



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE:

NOV 24 2014

OFFICE: NEBRASKA 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, Nebraska Service Center ("the director"), denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker (Form I-140), to classify the beneficiary as a multinational manager or 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, an [REDACTED] corporation, states that it is an affiliate of [REDACTED] the beneficiary's former employer located in [REDACTED]. The petitioner indicates that it operates a [REDACTED] restaurant and employs eight individuals. It seeks to employ the beneficiary as its president.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary had been employed by the foreign entity or would be employed by the U.S. petitioner in a qualifying managerial or executive capacity. On appeal the petitioner asserts that it has demonstrated that the beneficiary satisfies the requirements necessary for approval of the I-140 petition.

The record of proceeding before us contains: (1) the petitioner's Form I-140 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, and a brief in support of the appeal. We reviewed the record in its entirety before issuing this decision.<sup>1</sup>

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

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.

<sup>1</sup> We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.

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.

## II. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

The first issue to be addressed is whether the petitioner established that its claimed foreign affiliate employed the beneficiary in a qualifying managerial or executive capacity for one year in the three years preceding her admission to the United States as a nonimmigrant.

### A. Facts

In the initial January 15, 2013 letter submitted in support of the petition, the petitioner indicated that the beneficiary performed duties in the role of "Managing Director" or "Chief Executive Officer" for the foreign entity from January 2005 until May 2010. The petitioner submitted the following overview of the beneficiary's duties for the foreign entity:

[S]he had the responsibility for planning, directing and overseeing the policies to achieve our company's goals. In addition, she was in charge of reviewing the financial statements, supervising our professional staff, and developing plans to maximize the company's profit.

As the highest ranking executive in the company, her responsibilities also included developing and implementing high-level strategies, making major corporate decisions, managing the overall operations and resources of a [*sic*] company, and acting as the main point of communication between the board of directors and the corporate operations.

In order to carry out the duties mentioned above, the Managing Director, or Chief Executive Officer (CEO) had the responsibility of reviewing everything from the daily, monthly and yearly budget reports to analyzing marketing summaries.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE. The director requested that the petitioner submit probative evidence to establish eligibility for the benefit sought, and outlined the evidence to be submitted.

In response, the petitioner provided the same description for the beneficiary's responsibilities for the foreign entity as noted above and added the following:

1. Business Development (30%)
  - Maintain a good relationship with key executives and managers and work towards strengthening them.
  - Cultivate key client relationships, which lead to new business opportunities. Attend networking events[.]

- Manage marketing budget and decide on tradeshow and sponsorship opportunities the company pursues.
  - Participate in relationship reviews and contract reviews with elite clients.
  - Making sure the revenue targets will be met for the month, quarter, year etc. Making sure profitability numbers are being met.
  - Decide and implement budgets for the business unit.
  - Provide inputs for overall corporate goal setting and 5-year plans.
  - Oversee the marketing & advertising campaigns for company, including the monitoring of the marketing and advertising plans to make sure they meet the revenue growth goals.
2. Managing the onsite operation team (30%)
- Taking status reports from the team leaders on a daily/weekly basis, ensuring that the projects are running on time and solve any possible roadblocks[.]
  - Do performance appraisals.
  - Manage personal development plans of all direct reports and define a clear career path.
  - Mentoring the individual team members for improved performance.
  - Hiring and Firing responsibilities, including deciding on the job description for new positions.
  - Ensure invoicing and revenue collection are done on time.
  - Keeping the team accountable to deliver the deployment projects as per the development plan.
  - Review and approve time sheets for payment.
  - Creation of appropriate project metrics to monitor the cost, effort and quality[.]
  - Periodic reviews of all the project[s.]
  - Identify risks at the Project/Account level and formulate mitigation plans.
3. Identify new opportunities/assignments which will contribute to the growth of the company and ensure revenue targets are met or bring in efficiency in current operation (20%)
- Explore new techniques that can provide a competitive advantage.
  - Translate client issues into opportunities for development of new services.
  - Analyze strengths and weakness of key competitors and be aware of the latest trends in business[.]
  - Explore the different new opportunities to figure out the feasibility of implementation[.]
  - Oversee special projects[.]
  - Create new production processing system as needed to make things run more efficiently[.]
4. Supply Chain Management & Other Management Activities (20%)

- Solve pain points as needed.
- Work with current vendor base to make sure they will be able to meet our demand based on business forecast[.]
- Oversee pricing and service levels[.]
- Review new potential suppliers to provide items needed[.]
- Authorize capital equipment, computers and software items for the company[.]
- Overseeing the filing of company Corporate Returns & Reports.
- Responding to official communications.
- Execute and sign contracts on company's behalf.

