

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

(b)(6)

DATE: **APR 28 2015**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

A handwritten signature in black ink, appearing to be "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Texas Service Center Director approved the immigrant visa petition on March 20, 2013. On February 11, 2014, the director issued a Notice of Intent to Revoke (NOIR) the approval, and on May 13, 2014 the director revoked the approval and entered a finding of willful misrepresentation of a material fact. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The finding of willful misrepresentation of a material fact will be withdrawn.

The petitioner is a Florida Limited Liability Company engaged in automotive repair and maintenance. It seeks to employ the beneficiary in the United States as its finance director. 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 initially approved the petitioner's Form I-140 on March 20, 2013. The director subsequently determined that the record as it existed at the time of approval was lacking certain required initial evidence and thus the petition should not have been approved. Accordingly, the director issued a notice of intent to revoke (NOIR) the approval of the petition on February 11, 2014.

The director's NOIR questioned whether the beneficiary has worked and will work in a qualifying capacity. Specifically, the director found unresolved discrepancies relating to the tenure of the beneficiary's foreign employment, a lack of specific duties or time spent on any particular duties, and contradictions between the organizational chart and the petitioner's narrative regarding its organizational structure in the United States and the foreign entity's structure abroad. For example, the petitioner referred to "key departments" such as finance and marketing yet neither the petitioner's organizational chart nor the foreign entity's chart depicts such a structure. In addition, the director found that the evidence indicated the beneficiary would be a first-line supervisor but the petitioner failed to sufficiently establish that the beneficiary's direct reports were professionals. Further, the director stated that the beneficiary's proposed duty description submitted as part of a previously filed Form I-140 is different from the description provided as part of this current Form I-140 filing. The director also found discrepancies with the petitioner's three previous organizational charts when compared to the charts submitted as a part of the current filing.

In addition, the director questioned the beneficiary's own disclosures due to a number of inconsistencies in the record. For example, as part of an earlier Form I-140 application, the beneficiary prepared her Application to Register Permanent Residence or Adjust Status and submitted a Form I-485 (Form-G-325A) Biographic Information dated February 15, 2012 that claims her employment with the foreign entity spanned February 2005 through November 2006, instead of the period extending to either December 2007 or January 2008 as claimed in this petition. The beneficiary also signed and submitted an earlier version of the Form G-325A on December 27, 2010 (for another petition) indicating that she worked for the foreign entity abroad from February 2004 until January 2008. The director also noted that Department of State records show the beneficiary listed her employment as Director for [REDACTED] on a prior E-2 non-immigrant visa application, but failed to list

this employer on either of her Forms G-325A. Therefore, the director questioned whether the beneficiary was actually employed by the foreign entity since the beneficiary did not claim this employer on her previous E-2 petition. Finally, the director questions the beneficiary's ability to work in a permanent full-time position for the petitioner since she is listed as a managing member of four other limited liability companies (LLCs) and secretary of two condominium associations as reported by the Florida Department of State Division of Corporations; none of which were disclosed on her Forms G-325A.

The director revoked approval of the petition on May 13, 2014, concluding that the petitioner failed to overcome all of the bases for revocation.¹ Specifically, the director revoked the approval based on a finding that the petitioner failed to establish: (1) that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and (2) that the beneficiary was employed abroad in a qualifying managerial or executive capacity. Additionally, the director found that the petitioner and the beneficiary misrepresented the beneficiary's employment with the foreign entity, and entered a finding of willful misrepresentation of a material fact.

On appeal, the petitioner submits a legal brief challenging the director's findings and asserts that the director did not properly address the petitioner's response to the NOIR and did not properly consider or weigh the evidence in the record.

I. ISSUES ON APPEAL

A. U.S. Employment in a Managerial or Executive Capacity

1. The Law

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;

¹ Following approval of an immigrant or nonimmigrant petition, the director may revoke approval of the petition in accordance with the statute and regulations. Section 205 of the Act, 8 U.S.C. § 1155 (2005), states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition."

- (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, 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.

