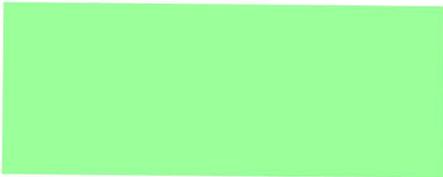


(b)(6)

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



U.S. Citizenship  
and Immigration  
Services

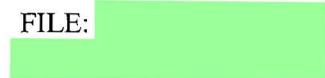


Date:

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Office: NEBRASKA SERVICE CENTER

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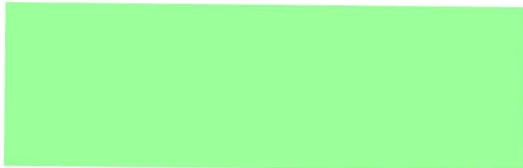
Petitioner:

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 Nebraska Service Center Director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks to classify the beneficiary as a multinational executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner, a California corporation established in 1999, engages in the “silk textiles/product wholesale” business. It claims to be an affiliate of the beneficiary’s foreign employer, [REDACTED] Ltd., d/b/a [REDACTED] (the foreign entity), located in China. The petitioner seeks to employ the beneficiary as its General Manager.

The director denied the petition, concluding that the petitioner failed to establish the beneficiary has been and will be employed in a managerial capacity.

The petitioner subsequently filed an appeal. The AAO initially rejected the appeal as untimely filed. However, upon review of new facts submitted to the AAO, it appears the appeal may be deemed as having been timely filed. As such, the AAO hereby exercises its discretion to reopen the appeal *sua sponte*.

On appeal, the petitioner asserts that the beneficiary has been and will be employed in a managerial capacity based on the totality of the evidence submitted. The petitioner submits a brief 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 regulation at 8 C.F.R. § 204.5(j)(3) states, in part:

(i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

\* \* \*

With respect to managerial and executive capacity, section 101(a)(44) of the Act defines the terms as follows:

(A) 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.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (I)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

\* \* \*

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

\* \* \*

(K) *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.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) 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.

**II. Statement of Facts and Procedural History**

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on behalf of the beneficiary. In the petitioner’s letter submitted with the initial Form I-140, the petitioner described itself and the foreign entity as “one of the world’s largest silk textile manufacturers.” The petitioner further described the nature of its business and that of the foreign entity as a “factory/showroom . . . [that] houses thousands of silk furnishings, textiles, and beautifully appointed accessories. The factory houses the entire manufacturing production process from silk yarn spinning, dyeing and weaving to product design.” The petitioner stated that it “strive[s] to give the client what they want in terms of design and we will manufacture it at [the foreign entity] and [the petitioner].”

The petitioner described the beneficiary’s proposed duties as the General Manager as primarily overseeing the day-to-day operations of the U.S. entity. With the initial petition, the petitioner

submitted the U.S. organization chart, showing that the beneficiary will directly supervise: (1) an accountant, [REDACTED] (2) a sales/marketing manager, [REDACTED] and (3) a production manager, [REDACTED]

In turn, the accountant will supervise an AP/AR employee, [REDACTED]. The sales/marketing manager will supervise “sales personnel,” with the only sales personnel identified as [REDACTED]

The production manager will supervise a manufacturing supervisor, [REDACTED]

The petitioner submitted the U.S. entity’s brochure, describing it as “one of the world’s largest silk textile manufacturers, from silk yarn spinning, dyeing, weaving to product designing and most notably handmade silk embroidery.”

The director issued a request for evidence (RFE), advising the petitioner to submit additional documentation to support the petition, including: a detailed description of the beneficiary’s duties abroad and in the United States, including an estimated percentage of time for each duty; a detailed organizational chart for the foreign entity; and a detailed description of the job duties for the beneficiary’s immediate supervisor and subordinate employees.

In response, the petitioner described the beneficiary’s duties abroad as Production Manager as “to oversee the intensive textile and silk production line.” The petitioner stated: “On a daily basis he was expected [*sic*] oversee the daily production schedules, targets and orders. Any custom orders for specific types of silk will be sent directly to [the beneficiary] as he oversaw that the project is assigned to the appropriate team through his Production Supervisors.” The petitioner described other duties, as summarized below, with no estimated percentages of time given:

- On a daily basis, “meet and confer with the sales managers to go over daily orders from the United States and within Asia;”
- “Work with the warehouse and shipping managers to ensure that the final products from his department are packaged and sent out to the customers accurately and timely;”
- Review production costs and oversee production;
- Review and assign employee schedules with the production supervisors to authorize overtime, to cut employee hours, permit personal time off or sick leave, reprimanding and writing up of employees for bad work, and terminating various staff members; and
- Spot checking the final product of either the silk textile or the silk product to ensure consistent quality control.