The petitioner also submitted a copy of the foreign entity's undated organizational chart which depicts the beneficiary as "Managing Director" supervising five individuals in the following positions: accounting manager, purchasing manager, marketing manager, export manager and factory manager. One additional position, the position of factory assistant manager, is listed under the factory manager.

In an attachment to the organizational chart, the foreign entity listed the employees depicted on the chart by position, name, and education level. The foreign entity also added a line indicating 100 employees worked as machine operators/clerks. The foreign entity does not identify these employees by name.

The foreign entity provided a brief job description for the listed employees as follows:

Managing Director [the beneficiary's position]: Direct, [p]lan the objectives of the company to achieve the goals. She analyzes the business plan, reviews the financial statements and looks [sic] business trend to maximize the profit for the company.

Accounting Manager: Be responsible to oversee the bank transaction and keep record of financial situation and prepare financial statements to for [sic] the company to review. Keep the employees' records and financial records.

Purchasing Manager: In charge of [p]urchasing materials for the factory. Contact the vendors and negotiate the contract. Keep the inventory and create the inventory reports to the board. Keep cost low and expand the products channel.

Marketing Manager: In charge of creating a marketing plan to promote the company's production to increase the sales. Develop the products and meet the international standard requirement. Expand the business to Asian countries like Japan and Hong Kong.

Export Manager: In charge of review [of] the customers' needs and requirement. Discuss with the production and Marketing Department to create the high quality products to meet the international standard. Negotiate sales with clients. Contact the shipping and banking for the banking [sic] for the transportation and export the products.

Factory Manager: In charge of furniture productions and keep control of 100 manpower to produce the furnitures [sic] per orders as assigned. Keep control of material inventory to

product [*sic*] the finished products. Report the upper level for quality and quantity of merchandise including problems occurred in the factory. Check the quality of the products to meet the global standard before shipment. Check with work schedules for each employee to perform the activities[.]

Factory Asst. Manager: Assist the manager to complete the tasks. Keep all reports, report the daily and monthly production report to the manager for consideration.

Machine Operators/clerks: Product [*sic*] the products per Manager's orders. Keep all the daily production report.

The record included 16 external and internal photographs of a factory. The photographs do not include sufficient information to identify the foreign entity by its English name. The record also included a document that is not translated but appears to be a certificate from a local company registration office issued October 3, 2012. The record further included what appear to be the foreign entity's bank statements. As these documents are only partially translated and do not include the foreign entity's company name, the pertinence of these documents has not been established.

The director reviewed the petitioner's submissions and determined that the petitioner had not established that the beneficiary had been employed in a qualifying managerial or executive capacity for the foreign entity.

On appeal, counsel takes issue with the director's analysis of the beneficiary's duties for the foreign entity.

#### B. Analysis

Upon review, and for the reasons discussed below, the petitioner has not established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as the actual duties themselves reveal the true nature of the 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); *see also* 8 C.F.R. § 204.5(j)(5). That being said, however, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

It is important to note that the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

First, upon review of the record, we are unable to ascertain whether the beneficiary's claimed executive and managerial duties constitute a majority of the beneficiary's duties. Although the foreign entity provided a description of the beneficiary's duties and the percentage of time allocated to groups of those duties, each group of duties also includes administrative and operational tasks. For example, "[m]anag[ing] marketing budget and decid[ing] on tradeshows and sponsorship opportunities," "[p]articipat[ing] in relationship reviews and contract reviews with elite clients," "[d]ecid[ing] and implement[ing] budgets for the business unit," "[c]reation of appropriate project metrics to monitor the cost, effort and quality," "[p]eriodic reviews of all the project[s]," "[t]ranslat[ing] client issues into opportunities for development of new services," "[a]nalyz[ing] strengths and weakness of key competitors and [awareness] of the latest trends in business," "[s]olv[ing] pain points as needed," "[w]ork[ing] with current vendor base," and "[r]evue[ing] new potential suppliers" are all descriptive of operational, not executive or managerial tasks. The duties, as described do not provide sufficient information to determine that the beneficiary was directing or managing these tasks rather than actually performing these duties as an inherent part of the day-to-day marketing, financial, and sales operations of the company. 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. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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).

Similarly, "[o]verse[ing] the marketing & advertising campaigns for company," "[t]aking status reports from the team leaders on a daily/weekly basis," "[e]nsur[ing] invoicing and revenue collection are done on time," providing "performance appraisals," "[m]anag[ing] personal development plans of all direct reports," "[r]evue[ing] and approv[ing] time sheets for payment" are supervisory duties. The statutory definition of the term "managerial capacity" allows for both "personnel managers" and "function managers."<sup>2</sup> *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. Section 101(a)(44)(A)(iii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(iii).