2. Facts

The petitioner is a Florida limited liability corporation engaged in automotive repair and maintenance. The petitioner was established in 2004 and claimed to employ 11 individuals at the time the petition was filed.

The petitioner's Form I-140, Immigrant Petition for Alien Worker, described the beneficiary's proposed duties as follows:

[The beneficiary] will continue to be responsible to consolidate operations and financial projections for development on a short and long-term business plans and interpret data affecting investment programs, such as price, yield, stability, future trends in investment risk, and economic influences. [The beneficiary] will also continue to be in charge of designing and establishing the overall financial strategy of the Company including its investment. [The beneficiary] will continue to be responsible of overseeing the operations of key departments such as Finance, Marketing and accounting. As head of these departments she will continue in charge of making decisions that impact the entire organization.

The petitioner's March 5, 2012 letter submitted in support of the petition stated that the beneficiary would continue to perform as finance director, a position she has held since January 2008. The petitioner listed the beneficiary's specific functions as follows:

Review and analyze the company's investment, statements and any other financial tool.
Analyze commodity prices, sales, cost, expenses, and tax rates in order to determine the company's value and to projected net worth
Oversee utility billing, business licensing, billing and collections
Consolidate operations and financial structure
Review Department reports
Review Business Plan and adjust accordingly
Set financial corporate policies and direct investment activities of the company

The petitioner provided the beneficiary's time distribution as follows:

- Supervise managerial personnel and review performance reports. 40% or 16 hours per week
- Review accounts payable and receivable reports from accounting. 35% or 14 hours per week
- Review budget and cost control mechanism on a weekly basis. 10% or 4 hours per week.
- Perform weekly meeting with Managerial Personnel. 5% of 2 hours per week
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- Review Company liabilities and short-term responsibilities. 5% or 2 hours per week
- Review and approve accounts payable including but not limited to utility bills, suppliers and special expenses. 5% or 2 hours per week.

The petitioner states that the beneficiary is responsible for the petitioner's "finance department" and has an "Administrative Manager," an "Import/Export Manager," and a "Marketing Manager" under

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her direct supervisory control. The petitioner further explains that the administrative manager is in charge of overall administrative tasks, including payroll accounting, budgets bank transactions, supplies and a variety of reports. The petitioner identifies the marketing manager as “Bachelor Marketing” and states that her duties include designing and implementing marketing strategies approved by the beneficiary. Her weekly time distribution is as follows: (1) 35% ensuring correct performance of the platform of the sales terms; (2) 20% performing customer service tasks; (3) 15% issuing quotes; (4) 20% negotiating terms and conditions with clients; and (5) 10% recording market data. Although the petitioner indicates that this marketing employee supervises the truck sales manager the position is not filled and the marketing employee has no time allocated to the task. The import/export manager’s time is allocated as follows: (1) 30% to coordinate weekly operations with Operations/Leasing and Marketing Managers; (2) 30% monitoring the export procedure; (3) 15% public relationships with suppliers and customers; (4) 15% preparing operations forecasts on a weekly basis; and (6) 10% estimating involved costs and maximize resources. The petitioner identifies this employee as “Bachelor/Associates.” The letter also indicates that an accounts receivable employee, [REDACTED] reports directly to the beneficiary and performs administrative and accounting tasks.

The petitioner’s letter dated March 2, 2012 restated the beneficiary’s narrative duty description and included the beneficiary’s oversight of operations of “key departments such as Finance, Marketing and accounting.”

The petitioner’s March 2012 organizational chart depicts the beneficiary as director of finance and directly subordinate to the director of operations. In turn, the beneficiary directly oversees an outsourced accountant, an accounts receivable employee, the administrative manager, the sales manager and the marketing manager. The chart demonstrates that both the sales manager and the administrative manager have employees subordinate to them. The petitioner’s March 5, 2012 letter does not refer to a sales manager as noted in the chart; instead it refers to an import/export manager.

In response to the director’s NOIR, the petitioner submitted a brief and additional evidence including an organizational chart depicting the same hierarchy previously discussed, but with additional subordinate employees such as a mechanic subordinate to the mechanic supervisor and an executive assistant and maintenance person subordinate to the administrative manager. The petitioner also provided job description manuals prepared by a company contracted by the petitioner.

