completely with those initially attributed to the beneficiary. As such, the petitioner has not established by a preponderance of the evidence that the beneficiary's duties will in fact be primarily managerial.

The petitioner emphasized that the beneficiary has been named as president of seven "project expansion LLCs" and that this role evidences his employment in an executive capacity. 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.*

The petitioner has provided evidence that the beneficiary has been appointed president of several domestic limited liability companies established for its separate projects, but this job title alone does not establish that the petitioner will employ him in an executive capacity. Rather, the petitioner indicated that the beneficiary was chosen for this temporary role until the U.S. infrastructure is finalized and all members are elected for these companies. The petitioner has not stated what the beneficiary's role or functions are with respect to the domestic limited liability companies. 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)).

Counsel correctly observes 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). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who 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. *Id.*

Here, the petitioner has not made a clear distinction between the duties performed by the beneficiary and those to be performed by his claimed subordinate and has not established that it has sufficient staff to perform the non-managerial tasks inherent to the day-to-day functioning of its U.S. sales and marketing office. While the beneficiary is the senior representative of the foreign entity in the United States, the evidence does not establish that his actual duties would be primarily managerial or executive as of the date of filing.

Based on the evidence submitted and the inconsistencies and deficiencies discussed herein, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

The petitioner indicates that the company anticipates hiring additional employees to perform sales and marketing functions in the future. While such future hiring plans cannot establish eligibility as of the date of filing, we note that the denial of the petition is without prejudice to any future petitions filed on behalf of the beneficiary.

III. MANAGERIAL OR EXECUTIVE CAPACITY (FOREIGN)

The second issue addressed by the director is whether the petitioner established that the beneficiary was employed abroad in a qualifying managerial or executive capacity for at least one year in the

three years preceding his admission to the United States to work for the petitioner as an E-1 nonimmigrant in September 2010.

A. Facts

The petitioner states that the beneficiary held the position of Technical Sales Director for its Italian parent company from 2002 until 2010 and described his duties as follows:

- Recruiting, hiring, training, developing, motivating and coaching the Systems Engineering team.
- Developing and implementing communication vehicles to ensure clear dissemination of strategies to all geographic locations.
- Establishing and implementing performance measurements designed to track and report progress against the global sales strategy.
- Creating and driving programs that assisted the team keep up-to-date on relevant competitive solutions, products and services.
- Ensuring that training programs support the ability of [the parent company's] organization to exceed the established goals and performance
- Conducting periodic operation reviews to cascade the strategy and ensure compliance.
- Providing guidance and feedback to Senior Management and product development on product and customer directions.
- Traveling as necessary to meet the goals and objectives of position.
- Participating with other team members in creation of new products and services.
- Participating in strategic marketing research and implementation for the corporation.
- Assisting in providing technical and sales support for accounts in assigned territory; and
- Performing technical presentations for customers, partners and prospects.

In the RFE, the director advised the petitioner that the submitted evidence did not establish that the beneficiary was employed abroad in a qualifying capacity. The director asked the petitioner to describe the beneficiary's specific daily duties and the percentage of time spent on each duty. In addition, the director requested an organizational chart for the foreign entity reflecting the beneficiary's position within the company and all subordinate employees who reported to him. The director also instructed the petitioner to provide job titles, brief job descriptions, and educational levels for the beneficiary's subordinates within the foreign company.

In its letter submitted in response to the RFE, the petitioner stated that the beneficiary, as Technical Sales Director, managed the parent company's technical sales division and function, including supervision of "junior-level sales team members." The petitioner noted that the position required frequent travel to meet with potential clients, customers, partners, dealers and distributors. The petitioner provided a breakdown of the beneficiary's duties as follows:

Sixty percent (60%) of [the beneficiary's] day to day job duties revolved around overseeing and supervising our sales division, activities and team. This encompassed:

- Overseeing regional and local sales divisions;
- Resolving client complaints regarding sales and service
- Preparing budgets and approving budget expenditures
- Monitoring customer preferences to determine the focus of sales efforts
- Analyzing sales statistics
- Projecting sales and determining the profitability of products and services
- Determining and approving discount rates and special pricing plans for our more elite clientele
- Planning and coordinating training programs for sales staff
- Resolved customer complaints regarding sales and service
- Monitoring customer preferences to determine the focus of sales efforts
- Setting targets and sales forecasting
- Supervising sales representatives to ascertain their performance in providing technical sales guidance, and capitalizing on client opportunities
- Gathering sales and client feedback and requests for product development consideration
- Leading the team to make its quotas,
- Acting as a liaison between the team and executives
- Taking disciplinary action, such as issuing a warning, handling problems with sales results and exerting extra effort to help a person do better.
- Organizing regular sales meetings to discuss goals and maintain team morale and confidence[.]