The foreign entity's description of the duties of the beneficiary's subordinates depicts individuals who perform bookkeeping, purchasing, marketing, factory, and exporting tasks. The duties as described do not include sufficient information to establish that the duties require the individuals performing the duties to be

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<sup>2</sup> The petitioner in this matter does not claim and the record does not support that the beneficiary's foreign position or the proposed position in the United States is a function manager position. Accordingly, as there is no basis for discussion of the criteria for a function manager, we will not address the criteria for this element further.

professionals.<sup>3</sup> The record is simply deficient in this regard. 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)). Thus, the petitioner has not established that the beneficiary performed supervisory duties, other than as a first-line supervisor of non-professional employees.

Accordingly, it is not possible to gain a meaningful understanding based on the general descriptions of the beneficiary's foreign duties, how much time the beneficiary spent performing qualifying tasks versus non-qualifying tasks. 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. Again, 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 record is insufficient to establish that it is more likely than not that the beneficiary spent the majority of her time performing executive and/or managerial tasks. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991); *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), (outlining the preponderance of evidence standard).

Further, we note that the record does not include any probative information substantiating that the foreign entity produces furniture or other products and further the record does not include evidence corroborating the employment of the individuals the foreign entity lists on its organizational chart. The photographs submitted do not include any information establishing the name or location of the factory photographed. Because the

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<sup>3</sup> In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." 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). Here, the petitioner's claim that the beneficiary's foreign subordinate possessed a bachelor's degree does not automatically lead to the conclusion that the employee was employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not established that a bachelor's degree is actually necessary to perform the duties described or that the foreign subordinates actually have such degrees.

petitioner failed to submit certified English translations of the foreign entity's banking and registration documents, we cannot determine whether the evidence supports any of the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, this evidence is not probative and will not be accorded any weight in this proceeding. Moreover, the record also does not include any employment records of the individuals the foreign entity claims to employ. Accordingly, the record is insufficient to establish the nature or scale of the foreign entity's business.

Finally, although not addressed in the director's decision, the record of proceeding contains inconsistent information regarding the beneficiary's actual dates of employment with the foreign entity. In a letter dated January 15, 2013, the petitioner stated that "[p]rior to entering the United States and changing her status to that of an E-2 Treaty Investor in May of 2010, [the beneficiary] was employed outside the United States by [the foreign entity] as its Managing Director (Chief Executive Officer) since 1997."

The record reflects that the beneficiary was last admitted to the United States in October 2009 and that she has maintained E-2 nonimmigrant status since May 2010. At issue is the period of time preceding her most recent admission to the United States. The beneficiary stated on the Form G-325A Biographic Information accompanying her concurrently filed Form I-485, Application to Adjust Status, signed in December 2012 that she has resided in [REDACTED] Arizona since May 2008 and that she worked for the foreign entity from January 2005 until December 2012. The record also contains a previous Form I-140 filed on the beneficiary's behalf by her former U.S. employer, [REDACTED] which was also accompanied by a concurrently filed Form I-485 and Form G-325A. On the previous Form G-325A, which the beneficiary signed on February 14, 2007, she indicated that she had resided in the United States continuously since September 2005. The petitioner declined to mention the beneficiary's previous periods of residence and employment in L-1 nonimmigrant status in the United States, and as a result, it is unclear when she may have completed the required one year of employment abroad. The organizational chart submitted for the foreign entity is not dated and it cannot be determined whether it represents the structure of the foreign entity during the relevant period.

Therefore, the record does not include sufficient consistent evidence establishing that within the three years preceding the time of the alien's application for classification and admission into the United States, she had been employed for at least one year by a qualifying firm or corporation or other legal entity or an affiliate or subsidiary thereof. Section 203(b)(1)(C) of the Act. 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).

The petitioner has not presented evidence on appeal sufficient to overcome the director's determination on this issue. Accordingly, the appeal will be dismissed.

### III. U.S. EMPLOYMENT

The remaining issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity.

A. Facts

In the initial January 15, 2013 letter submitted in support of the petition, the petitioner indicated that, since assuming her position as the petitioner's president, she has "continued to perform basically the same duties that she performed abroad." As those initially and generally described duties are set out described above, they will not be repeated here.

The initial record also included a copy of the petitioner's organizational chart which depicted the beneficiary as "President" supervising a manager. The manager is shown supervising a chef, a cashier/waitress, a waitress, and a dishwasher. The chef is depicted as supervising a cook and a cook helper.