The director revoked the petition and determined, among other things, that the petitioner did not provide a specific description of the beneficiary’s job duties, or explain how the beneficiary would accomplish the duties, or provide a percentage breakdown of time that the beneficiary would spend on each individual task.

The director found that the beneficiary failed to list all employment on her Form G-325A submitted in connection with her Form I-485. In response to the NOIR, the petitioner briefly described the beneficiary’s involvement with four limited liability companies (LLCs) and two condominium association companies in Florida. The Petitioner claims that the beneficiary is an owner and managing member of two LLCs, on the board of directors of both the condominium association companies,

and a co-owner of the remaining two LLCs. The petitioner explained that the beneficiary did not include these companies on the Form G-325A because she was not actually employed by any of them. The director found that the Florida website, [REDACTED] indicated that the beneficiary was a managing member of four companies and a secretary on the board of directors for the remaining two. The director also found that the petitioner provided no documentation to support the claim that the beneficiary was not employed by any of the six corporations. The director found these inconsistencies to be unresolved. Moreover, the director questioned whether the beneficiary had actually been working full time or whether she could be working full time for the petitioner given her obligations with six other corporations.

For all of the reasons discussed, the director found that the petitioner had provided insufficient evidence to demonstrate the beneficiary would be employed in a primarily managerial or executive capacity.

3. Analysis

Upon review of the totality of this record, we find the evidence does not support a finding that the beneficiary would perform duties in a qualifying managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, we review the totality of the record, starting first with the petitioner's description of the beneficiary's proposed job duties. See 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed 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). We will then consider this information in light of other relevant factors, including job descriptions of the beneficiary's subordinate employees, the nature of the business that is conducted, the petitioner's subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioning entity. While an entity with a limited support staff will not be precluded from the immigration benefit sought herein, it is subject to the same burden of proof that applies to a larger entity with a moderate or large subordinate staff. In other words, regardless of an entity's size or support staff, the petitioning entity must be able to provide sufficient evidence showing that it has the capability of maintaining its daily operations such that the beneficiary would be relieved from having to primarily perform the operational tasks.

The beneficiary's role as finance director includes oversight over all financial matters; designing and establishing the petitioner's overall financial strategy and overseeing the operations of the finance, marketing and accounting departments; all key to the petitioner's organization. In support of this claim, the petitioner provided a chart listing the beneficiary's seven specific functions. The seven tasks included in this function list included tasks such as "review department reports," "review business plan and adjust accordingly," "consolidate operations and financial structure," and four more tasks that are related to the petitioner's financial needs. The petitioner also included a "time distribution" section in the chart that allocated a percentage of the beneficiary's time to the beneficiary's tasks. Instead of assigning a percentage of time to any of the seven tasks already

listed, the petitioner listed six new tasks such as “supervise managerial personnel and review performance reports” 40%, review accounts payable and receivable reports from accounting” 35%, and “review budget and cost control mechanism on a weekly basis” 10%, along with three others tasks each accounting for 5% of the beneficiary’s time. A review of the beneficiary’s allocation of time shows that many tasks included in the initial function list have not been allocated any of the beneficiary’s time. Furthermore, none of the beneficiary’s time appears to be allocated to marketing.

The petitioner’s descriptions for the beneficiary are inconsistent and the petitioner has not clearly established how the beneficiary will spend her time. Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *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).

Further, 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).

Moreover, the record fails to demonstrate that the beneficiary’s duties are primarily managerial. An employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Intn’l.*, 19 I&N Dec. 593, 604 (Comm’r 1988).

