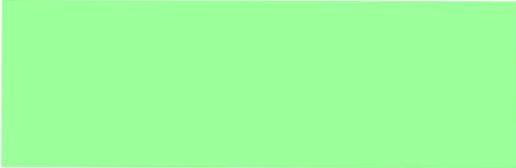




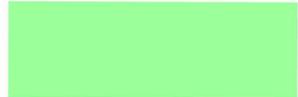
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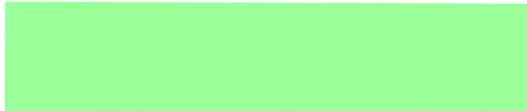


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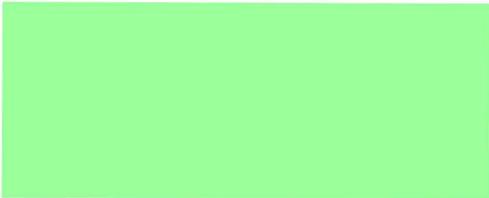


IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Guam corporation engaged in the retail, wholesale, and service of electronics, computers, and appliances. It seeks to employ the beneficiary as its department manager. 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, finding that the petitioner failed to establish that the beneficiary was employed abroad by the petitioner's subsidiary 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 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 record shows that the petitioner filed the Form I-140 on January 2, 2013. In support of the Form I-140, the petitioner provided a statement, dated January 1, 2013, claiming that the beneficiary's current U.S. employment as well as his prior employment abroad qualify him for the immigrant visa category of multinational manager. The petitioner focused on the beneficiary's proposed employment in Guam, asserting that the beneficiary manages an essential function within the organization. Although the petitioner stated that the beneficiary's proposed position with the petitioning entity is similar to his prior position with the foreign entity, the petitioner did not provide a description of the beneficiary's foreign employment. The petitioner did, however, provide a number of additional supporting documents, including both entities' organizational charts, corporate and tax documents, quarterly wage statements, advertising materials, and photographs of the petitioner's business premises.

After reviewing the petitioner's submissions, the director determined that the petitioner failed to establish eligibility and therefore issued a request for evidence (RFE) on July 3, 2013. One focal point of the director's request was documentation pertaining to the beneficiary's prior employment with the petitioner's foreign subsidiary. Namely, the director instructed the petitioner to list the actual day-to-day job duties the beneficiary performed and to specify the percentage of time the beneficiary allocated to each task. The director also asked the petitioner to provide an organizational chart for the foreign entity showing the staffing levels and job descriptions of the beneficiary's immediate supervisor and subordinate employee(s).

In response, the petitioner submitted a statement dated September 15, 2013, claiming that the beneficiary was responsible for managing an essential function "which was to direct all repair and maintenance services for the company." The petitioner also provided a job description, which shows that the beneficiary's job duties fit into seven categories – workflow management, establishing service rates, department performance, budget management, develop and implement policies and procedures, manage personnel matters, and report to top level management.<sup>1</sup> With regard to the foreign entity's organizational chart, the petitioner asked the director to refer to the initial supporting documents, which included the requested chart where the beneficiary was depicted as having one subordinate – a services technician – and as the direct subordinate to a general manager. Additionally, the petitioner provided job descriptions for the general manager and the beneficiary's two subordinate services technicians in his position with the U.S. entity. However, given that the U.S. entity's services department is comprised of four employees – the beneficiary, two services technicians, and a customer care specialist – while the services department of the beneficiary's foreign employer included only the beneficiary and one services technician, it is not clear that the job duties of the single services technician, who worked alone and did not have the support of a customer care specialist, were the same as those of the two services technicians, who currently serve as the beneficiary's subordinates in the U.S. entity. The petitioner did not clarify this point or provide a separate job description for the beneficiary's subordinate with the foreign entity. Therefore, it is noted that the petitioner failed to comply with an RFE request pertaining to the beneficiary's employment abroad. 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).

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<sup>1</sup> As the director restated the beneficiary's job description, in its entirety, in the decision denying the petition, that job description need not be restated in this discussion.

The director reviewed the petitioner's submissions and determined that the record lacked sufficient evidence to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. The director observed that given the services department's key role within the foreign organization, it is not plausible for a single employee, in a company that was comprised of approximately seventeen employees, was able to perform all of the maintenance and repairs thereby relieving the beneficiary from having to assist with the non-qualifying repair-related job duties. In other words, the director questioned how a single individual could have carried out all of the maintenance and repair services that were being provided to the foreign entity's clientele without the beneficiary assisting with the provision of some of those services.

On appeal, counsel disputes the director's adverse conclusion, asserting that the company's size cannot be the determining factor in establishing whether the beneficiary was employed in a qualifying capacity. Counsel asserts that the petitioner established that the majority of the beneficiary's time was spent performing managerial job duties, despite the lack of a subordinate staff. Finally, in the appellate brief, counsel contends that the director did not indicate which of the beneficiary's job duties were outside the scope of what is deemed to be within a managerial capacity.

We find that counsel's assertions are not sufficient to establish that the petitioner is eligible for the immigration benefit sought herein. The discussion below will provide a comprehensive analysis of the facts and evidence presented with regard to the key issue concerning the beneficiary's former position with the foreign entity.

### III. Managerial or Executive Capacity

As indicated above, the primary issue to be addressed in this proceeding is whether the petitioner established that the beneficiary was employed by the foreign entity 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, U.S. Citizenship and Immigration Services (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, the totality of the record must be reviewed, starting first with the petitioner's description of the beneficiary's job duties, as 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 carried out the organization'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 organization.