With respect to the U.S. entity, the petitioner asserted that the beneficiary reports directly to the President and will work closely with her to continue developing business objectives. The petitioner explained that due to multiple responsibilities, the President and Vice President of the company are often out of town overseeing their other operations in Hong Kong and in various cities in China. The petitioner asserted that the “effective running of the US operation is left primarily to the General Manager, [the beneficiary].” The petitioner also asserted that “[t]he US operation is integrally tied to the operations in Asia as much of the manufacturing is done over there.”

The petitioner provided the following breakdown of the beneficiary’s duties in the United States:

- Daily communications with Asia and overseeing the manufacturing, production and shipping schedules (25-30%);
- Meet with “sales/marketing manager and sales personnel as well as independent sales contractors” (15-20%);
- Setting sales goals and tri-weekly telephone conferences between U.S. sales team and the production team in Asia (30%);
- Goes through financial projections, budgets, and AP/AR records (10-15%);
- Oversee specific high-end custom sales (5-10%); and
- Oversee the staffing and administrative management of the company, including “switching employees to independent contractors to firing sales people for under performing” (10-15%).

The petitioner submitted, *inter alia*, the foreign entity’s organizational chart which indicated that the beneficiary directly supervised two production supervisors. Beneath the production supervisors were: a head of textile production, head of textile preparation, head of dye process, head of sewing, and head of product [preparation]. Below these positions were 170 textile workers, 20 dye process workers, 250 sewing workers, and 150 production line workers.

The petitioner also submitted a list of employees supervised by the beneficiary at the foreign entity and a brief description of their duties, as follows:

- [REDACTED] **(Production Supervisor)** She heads the Textile Production department and ensures that the production floor operates efficiently and timely. She understands silk engineering thoroughly and supervises the Heads of Textile to ensure that all materials are spun and produced according to company specifications. She also oversees production orders are filled and production teams are assigned the various contracts. She is in charge of hiring and firing of all factory staff in her department;
- [REDACTED] **(Production Supervisor)** He has been supervising the production workshop which includes all dye processing, sewing and product processing element. As many of these products are highly delicate and require specialized handling, Mr. [REDACTED] has been key supervising the final production of many of the textiles. He assists the Production Manager to make sure all orders are filled and properly finished. He is in charge of hiring and firing all factory staff within his department;
- [REDACTED] **(Head of Textile Preparation)** She has her expertise in fabric and textile weaving. She plans production schedules for her department and supervises the textile preparation workers. She also woks [*sic*] with the textile weaving workers to ensure that each order’s specifications are met;
- [REDACTED] **(Head of Textile Production)** He has over 22 years of textile supervision. He works with the Production Supervisor on production schedules, conducts product quality inspections, trains textile workers on machinery and raw materials, and enforces discipline within his team;
- [REDACTED] **(Head of Dye Process)** He trains his team workers on the technical skills of distinguishing chromatic aberrations, blemishes, color repair, additive production of color and oversee the work and final product of all those working in the dye processing team. He has to process work orders and assign tasks to his workers; and

- [REDACTED] (**Head of Sewing**) He supervises the production schedules, arranges for material delivery and supervises all sewing teams.

The petitioner submitted another organizational chart for the U.S. entity, with the following changes: the accountant now holds the title “finance manager;” and the “sales personnel” are identified as [REDACTED] + Sales Contractors.” The petitioner provided the following description of the beneficiary’s subordinates at the U.S. entity:

- [REDACTED] (**Finance Manager**) oversees all the financial aspects of the company and to ensure there is a there is a financial roadmap set. She works under and coordinates with [the beneficiary] in ensuring that all financial records are properly maintained and forecasts the monthly, quarterly and annual budgets for the company;
- [REDACTED] (**Sales Manager/Marketing Manager**) is a relatively new hire to replace former employee, [REDACTED]. He is integral is [sic] setting goals for [the petitioner’s] sales agents. He maintains a strong understanding of the sales and marketing trends and applies it to the niche market that [the petitioner] is in. He is an important member of the company in sourcing out new markets to sell [the petitioner’s] products. He manages all sales personnel and any sales contractors assigning them the company goals and setting sales targets. He is also in charge of the promoting of [the petitioner’s] products and services;
- [REDACTED] (**Production/Shipping Manager**) has replaced [REDACTED]. He works to oversee and supervise all product shipments. He ensures that the products received are accounted for, logged, repackaged properly or held within the location warehouse for later shipments. He also handles the inventory system and works with [the beneficiary] on timely retrieval and shipment of final products to customers.
- [REDACTED] (**AP/AR**) oversees the recording and tracking of revenues and expenses for the company. She is responsible for matching invoices, vendor calls, journal entries, sending out statements, applying invoices to lot numbers, and receiving entries; and
- [REDACTED] (**Sales Personnel**) [replacing [REDACTED]] contacts new sales leads and continue to foster existing customers. He works on marketing and selling the diverse product lines and is expected to close new accounts for the company. He performs promotion duties on behalf of [the petitioner] and handles customer support issues.

The petitioner submitted its California quarterly wage and withholding report for the 4<sup>th</sup> quarter of 2011 listing the following employees: [REDACTED] the beneficiary; [REDACTED] and [REDACTED]. The petitioner also submitted its 2010 Form 1120, U.S. Corporation Income Tax Return, in which it reported its business activity as “Manufacturing.”

### III. Discussion

The first issue to be addressed is whether the beneficiary will be employed in a qualifying managerial capacity in the United States.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has failed to establish that the beneficiary will be employed in a managerial capacity, as defined at section 101(a)(44)(A) of the Act, for the United States entity.

The petitioner indicates that the beneficiary qualifies both as a personnel manager and a function manager. 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 what may be a 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; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). 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 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).

First, the petitioner asserts that the beneficiary qualifies as a personnel manager because the beneficiary will supervise the following three "managers" in the United States: (1) a "finance manager," previously referred to as the "accountant," who will oversee an AP/AR employee; (2) a "sales/marketing manager" who will supervise "sales personnel as well as independent sales contractors;" and (3) a "production/shipping manager" who will supervise a "manufacturing supervisor." On appeal, the petitioner reiterates that the beneficiary's three direct subordinates "oversee the work of their respective subordinate personnel in their performance of relative functions in those departments (e.g. Finance Manager oversees the AP/AR personnel; the Sales/Marketing Manager oversees the sales personnel; [and] the Production Manager oversees the manufacturing supervisor)."

However, the petitioner's claim that the beneficiary will be a personnel manager is not supported by the evidence in the record. Specifically, the petitioner has not provided a consistent, credible description and evidence of the actual structure and staffing of the U.S. entity. Despite the titles of the beneficiary's three direct subordinates, the record does not establish that his direct subordinates are actually managers or supervisors of other personnel. Critically, and as discussed in greater detail below, the petitioner's job descriptions for the Finance Manager and the Production/Shipping Manager contain no element of supervision or management over other personnel. In addition, the petitioner failed to provide a job description for the "manufacturing supervisor," thus leaving the record unclear as to whether such a position actually exists within the U.S. entity and the associated duties of that 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id*

While the job descriptions for the Finance Manager and the Production/Shipping Manager state that both positions will “oversee” their respective functions, the lack of subordinate employees indicates that they will be performing, rather than managing, the day-to-day operational tasks associated with their respective functions. As such, the petitioner has not established that they will actually be managerial employees, notwithstanding their official titles. An individual will not be deemed a manager simply because he or she has a managerial title. The actual duties themselves reveal the true nature of the employment. *See 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). Artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position.

Moreover, while the petitioner’s job description for the Sales Manager/Marketing Manager states that he “manages all sales personnel and any sales contractors,” the record is inconsistent as to whether the petitioner actually employs any subordinate sales personnel and independent sales contractors, as claimed. The petitioner repeatedly asserts that it employs “sales personnel and sales contractors,” in the plural. However, the only sales personnel the petitioner claims to employ is [REDACTED] who replaced [REDACTED]. The petitioner has not identified nor documented that it employs, or has ever employed, more than one sales personnel at once, or any sales contractors at any time.