The petitioner indicated that the beneficiary allocated 20 percent of his time to responsibilities involving customer relations, including:

- Pre-sale, client-facing providing technical sales expertise and thereafter assigning the appropriate salesperson to handle the account and solidifying the sales agreement;
- Acting as the subject matter expert as well as a knowledge master in all things IOC including, but not limited to, ad serving, products, features and functionalities, capabilities, distribution channels and partnerships
- Preparing and training the staff on technical presentations and sales pitches that explain products or services to customers and prospective customers
- Partnering with senior executives to identify complex opportunities and appropriate solutions for new and existing clients. . . .
- Providing technical guidance and expertise in client meetings regarding implementation and executions, best practices, products and features. . .

Finally, the petitioner indicated that the beneficiary's remaining time was allocated to "market management" including the following:

- Proactively seeking opportunities to improve client relations, working closely with sales to build these deep client relationships
- Building strong communication channels between product development and sales.
- Acting as a field feedback loop for product development
- Training Sales Operations to participate in and facilitate sales development sessions
- Meeting with key business and product leaders to discuss marketing communication opportunities
- Assisting the President with establishing campaign and ongoing marketing strategies for the US expansion
- Contributing to the development of marketing plans and timelines
- Creating and updating the marketing content as needed in collateral material, presentations and web pages.
- Ensuring a consistent message and tone with all marketing materials by reviewing, approving and overseeing all marketing plans and campaigns created by the marketing team.

The petitioner submitted an undated organizational chart for the foreign entity depicting the beneficiary as Technical Sales Director and head of the sales and marketing department. The chart depicts a total of eight employees in three departments reporting to the beneficiary as follows: (1) Accounting – one manager, two accountants, and one analyst; (2) Sales – one national sales manager, two export managers and one employee whose job title is not provided; and (3) Marketing – one marketing analyst. The petitioner did not provide the requested descriptions of duties for the subordinate employees.

The director denied the petition, concluding that the petitioner's descriptions of the beneficiary's duties failed to convey what duties he performed on a day-to-day basis in his role with the foreign entity. The director further observed that the submitted position description included both overly broad and non-qualifying duties and was therefore insufficient to establish that the beneficiary performed primarily managerial or executive duties while employed abroad.

On appeal, the petitioner asserts that the evidence establishes that the beneficiary functioned at a high level within the foreign organization and that his duties were "purely managerial," with overall responsibility for the day-to-day operations of the sales and marketing components of the company.

B. Analysis

Upon review, the petitioner has not established that the foreign entity employed the beneficiary in a primarily 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).

As with the U.S. position, the petitioner made unexplained revisions to the beneficiary's position description subsequent to the filing of the petition and has not clearly established how his time was allocated between managerial and non-managerial tasks. At the time of filing, the petitioner submitted a list of 12 duties which outlined a combination of personnel management, sales, market research, and reporting functions, and, as described, included non-managerial functions. For example, the petitioner indicated that the beneficiary participated in "provision of guidance and feedback to senior management," "creation of new products and services," "strategic marketing research and implementation," "providing technical and sales support for accounts in assigned territory," and performing technical presentations. The petitioner did not indicate how the beneficiary's time was divided among his personnel management responsibilities and these direct sales, market research and support responsibilities. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. The petitioner also did not identify any sales or marketing staff reporting to the beneficiary but rather indicated that he supervised a "Systems Engineering team."

In response to the RFE, the petitioner submitted a lengthy description of the beneficiary's duties with the percentage of time the beneficiary allocated to broad categories of duties. However, within each category, the petitioner included both managerial tasks and non-qualifying duties. For example, the petitioner stated that the beneficiary's duties included analyzing sales statistics, resolving customer complaints, monitoring customer preferences, liaising between the sales team and executives, pre-sales technical presentations, acting as a subject matter expert on the company's products, providing technical guidance and expertise in client meetings, and contributing to marketing materials. The petitioner also introduced an inconsistency by changing the job titles of the beneficiary's subordinates. The petitioner indicated in response to the RFE that the beneficiary supervises "junior-level sales team members," and did not attempt to explain why the initial description referred to the beneficiary's subordinates as the "Systems Engineering team."