The petitioner also provided: its corporate documents; a certificate of occupancy and business license expiring November 1, 2012 for [REDACTED] restaurant, located at [REDACTED] Arizona; a five-year lease for [REDACTED] restaurant signed by the beneficiary on behalf of [REDACTED] Restaurant"; evidence that the petitioner purchased the assets of [REDACTED] from [REDACTED] for \$95,000 on March 1, 2010; "Escrow Instructions" dated September 16, 2011 indicating that the petitioner purchased [REDACTED] restaurant from [REDACTED] for \$80,000 in September 2011; a letter confirming that the petitioner, doing business as [REDACTED] currently occupied space at the [REDACTED]; a liquor license for [REDACTED] restaurant located at [REDACTED] Arizona; its [REDACTED] account statements for 2012 showing its operating account for [REDACTED]; and its [REDACTED] account statements for 2012 showing its operating account for [REDACTED]. The record also included copies of the beneficiary's Internal Revenue Service (IRS) Form 1040, Individual Tax Return, for 2010 and some of the petitioner's tax documents for 2011 and 2012.

The director, in the issued RFE, noted the insufficiency of the evidence and outlined the evidence to be submitted.

In response, the petitioner again provided the same general description for the beneficiary's responsibilities and noted that the beneficiary would continue to perform these duties except in a different context and work environment. The petitioner emphasized that the beneficiary is the highest ranking officer in the petitioner's organization. The petitioner provided the same groups of duties as had been set out for the foreign entity, changing a few words, deleting a few phrases and duties, and allocating a different percentage of time to the groups of duties. For convenience, the duties and time percentages are set out here:

1. Business Development (45%)

- Maintain a good relationship with managers and employees and work towards strengthening them.
- Cultivate key client relationships[.]
- Manage marketing budget and decide on tradeshow and sponsorship opportunities the company pursues.
- Making sure the revenue targets will be met for the month, quarter, year etc.
- Make sure profitability numbers are being met.

- Decide and implement budgets.
  - Provide inputs for overall corporate goal setting and 5-year plans.
2. Managing the business personnel (45%)
- Taking status reports from managers on a daily/weekly basis[.]
  - Ensuring that [sic] efficient operation of the business and solve any possible roadblocks[.]
  - Do performance appraisals.
  - Manage personal development plans of all direct reports and define a clear career path.
  - Mentoring individual employees for improved performance.
  - Hiring and Firing responsibilities, including deciding on the job description for new positions.
3. Identify new opportunities which will contribute to the growth of the company and ensure revenue targets are met or bring in efficiency in current operation (10%)
- Explore new techniques that can provide a competitive advantage.
  - Translate client issues into opportunities for development of new services.
  - Analyze strengths and weakness of key competitors and be aware of the latest trends in business[.]
  - Explore the different new opportunities to figure out the feasibility of implementation[.]
  - Manage special events[.]
4. Supply Chain Management & Other Management Activities (10%)
- Work with current vendor's base to make sure they will be able to meet our demand based on business forecast[.]
  - Oversee the negotiation regarding pricing and service levels[.]
  - Find new suppliers to provide items needed[.]
  - Oversee the procurement of capital equipment, computers etc. for the company[.]
  - Overseeing the filing of the company's Corporate Returns & Reports.
  - Responding to official communications.
  - Apply for permits, memberships and licenses.
  - Execute and sign contracts on company's behalf.

The petitioner submitted a revised copy of its organizational chart which again depicts the beneficiary as "President" supervising a manager. In this iteration, the manager is shown supervising a chef, a cashier/waitress, and two dishwashers. The chef is depicted as supervising a cook and two cook helpers. The waitress/cashier is shown supervising two waitresses and there are a total of eleven employees included on the chart.

The petitioner also provided copies of its IRS Forms 1120, U.S. Corporation Income Tax Return, for 2010, 2011 and 2012. The petitioner further included its IRS Form 941, Employer's Quarterly Federal Tax Return for the first quarter of 2013, the quarter in which the petition was filed. The Form 941 shows that the petitioner employed eight individuals and paid \$34,982.08 in wages, tips, and other compensation in the first quarter of 2013. The petitioner did not provide the names or otherwise identify the eight individuals compensated. The IRS 941 Form identified the trade name for the petitioner as [REDACTED].

The record also included the petitioner's Arizona Department of Economic Security tax and wage report for the second quarter of 2013, which indicates the petitioner employed nine individuals in April, ten individuals in May, and nine individuals in June. The second quarter wage report identifies eleven names which correspond to the names listed on the petitioner's revised organizational chart. Notably the chef's salary is half as much as one of the cook helpers he allegedly supervises.<sup>4</sup>

The director reviewed the petitioner's submissions and determined that the petitioner had not established that the beneficiary would be employed in a qualifying managerial or executive capacity at the petitioner.