Furthermore, the petitioner explains that, prior to [REDACTED] the “sales personnel” was [REDACTED]. However, [REDACTED]’s resume reflects that she was employed by the petitioner as the “Administrative Assistant,” performing the duties of “[c]reating invoices, data entry, filing, copying, [and] ordering supplies.”<sup>1</sup> Her resume does not list any sales or marketing duties for the petitioner. The petitioner has not provided any explanation for this discrepancy and, therefore, we must call into question the veracity of the petitioner’s claims regarding the actual employment capacity of its “sales personnel.” Again, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-92. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co.*, 724 F. Supp. at 1108.

The petitioner also failed to establish that the beneficiary’s three direct subordinates are professionals, in that there is insufficient evidence that these positions require at least a bachelor’s degree. The term “profession” contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm’r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The

<sup>1</sup> The petitioner submitted [REDACTED]’s resume in support of its previously filed Form I-140 on behalf of the beneficiary, which was denied on September 4, 2008.

possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

Overall, the petitioner has failed to establish that the beneficiary's three direct subordinates are supervisors, managers, or professionals. Rather, the record as presently constituted indicates that the beneficiary is a first-line supervisor within the U.S. entity. The statute and regulation plainly state 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; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988). As stated above, there is insufficient evidence that the beneficiary's subordinates can be considered "professionals." In summary, the petitioner has not established that the beneficiary qualifies as a "personnel manager" pursuant to section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii).

Second, the petitioner failed to establish that the beneficiary qualifies as a "function manager." Here, the petitioner has indicated that the beneficiary will oversee the daily operations of the U.S. entity but has not specified any particular function that the beneficiary will oversee. Broadly claiming that the beneficiary will oversee the entire U.S. operation is insufficient to establish what particular function the beneficiary will manage.

The petitioner's description and breakdown of the beneficiary's specific duties in the United States is not entirely consistent with the evidence submitted. For instance, the petitioner asserted that the beneficiary will spend 25-30% of his time "overseeing the manufacturing . . . schedules." However, as discussed above, the petitioner failed to provide a job description for the "manufacturing supervisor," thus leaving the record unclear as to whether the U.S. entity actually has such a position, and the associated duties of that position. Moreover, the petitioner does not claim to have any other employees who perform manufacturing functions in the United States. This omission is important because the petitioner indicates that the U.S. entity engages in or will engage in manufacturing. For instance, the petitioner describes the U.S. entity as a "factory/showroom" that will manufacture clients' products. The petitioner also states that "much" – but not "all" – of the manufacturing is done in Asia, again indicating that the U.S. entity engages or will engage in some manufacturing as well. The petitioner has not explained or documented which of its employees in the United States performs manufacturing functions. This omission further calls into question the credibility of the petitioner's description regarding its overall structure and staffing.

The petitioner also indicated that the beneficiary will spend 15-20% of his time meeting with "sales/marketing manager and sales personnel as well as independent sales contractors." Again, as stated above, the record is unclear whether the U.S. entity actually employs any sales personnel or independent sales contractors, other than possibly the "sales/marketing manager." It is unclear which of its other employees in the United States perform the day-to-day sales and marketing functions necessary to carry out the petitioner's "wholesale business," that is also a "factory/showroom."

Overall, the petitioner's description of the beneficiary's duties are not entirely consistent with the evidence submitted, further undermining the credibility of the petitioner's claims made in support of this petition. In this matter, it cannot be concluded that the beneficiary will be managing an essential

function. It also cannot be concluded that he has been relieved of primarily performing the day-to-day duties related to that function, considering the inconsistencies and discrepancies regarding the petitioner's staffing and structure. 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 *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995) (citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

The next issue to be discussed is whether the beneficiary was employed in a qualifying managerial capacity for the foreign entity.

Upon review of the record, the AAO concurs with the director's conclusion that the petitioner failed to establish that the beneficiary was employed in a qualifying managerial capacity for the foreign entity.