In the present case, the petitioner has stressed that the beneficiary's primary focus was not the management of personnel, but rather the management of the services department, which was responsible for carrying out maintenance and repairs – an essential function within the foreign organization. Turning first to the beneficiary's job description, the record shows that the beneficiary performed a number of non-qualifying job duties including overseeing repairs done by his subordinate services technician; "assisting in difficult repairs[;]" ordering equipment and negotiating with suppliers; actively gathering information regarding incoming repairs, repair timelines, customer satisfaction, and inventory levels; negotiating shipping rates; training and overseeing subordinates; conducting training seminars; and preparing quarterly reports for the

general manager. As the petitioner assigned time allocations to groups of tasks, rather than specifically to each itemized task, we are unable to determine precisely how much time in total the beneficiary allocated to tasks of a non-qualifying nature. While no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary performed were 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). Merely establishing that the beneficiary performed tasks at a professional level is not sufficient unless those tasks rise to the level of managerial or executive capacity.

Additionally, while the job description indicated that the beneficiary "reviewed activity reports and other performance data from his department," the petitioner did not explain who actually generated the reports. In the event that the beneficiary himself generated those reports, the petitioner did not establish that this task is one deemed to be within a qualifying managerial capacity. Similarly, given that the beneficiary and one service technician (whose job description the petitioner did not provide) were the only two employees within the service department, it is unclear who, if not the beneficiary, gathered the financial data that the beneficiary relied upon to generate his department's yearly and monthly budget.

Further, while the petitioner claimed that the beneficiary developed and implemented policies regarding the intake and release of equipment as well as customer service guidelines, the petitioner did not explain who actually deals with the customer in terms of taking in repair work and providing various types of customer services – tasks which the U.S. petitioner is equipped to handle through its own customer service representative. Given that the foreign entity's organizational chart did not depict a customer service representative, it is unclear who, if anyone, was available to relieve the beneficiary from having to perform these non-qualifying tasks during the time of the beneficiary's employment with the foreign entity. We cannot assume that the beneficiary was relieved from having to allocate his time primarily to the performance of non-qualifying tasks without an account of who within the foreign organization actually carried out the daily operational tasks that were performed within the service department that the beneficiary managed. 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)).

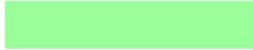
Accordingly, while counsel properly asserts on appeal that the size of an entity's staff cannot be the single factor that determines a beneficiary's qualifying capacity, this factor can and should be considered for the purpose of ascertaining how, if at all, the employing entity was able to relieve the beneficiary from having to spend his time primarily performing non-qualifying operational tasks. Regardless of whether the beneficiary claims to have been employed as a personnel manager or as a function manager the issue of staffing often serves as a valid indicator of an entity's ability to support the beneficiary in allocating his time to primarily performing tasks that are within a qualifying managerial or executive capacity.

In the present matter, the petitioner has provided a job description that indicates that some portion of the beneficiary's time was spent performing non-managerial tasks. Based on the petitioner's failure to itemize and to assign time allocations to each individual task it is unclear how much time the beneficiary spent

performing qualifying versus the non-qualifying tasks. Moreover, given the petitioner's failure to provide a job description for the beneficiary's single subordinate employee or to indicate who actually performed some of the operational tasks that were performed within the service department, the AAO cannot conclude with any degree of certainty that the beneficiary was relieved from having to allocate his time primarily to the performance of non-qualifying tasks. Despite the beneficiary's discretionary authority over the operation and personnel matters within the department he managed, the petitioner cannot meet its statutory burden unless it provides sufficient evidence to establish that the beneficiary's employment abroad was primarily comprised of tasks within a qualifying managerial or executive capacity. Furthermore, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *managed* the function rather than *performed* the duties related to the function. As noted above, any individual 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. at 604.

Here, the petitioner seeks to focus away from the beneficiary's subordinate employee by asserting that the beneficiary served as a function manager rather than as a personnel manager in his former position with the foreign entity. However, the record indicates that at least some portion of the beneficiary's time was allocated to overseeing and training the services technician whom the foreign entity's organizational chart clearly depicted as the beneficiary's subordinate. Moreover, regardless of whether the beneficiary assumed the position of a personnel or a function manager, the size of support personnel is not irrelevant to a determination of whether the beneficiary's position was within a qualifying managerial capacity. Even where the beneficiary does not directly manage any subordinates, an assertion that has been claimed but not established based on the facts presented in the instant record, the petitioner must provide sufficient evidence to explain how the company's daily operational tasks were executed. It stands to reason that where a company is unable to show who carries out its non-qualifying tasks or in situations where a company's support staff is extremely limited, we cannot rule out the possibility that those tasks may necessarily become the beneficiary's responsibility.

Looking at the totality of the evidence presented in the matter at hand, the petitioner has failed to establish that the beneficiary was employed abroad in a qualifying managerial capacity. While evidence points to the likelihood that the beneficiary assumed a top-level position within the service department that he managed during his employment abroad, this fact must be considered together with other evidence in the record. Here, given the various non-qualifying tasks that were expressly assigned to the beneficiary and in light of the numerous unanswered questions about the beneficiary's role in possibly carrying out various other non-qualifying tasks, including the gathering of financial data, taking in customer orders, and providing customer service, it cannot be established that during the course of his employment with the foreign entity the beneficiary allocated his time primarily to the performance of qualifying managerial tasks and on the basis of this conclusion the instant petition cannot be approved.



**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.