The petitioner's organizational chart submitted in response to the RFE introduced another inconsistency as it did not depict the beneficiary's subordinates as "junior-level sales" staff or as systems engineers. Rather it identified his subordinates as a national sales manager, two export managers, a marketing analyst, an accounting manager, two accountants, an analyst and one employee whose title was not provided. The petitioner did not explain the discrepancies between the initial position description, the revised description, and the organizational chart. 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).

Further, the petitioner not provided the requested information regarding the job duties performed by the beneficiary's claimed foreign subordinates or their educational levels. Without complete and consistent information regarding the beneficiary's subordinate staff, the petitioner has not

met its burden to establish that the beneficiary was employed as a personnel manager. 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. 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)). Based on the conflicting information provided, we cannot conclude whether the beneficiary supervised systems engineers, junior sales staff, or the team of eight accounting, sales, export and marketing staff depicted on the organizational chart.

On appeal, the petitioner simply asserts that the beneficiary clearly performed purely managerial duties and held the senior sales position in the company. However, as discussed above, none of the submitted position descriptions suggest that the beneficiary performed solely managerial duties. Further, given the discrepancies in the record with regard to the beneficiary's subordinate staff and the lack of information regarding how the beneficiary's time was divided among qualifying and non-managerial duties, the record is insufficient to establish that his duties were primarily managerial. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). In addition, the record does not establish the number and type of employees the beneficiary supervised or the scope of their duties, and thus does not show that the beneficiary's subordinates relieved him from allocating a significant portion of his time to the performance of non-managerial tasks.

For these reasons, the petitioner has not established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

IV. DOING BUSINESS

The director denied the petition, in part, based on a finding that the petitioner failed to establish that the U.S. company and its Italian parent company are doing business as defined at 8 C.F.R. § 204.5(j)(2). The director acknowledged that the petitioner submitted invoices showing that the foreign entity shipped its products to the petitioner, and provided copies of its IRS Forms 1120, U.S. Corporation Income Tax Returns, payroll statements, and bank statements. However, the director concluded that the documents submitted are "not indicative of business transactions between the petitioner and a third party." For similar reasons, the director concluded that there was insufficient evidence to establish that the foreign entity is doing business.

Upon review, the petitioner has established that it and its foreign parent company are engaged in the regular, systematic and continuous provision of goods and services. The petitioner has submitted voluminous evidence of both entities' business activities which includes evidence that

the petitioner is in fact selling and installing its imported products to customers in the United States. The evidence also establishes that the foreign entity is actively engaged in the provision of goods and services. Accordingly, the director's determination that the petitioner and the foreign entity are not doing business will be withdrawn.

V. ABILITY TO PAY

The director further determined that the petitioner did not establish its ability to pay the beneficiary's proffered wage of \$190,000 per year as of the priority date. See 8 C.F.R. 204.5(g)(2).

The director acknowledged that the beneficiary was being paid a salary of \$137,394 as of the date of filing, and further acknowledged that the petitioner had reported net current assets of \$157,510 on its most recent IRS Form 1120, U.S. Corporation Income Tax Return. The director found that "the net current assets are not equal to or greater than the proffered wage" and thus could not be used as evidence as the petitioner's ability to pay.

Counsel asserts that as the sum of the petitioner's net current assets and the beneficiary's current salary is greater than the proffered wage, the petitioner has, in fact, established its ability to pay the wage.

Upon review, counsel's assertions are persuasive. The petitioner submitted credible documentary evidence that the petitioner has paid the beneficiary in the year of filing; therefore his current salary can be deducted from the proffered wage in order to establish the petitioner's ability to pay. The petitioner's net current assets are sufficient to pay the difference between the beneficiary's salary and the proffered wage. The director's adverse determination with respect to this issue will be withdrawn.

VI. CONCLUSION

The petition will be dismissed based on the petitioner's failure to establish that the beneficiary was employed abroad, and 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, that burden has been met.

ORDER: The appeal is dismissed.