The petitioner's description of the beneficiary's duties abroad is not entirely consistent with the evidence in the record. For instance, the petitioner stated that the beneficiary met and conferred with the "sales managers" in the plural, but the foreign entity's organizational chart showed only one sales manager. The petitioner asserted that the beneficiary worked "with the warehouse and shipping managers," but the foreign entity's organizational chart did not list any warehouse and shipping managers, employees, or departments. These discrepancies undermine the credibility of the petitioner's claims and evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

The petitioner asserted that the beneficiary oversaw the daily production schedules, targets and orders, oversaw that projects were assigned to the appropriate team, and was responsible for terminating various staff members among other duties. However, the petitioner listed these same duties for [REDACTED] and [REDACTED] the Production Supervisors, as well. The petitioner also asserted that the beneficiary was responsible for "[s]pot checking the final product of either the silk textile or the silk product," but the petitioner indicated that [REDACTED] (Head of Textile Production) was also responsible for "product quality inspections." While we acknowledge the possibility that several managerial employees could have joint responsibility for overseeing production, assigning tasks, and quality assurance in a general sense, these broadly-cast job responsibilities are insufficient to describe the actual job duties performed by the beneficiary or the beneficiary's subordinates. Reciting vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties; the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Notably, the director's RFE requested the petitioner to provide a detailed description of the job duties of the beneficiary's subordinates. 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).

In the RFE, the director also requested information regarding the scope and nature of the foreign entity's operations, supported by documentary evidence. In response, the petitioner submitted only an organizational chart for the foreign entity. The petitioner did not submit any independent, objective evidence to support the foreign entity's claimed size and staffing, such as tax

documentation similar to that submitted for the U.S. entity. Again, 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). 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)).

Overall, based on the inconsistent and vague job descriptions and the lack of supporting evidence to confirm the size and staffing of the foreign entity, the petitioner has failed to meet its burden of proof in establishing that the beneficiary was more likely than not employed in a qualifying capacity abroad.

Beyond the decision of the director, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity.<sup>2</sup> 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. one entity with "branch" offices), 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").

In its letter submitted with the initial petition, the petitioner asserted that it is an affiliate of the foreign entity because both entities are owned and controlled by the same individuals in the same proportions. Specifically, the petitioner asserted that [REDACTED] is an 85% shareholder of both entities, and [REDACTED] is a 15% shareholder of both entities. The petitioner explained that [REDACTED] made a capital contribution of US \$1,355,000 and [REDACTED] made a capital contribution of US \$245,000 towards the foreign entity, for a total investment of US \$1,600,000. The petitioner stated that "[a]ll executive decision[s] for these two affiliated companies are made by both shareholders."

As evidence of the qualifying relationship, the petitioner submitted the U.S. entity's Articles of Incorporation and by-laws. The petitioner also submitted a copy of the foreign entity's Certificate of Approval for Establishment of Enterprises with Foreign Investment in the People's Republic of China, which was approved on March 18, 1997 and issued on March 30, 2005. This certificate reflects that [REDACTED] made a capital contribution of US \$245,000 and [REDACTED] made a capital contribution of US \$1,355,000 towards the foreign entity, for a total investment of US \$1.6 million.

In the RFE, the director instructed the petitioner to submit additional evidence to show that it has a qualifying relationship to the foreign entity. In response to the RFE, the petitioner reaffirmed that it is an affiliate of the foreign entity because both entities are owned by the same individuals: [REDACTED] who has 85% ownership; and [REDACTED] who has 15% ownership. The petitioner then asserted that "because this is a privately owned enterprise, it does not issue any stock."

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<sup>2</sup> The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In support of the RFE, the petitioner submitted a copy of its 2010 IRS Form 1120, U.S. Corporation Income Tax Return. In Schedule E, Compensation of Officers, the petitioner indicated that [REDACTED] owned 85% of the corporation's common stock, and [REDACTED] owned 15% of the corporation's common stock.

Upon review of the submitted documentation, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity as affiliates. The petitioner failed to submit sufficient documentation establishing the ownership and control of both the U.S. and foreign entities.

With regards to the U.S. entity, the self-reported percentages of ownership as reflected on the petitioner's tax return are not supported by a stock ledger, stock certificates, and other objective evidence of ownership and control. In addition, there is insufficient evidence to show that the stock was actually purchased by these two individuals, and the by-laws, while signed, were never dated.<sup>3</sup> As general evidence of a petitioner's claimed qualifying relationship, the petitioner's corporate stock or membership certificate ledger, stock certificate registry, corporate bylaws, operating agreement and the minutes of relevant annual shareholder or member meetings must be examined to determine the total number of shares or membership units issued, the exact number issued to the shareholders or members, 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.<sup>4</sup> *Cf. Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362, 364-365 (Comm'r 1986). Without full disclosure of all relevant documents, the petitioner is unable to establish the elements of ownership and control.