The statutory definition of "managerial capacity" allows for both "personnel managers" and a "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act.; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). 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. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

We acknowledge that the petitioner submitted a letter dated, March 12, 2014, from an outside company hired to design a job description manual for the foreign entity and the U.S. petitioner. The contracted company met with the company management and used the information provided to “interpret the existing responsibilities and duties at the time and reorganize them in an efficient manner.” The contracted company provided a comprehensive job manual with employee duty positions and duty descriptions for both the foreign entity and the U.S. petitioner. Although the

petitioner asserts that the contracted company signed the petitioner's two organizational charts, it is not clear when the company completed the job manual. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

We acknowledge the petitioner's efforts to improve its organization, it does not appear that the job description manual was in operation at the time of filing. Additionally, although the contracted company relied upon stated duties and management discussions in order to develop the job description manual, it is not sufficient for us to rely upon a third party's assessment of what the beneficiary should have done in her position abroad or what she will do in her proposed position, at least not until the petitioner implements the manual and provides it as the measure at the time the petition was filed. In this case, the petitioner offers a conflicting duty description for the beneficiary that appears to have been created after this petition was filed. 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's organizational chart depicts the beneficiary as a manager of three managers; an administrative manager, marketing manager, and an import/export manager. Despite the petitioner's characterization, the record does not sufficiently establish that the beneficiary is more than a first-line supervisor. It is not enough for the petitioner to rely on its employee's title. First, the administrative manager reports directly to the beneficiary, but she is responsible for administrative tasks including payroll, accounts payable and receivable, invoicing, collections, special projects, report preparation and supports the beneficiary in all financial and administrative matters. Although the organizational chart depicts this employee as a supervisor to a mechanic supervisor, her duty description does not identify the supervisory relationship and none of her time has been allocated to any supervisory activities. Second, the petitioner's marketing manager reports directly to the beneficiary and is charged with designing and implementing marketing strategies that the beneficiary approves. One of her tasks includes supervising the truck sales manager, however, that position is vacant and her allocation of time distribution does not include supervisory tasks. Third, the import/export manager reports to the beneficiary, but 30% of his time is allocated to coordinating with the operations/leasing and marketing managers; none of his time is allocated to supervisory tasks. Based on the duty descriptions provided, the petitioner has not demonstrated that these three subordinate managers actually supervise others; rather it appears that each performs duties necessary to produce the company products and services making the beneficiary a first-line supervisor over each of them. 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)).

As found by the director, the petitioner repeatedly referred to the beneficiary's oversight of "key departments such as Finance, Marketing and accounting" yet the petitioner's organizational chart does not establish that those departments exist. Instead, the petitioner asserts that because its employees perform financial, marketing and accounting tasks they relieve the beneficiary from performing those tasks herself. We agree that the beneficiary has employees to perform such tasks, but the record does not show the areas to be separate "departments" of the organization. The record indicates that the beneficiary is involved in daily operations and that she is not relieved from primarily performing them herself, nor does she have as finance or marketing "department" upon which to rely or direct.

The petitioner asserts on appeal that the petitioner's reference to a "department" has been taken too literally and that the organizational chart demonstrates the essence of that department. We disagree. The various descriptions and responsibilities proposed for the beneficiary focus heavily on finance and finance related activities, yet there is not a dedicated finance department as claimed. Instead, the company employs an administrative manager and an accounts employee who handle some, but not all of the financial tasks; leaving the beneficiary to perform unqualified duties. We note that the claim regarding a "finance department" was made by the petitioner, and as such, the petitioner must present evidence to establish its claims. In this matter it has not done so.

When examining the managerial or executive capacity of a beneficiary, we review the totality of the record. The evidence 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. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors or managers. Instead, the record indicates that the beneficiary's subordinates perform the actual day-to-day tasks and are therefore not supervisors or managers. 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. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

The petitioner has also not established that the beneficiary will supervise professionals. In evaluating whether the beneficiary manages professional employees, we 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). We must focus on the level of education required by the position, rather than the degree held by subordinate employee. The 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. In the instant case, the petitioner has not provided sufficient evidence to establish that the beneficiary's subordinates either have bachelor's degrees or require degrees in their respective positions. In addition, while the beneficiary may rely upon an outsourced accountant to assist the company, the record does not establish that the beneficiary supervised the accountant.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, we must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici* at 158.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must

demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); see also *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)).