On appeal, counsel takes issue with the director's analysis of the beneficiary's duties for the petitioner.

#### B. Analysis

Here we seek to determine whether the petitioner provided sufficient evidence to establish that the beneficiary more likely than not will allocate her time at the petitioner primarily in the performance of tasks that are within a qualifying managerial or executive capacity.

As set out above, the job description for the beneficiary's work at the petitioner, copied almost verbatim from the beneficiary's duties at the foreign entity, includes non-qualifying duties and further includes no duties that are specific to the restaurant industry. Here, the petitioner does not provide evidence that the petitioner employs individuals to market the petitioner's restaurant, to perform the bookkeeping and other financial duties related to running the restaurant, or to negotiate pricing. Accordingly, the petitioner has not established that it employs individuals who will relieve the beneficiary from primarily performing these operational and administrative tasks. The petitioner also does not establish that the beneficiary performs duties that are primarily involved in directing the management or managing the organization, other than as a supervisor of non-professional, non-supervisory, or non-managerial employees.

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<sup>4</sup> The Arizona Department of Economic Security tax and wage report for the second quarter of 2013 does not provide probative evidence demonstrating when the individuals were hired and/or fired, the number of hours they worked, or other evidence to assist in determining the actual roles these individuals performed for the petitioner. Moreover, as this document depicts, in part, the state of the organization for the second quarter of 2013, it does not reflect the organization's number of employees when the petition was filed. 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). Accordingly, the pertinence of this document and the revised organizational chart has not been established.

In addition, the Form 941 submitted for the first quarter of 2013, establishes only generally that the petitioner, using the trade name [REDACTED] employed eight individuals when the petition was filed. Even if we found that the seven subordinate positions identified on the petitioner's organizational chart depicted the organizational structure of the petitioner when the petition was filed, it does not demonstrate that the beneficiary will be relieved from primarily performing non-qualifying duties. This is particularly true in this case, where the petitioner submitted supporting evidence suggesting that it operates two [REDACTED] restaurants in [REDACTED] Arizona, but provided an organizational chart and quarterly wage reports showing staffing levels consistent with the operation of a single restaurant. Again, we point out that 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. *Matter of Ho, Id.*

To emphasize again, an employee who "primarily" performs the tasks necessary to produce a product or provide a service 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).

The record here does not include descriptions of the duties of the beneficiary's subordinates at the U.S restaurant. Although the petitioner's organizational chart depicts a managerial position directly below the beneficiary, the record does not include evidence of the duties the "manager" performs. Moreover, the petitioner does not indicate how much time the beneficiary will spend supervising this position. The evidence of record must substantiate that the duties of the beneficiary and her subordinates correspond to their placement in an organization's structural hierarchy; 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 manager position.

As discussed above, the petitioner has not identified employees within the petitioner's organization, subordinate to the beneficiary, who would relieve her from performing routine duties inherent to the duties of a first-line supervisor of non-professional, non-managerial, and non-supervisory employees. In addition, as observed above, the record does not include evidence that the petitioner employs personnel who will perform the administrative and operational duties, necessary to run the petitioner's business, particularly as the evidence indicates the petitioner's ownership of two restaurants.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates perform the actual day-to-day, non-supervisory, non-managerial tasks of operating the petitioner's restaurant. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Although the beneficiary is listed as head of the organization, the record does not include documentary evidence that the beneficiary has a subordinate level of managerial employees to direct.

Pursuant to section 101(a)(44)(A)(iv) and section 101(a)(44)(B)(i) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

We observe 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 section 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 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). In addition, a company's small size does not obviate the need to establish that a beneficiary is not primarily performing the duties of the organization. To establish such, the petitioner must fully and definitely describe the actual duties the beneficiary and his or her subordinates perform. Further, the petitioner must establish that the company currently has a reasonable need for the beneficiary to perform duties that are primarily in a managerial or executive capacity as those terms are defined in the statute. In this matter, the petitioner has failed to provide this essential evidence.

Upon review of the totality of the record including the petitioner's organizational structure, the lack of evidence regarding the beneficiary's subordinates, the inconsistent evidence regarding the scope of the business, and the lack of evidence regarding employees to relieve the beneficiary from primarily performing non-managerial duties, the petitioner has not established that the beneficiary's actual duties are primarily managerial or executive in nature. Accordingly, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity. For this additional reason, the appeal will be dismissed.

#### 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.