Notably, the petitioner claimed in response to the RFE that it "does not issue any stock." However, this claim is contradicted by the petitioner's initial characterization of [REDACTED] and [REDACTED] as "shareholder[s]." This claim is also contradicted by the evidence the petitioner submitted showing that the U.S. entity has issued stock, such as the petitioner's 2010 tax return specifically showing [REDACTED] and [REDACTED] as owners of common stock. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

With regards to the foreign entity, the petitioner only submitted evidence establishing that [REDACTED] and [REDACTED] were the two foreign investors as of March 30, 2005. However, this evidence does not establish that [REDACTED] and [REDACTED] were, and still are as of the date of

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<sup>3</sup> The by-laws state, in pertinent part, that the corporation "shall keep at its principal executive office . . . a record of all its shareholders, giving the names and addresses of all shareholders and the number and class of shares held by each shareholder," and that "[a] certificate or certificates for shares of the capital stock of the corporation shall be issued to each shareholder when any of these shares are fully paid . . . ."

<sup>4</sup> While the petitioner submitted a combined "Profit/Dividend Sheet" for the U.S. and foreign entities, this document did not contain any information that would be pertinent to showing ownership or control of the entities, such as how profits and dividends were actually distributed. In addition, this document was from 2004 (although the 2004 was whited-out).

filing, the sole owners of the foreign entity in the same proportions of their initial investments. The petitioner submitted no objective evidence establishing the foreign entity's overall ownership and control, such as its stock ledger, stock certificates, and other evidence establishing the total number of shares or membership units issued. *Cf. Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 364-365. Overall, the documentation submitted is insufficient to establish that the U.S. and foreign entities have a qualifying relationship. For this additional reason, the appeal must be dismissed.

Finally, beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage of \$60,000.00 per year as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>5</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967).

In the instant case, the petitioner did not appear to pay the beneficiary the full proffered wage in 2011. The petitioner's California quarterly wage and withholding report for the 4<sup>th</sup> quarter of 2011 reflects that it paid the beneficiary \$9,692.40, equivalent to approximately \$38,769.60 per year. In addition, according to the petitioner's 2010 federal tax return, its net income of \$228 and net current assets of \$0, when added to the wages paid to the beneficiary, were not equal or greater to the proffered wage.

Further, the petitioner failed to establish that factors similar to *Sonogawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets. In response to the RFE, the petitioner asserted that the company's financial health and liquidity should be viewed "in the totality of the circumstances." Specifically, the petitioner highlighted the company's total revenue and total income in 2010 of \$3,858,238 and \$818,988, respectively.<sup>6</sup> The petitioner explained that the company "chose to apply deductions in order to result in the company having a zero tax payment." The petitioner also highlighted the company's \$289,309 in liquid cash, and \$7,644,134 worth of assets. Furthermore, the petitioner asserted that the depreciation value of \$37,414 should be added back to the taxable income of the company.

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<sup>5</sup> *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9<sup>th</sup> Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6<sup>th</sup> Cir. filed Nov. 10, 2011).

<sup>6</sup> The petitioner's 2010 federal tax return confirms its gross receipts or sales (line 1) as \$3,858,238, and its total income (line 11) as \$818,988.

However, the petitioner's assertions are not persuasive. In determining the petitioner's ability to pay, USCIS and judicial precedent support the use of *net* income figures, as opposed to gross income, as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses.<sup>7</sup> Furthermore, while the petitioner highlighted the company's liquid cash and assets, these assets were entirely offset by the petitioner's total liabilities, including its accounts payable of \$13,757,494. Overall, after considering the totality of the circumstances, the petitioner has failed to establish its ability to pay the proffered wage to the beneficiary.

#### IV. Conclusion

The petitioner failed to establish that the beneficiary will be employed in a qualifying managerial capacity by the U.S. entity, or that he was employed in a qualifying managerial capacity by the foreign entity. The petitioner failed to establish that it has a qualifying relationship with the foreign entity. Finally, the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

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<sup>7</sup> See *River Street Donuts, LLC v. Napolitano*, 558 F.3d at 118; *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881.