In this matter, the petitioner has not provided sufficient evidence to establish that the beneficiary manages an essential function. Despite the petitioner’s assertion that the beneficiary oversees a marketing department, the record includes insufficient evidence that there is either a marketing department or employees assigned marketing duties. Similarly, the record does not establish an accounting department or a finance department. The petitioner has not demonstrated that the beneficiary’s three subordinate employees will perform all of the tasks necessary to accomplish the tasks necessary to functions so that the beneficiary can primarily manage those functions. Therefore, the petitioner has not demonstrated that the beneficiary will be employed primarily as a functional manager.

The petitioner provided insufficient evidence to establish that the beneficiary would primarily perform in a qualifying managerial or executive capacity. Therefore, the petitioner failed to overcome this ground for the revocation of the petition’s approval.

B. Employment Abroad in a Managerial or Executive Capacity

1. Facts

In a letter dated March 5, 2012, the petitioner asserted that the beneficiary worked abroad as finance director for the foreign entity from February 2005 until November 2006. The petitioner described the beneficiary’s main activities abroad as follows:

[the beneficiary] was in charge of consolidate *[sic]* operations and financial projections for development on a short and long term business plans and interpret data affecting investment programs, such as price, yield, stability, future trends in investment risk, and economic influences. She also was in charge of designing and establishing the overall financial strategy of the Company including its investment. She was also responsible of overseeing the operations of key departments such as Finance, Marketing and accounting. As head of these departments she was in charge of making decisions that impact the entire organization.

The petitioner described the beneficiary’s specific functions as follows:

Review and analyze the company’s investment, statements and any other financial tool.

Analyze commodity prices, sales, cost, expenses, and tax rates in order to determine the company's value and to projected net worth
Oversee utility billing, business licensing, billing and collections
Consolidate operations and financial structure
Review Department reports
Review Business Plan and adjust accordingly
Set financial corporate policies and direct investment activities of the company

The petitioner described the beneficiary's time distribution as follows:

- Supervision of company's financial operations improvement strategy to support the organizational goals and represent the corporate in all commercial and financial matter 35% 14 hrs/Wk
- Approval of all commercial transactions of the corporation, assuring that were within the parameters of the corporate purpose and according to the Venezuela's legal framework 20% 8 hrs/Wk
- Plan, formulate and implement administrative and operational policies and procedures. Assign and delegate responsibilities 20% 8 hrs/Wk
- Coordinate the functions among the sales department and analyzed its operation to evaluate performance of her supervised staff 10% 4 hrs/Wk
- Establish internal control procedures, monitor business and agencies to ensure that they efficiently provide needed services 10% 4 hrs/Wk
- Submit progress report for the Board of Director 5% 2 hrs/Wk

The foreign entity's undated organizational chart depicts the beneficiary as Finance Director having a finance assistant and a finance manager who, in turn, supervised an accounts receivable supervisor.

The administrative director, the purchase/sales director, the marketing director and the beneficiary as finance director each reported directly to the board of directors, who, in turn, reported to the president.

In response to the RFE, the petitioner provided a second job description for the beneficiary indicating that the beneficiary worked for the foreign entity through December 2007 instead of November 2006 as previously claimed; the petitioner's counsel stated that the beneficiary worked for the foreign entity from September 2005 through January 2008.

Also in response to the RFE, the petitioner submitted a letter from the foreign entity stating that the beneficiary oversaw a finance assistant and a finance manager, who in turn supervised an accounts receivable supervisor. This letter did not include any reference to the marketing department.

In the NOIR, the director stated that the file in its entirety had been reviewed. Included in the review was a previous I-140 petition filed by the petitioner on January 11, 2011, on behalf of the beneficiary. The prior I-140 petition was denied on December 1, 2011.

The record includes the beneficiary's Biographic Information (Form G-325A) submitted in support of the previous Form I-140 and signed on February 15, 2012 indicating that she was employed with the foreign entity abroad from February 2005 until November 2006. However, the beneficiary also signed and submitted a Form G-325A on December 27, 2010 claiming to have been employed with the foreign entity from February 2004 until January 2008. The director noted these discrepancies and determined that the petitioner provided inconsistent evidence.

Based on the discussion above and discrepancies noted, the director determined that the petitioner failed to sufficiently demonstrate that the beneficiary had been employed in a qualifying managerial or executive capacity.

3. Analysis

Upon review, the petitioner has not established that the beneficiary was employed abroad in a managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed 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).

A review of the beneficiary's duty description reveals a vague and broad "function" list of the beneficiary's overall duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Nevertheless, the petitioner also provided a list of the beneficiary's tasks with a percentage of time allocated to each. We find that the petitioner did not sufficiently establish that more than 50% of the beneficiary's time would be spent performing primarily qualifying tasks. For example, five of the beneficiary's six tasks may include non-qualifying duties. Only 35% of the beneficiary's time appears to be dedicated to potentially qualifying tasks, although that task is so broadly written that it cannot be determined.

Based on the current record, we are unable to determine whether the claimed managerial duties constituted the majority of the beneficiary's duties, or whether the beneficiary primarily performed non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not sufficiently establish what proportion of the beneficiary's duties were managerial in nature, and what proportion was actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The statutory definition of "managerial capacity" allows for both "personnel managers" and a "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). 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. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

As found by the director, the petitioner asserted that the beneficiary was responsible for "key" departments abroad such as finance, marketing and accounting. However, as demonstrated in the record, the beneficiary oversaw three employees, two of whom were direct reports. While all three subordinates were engaged in financial and accounting tasks, the claim that the beneficiary oversaw finance and accounting departments is unsupported by the record. Furthermore, the record does not establish that the beneficiary oversaw a marketing department as stated by the petitioner. The record demonstrates that the foreign entity had its own marketing director who reported directly to the board of directors. We find that the record does not support the petitioner's claim that the beneficiary was responsible for the marketing department. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

We find that the petitioner's description of the beneficiary's duties abroad is inconsistent with the beneficiary's duty description for the same foreign entity during the same time period submitted as part of a previous Form I-140 petition. The director advised the petitioner of this conflict in the NOIR. In response, the petitioner stated that a previous attorney had prepared the earlier filing and that the petitioner's current attorney "had found several errors in the way the case had been prepared and presented by the former attorney." Thus, the petitioner refiled the matter after correcting errors. However, the petitioner did not claim that the earlier description was erroneous, nor did the petitioner claim that the former attorney provided ineffective assistance. The petitioner failed to sufficiently explain how a former duty description could change from one petition to another petition. While changes in proposed duties for the petitioner may change, the petitioner failed to adequately explain why the beneficiary's previous duty description had changed. The petitioner has not resolved this inconsistency. 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. 582, 591 (BIA 1988).

On appeal, the petitioner responds to inconsistencies found by the director such as date that the beneficiary last worked for the foreign entity. The petitioner explains that regardless of the dates claimed, the beneficiary meets the one year requirement for approval of the petitioner. While this may be true, the petitioner overlooks the fact that the inconsistency raises questions of credibility. The petitioner's explanation for the date discrepancy is reasonable, but the inconsistencies regarding

the beneficiary's duty descriptions and oversight responsibilities are not resolved. We do not agree with the petitioner that the beneficiary's duty description is adequately described and we do not agree that the director's interpretation of the description of the foreign entity's "key department" is "unduly restrictive." The petitioner must demonstrate that the beneficiary's position abroad was sufficiently complex to require the skills and oversight of one in a managerial or executive capacity but here, it has not been established. Moreover, the petitioner did not address the inconsistencies relating to the marketing department. 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 director determined that the petitioner did not establish that the beneficiary was employed abroad in a qualifying capacity due to inconsistencies in the record such as this one, and we agree with that finding.

The petitioner failed to overcome this ground for the revocation of the petition's approval.

C. Willful Misrepresentation of a Material Fact

The final issue to be addressed is the director's finding that the petitioner willfully misrepresented information regarding the beneficiary's employment, which is material to her eligibility for the benefit sought.

1. The Law

Section 212(a)(6)(C) of the Act provides:

Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. See *Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *Matter of Healy and Goodchild*, 17 I&N Dec.

22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

2. Facts

The director's NOIR identified a number of inconsistencies in the record to be addressed by the petitioner. Specifically, the petitioner's letter indicated that a person other than the beneficiary would perform as finance director if the petition were approved. The petitioner submitted a nearly identical letter to correct the statement; the date was changed along with other facts to make the letter correct as of the new date. In addition, the director was concerned that the beneficiary's duty description abroad and for the petitioner were "nearly identical." Furthermore, the director also found that the beneficiary failed to include all relevant information on her G-352A including other employment held at the time she was employed abroad.

The petitioner's response to the NOIR included a letter from the petitioner's newly hired counsel. Counsel asserted that he made an error and that the beneficiary's employment abroad included "a clerical mistake." Counsel asserted that the beneficiary's employment abroad should have listed an end date of November 2006 instead January 2008. Counsel explained that it could only be argued that the beneficiary worked for the foreign entity until November 2006 because she did not return to Venezuela after that time even though she was still employed with the foreign entity. Other evidence within the record also reflect the beneficiary's employment until December 2007. Counsel asserted that the beneficiary was actually still employed with the foreign entity after November 2006, but he does not explain when that employment ended.

Ultimately, the director revoked the petition's approval, finding:

[b]y claiming the beneficiary was employed as Finance Director of the foreign entity while she was employed as Director of [REDACTED] (and in the United States as B-2 nonimmigrant), the petitioner and beneficiary made a false representation to USCIS. The petitioner and beneficiary willfully made this representation, and it is material to whether the beneficiary is eligible to be classified as a multinational manager.

On appeal, the petitioner reiterates that the errors were unintentional and provides an explanation for the errors. The petitioner further asserts that even if the error were not explainable they are not material to the determination as to whether the beneficiary was employed for at least one year in the last three prior to her transfer to the United States.

3. Analysis

Upon review, we find that the petitioner's assertions are persuasive. Accordingly, we will withdraw the director's finding of willful misrepresentation of a material fact.

The term "willfully" in the statute has been interpreted to mean "knowingly and intentionally," as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary"). In this matter, the petitioner asserts that there was no willful misrepresentation. The petitioner offers a reasonable explanation for the discrepancies found by the director. Specifically, we acknowledge that the petitioner's managing member, [REDACTED] wrote a letter stating that he, and not the beneficiary, would continue to hold the position as finance director if the petition was approved. The director found this to be an unresolved inconsistency; however, we agree with the petitioner's assertion that the statement appears to be an inadvertent typographical error. Within the context of the letter in its entirety, it appears that Mr. [REDACTED] was referring to the beneficiary and not to himself. Notably, the petitioner submitted a new letter dated, March 11, 2014, reflecting the correction. Thus, we find this inconsistency to be resolved.

Additionally, the petitioner explained that the beneficiary did not list her affiliations with several United States companies on her Form G-325A because she was not getting paid for that work and she was not considered an employee of those corporations. There is no evidence in the record that the beneficiary has been paid for her work with those corporations. The petitioner's explanation is not unreasonable. Further, the director's concern regarding the beneficiary's ability to perform in a permanent, full-time position while also having responsibilities for other companies is valid; however, nothing in the record indicates that the beneficiary would not be fully employed for the petitioner and, in this matter, we will not conclude that the beneficiary's other obligations will interfere with her employment.

While there are some inconsistencies in the record, the director's primary concerns regarding the petitioner's misrepresentation of material information have been resolved. A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). Accordingly, we will withdraw the director's finding that the petitioner willfully misrepresented facts material to the beneficiary's eligibility for the benefit sought.

III. CONCLUSION

We find that the director had good and sufficient cause to revoke the approval of this petition. On appeal, the petitioner failed to establish that the beneficiary had been employed abroad or would be employed in the United States in a managerial or executive capacity. However, we withdraw the director's finding of willful misrepresentation of a material fact.

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The petition's approval will remain revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition's approval remains revoked. The director's finding of willful misrepresentation of a material fact is withdrawn.