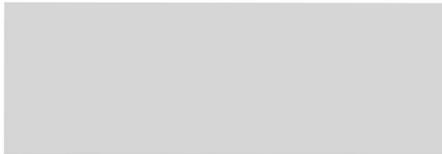




U.S. Citizenship  
and Immigration  
Services

(b)(6)



**JUN 08 2015**

DATE:

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PETITION RECEIPT #: 

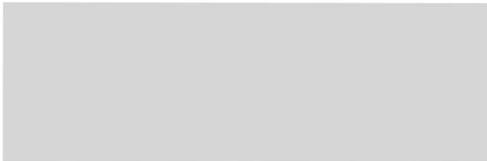
IN RE:

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:



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](http://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,

Ron Rosenberg

Chief, Administrative Appeals Office

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

The petitioner is engaged in the design, manufacture and sales of specialty foam products. It seeks to employ the beneficiary in the United States as its senior project manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition, concluding that the petitioner failed to establish: (1) that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and (2) that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to us for review. On appeal, the petitioner submits a brief and documents.

## 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 the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate

or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

Additionally, the regulations at 8 C.F.R. § 204.5(j)(3)(i) state that the petitioner must provide the following evidence in support of the petition in order to establish eligibility:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

## II. EVIDENTIARY STANDARD

As a preliminary matter, and in light of the petitioner's references to the requirement that we apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

\* \* \*

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

\* \* \*

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

*Id.*

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support the petitioner's contentions that the evidence of record requires that the petition be approved.

Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

### III. THE ISSUES ON APPEAL

#### A. Employment Abroad in a Managerial or Executive Capacity

The first issue is whether the petitioner established that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

#### 1. Facts

In a letter of support dated August 7, 2013, the petitioner stated that the beneficiary was employed abroad with the petitioner's subsidiary, [REDACTED] prior to entering the United States in an L-1A status in 2010. The beneficiary was employed with this foreign entity from March 2006 through July 2010 as a Product Development Manager.

The petitioner claimed that the beneficiary was a personnel manager who directly supervised a professional design engineer, a professional product coordinator and "teams of product development professionals." The petitioner concluded that the engineer and the coordinator were professionals because they both held degrees. The petitioner also claimed that the beneficiary managed the critical function relating to product engineering and design of the company's automotive seat products.

The petitioner stated that the beneficiary planned, coordinated and directed product development. The petitioner explained that the beneficiary was expected to interpret changing industry standards, and develop and implement plans to address those changes. The petitioner explained that the beneficiary was required to have in-depth knowledge of industry standards and customer requirements and that he was "able to perform these functions based on his advanced knowledge and his engineering knowledge of [the petitioner's] seat design."

On April 21, 2014, the director sent a request for evidence (RFE) to the petitioner with instructions to provide additional evidence demonstrating that the beneficiary was employed abroad in a qualifying capacity. The director's RFE advised the petitioner to provide additional evidence such as the beneficiary's specific tasks and a percentage of time allocated to those tasks, a list of employees along with their duties, and a description of the foreign entity's products or services and an explanation of who performs the tasks necessary to produce those products or services.

In response to the RFE, the petitioner referred to the beneficiary's prior L-1A status approvals and requested deference to those prior approvals. The petitioner provided a letter from the foreign entity, a table listing the beneficiary's duties, and an organizational chart. The letter from the foreign entity, dated June 25, 2014, stated that the beneficiary spent a significant amount of time supervising professionals with college degrees, supervising product development professionals, and managing the company's critical product design and development function.

The table included the beneficiary's duties and the percentage of time he spent on those duties as follows:

Duty	Daily Tasks Related to Duty	Percentage of Time Performing Each Duty
Supervise (2) Japanese Design Engineers, and Sales Coordinator	Supervised employees in their daily tasks to ensure each carried out duties efficiently and effectively. Reviewed performance of professional employees.  Had authority to hire, fire, promote and take and recommend other personnel actions.	20%
Supervised teams of product development professionals in execution of design projects	Serve as primary Japanese customer contact and liaison to enhance Japanese business development and more effectively disseminate information between customer and other [redacted] entities globally.  Serve as central participant at weekly global meeting regarding [redacted] and relay results of meetings to customers.	40%

	<p>Conduct design and product review with the customer and provide updates to upper management and executives at [REDACTED] and to North American entities.</p> <p>Conduct designer meeting and advise designers on correction direction of projects.</p> <p>Instruct teams on technical point of design and specialty foam qualifies (<i>sic</i>) and characteristics to improve our company's capabilities and design documentation skills.</p>	
<p>Manage product design and development function of the company</p>	<p>Responsibility and oversight of the entire automotive seat product design process for all Japanese and Korean customers including all major stages: analysis, concept and synthesis, within a departmental budget of JPY 80,943,000</p> <p>Liaise with customer plants and oversee whole assembly line.</p> <p>Liaise with our local (Global) plant to discuss and find means to further quality and product improvement.</p> <p>Managed and ensured success of technical support for Japanese and Korean customers.</p> <p>Managed the direction of [REDACTED] design capabilities and requirements with respect to Senior Advance Purchasing and Engineering Management at Tier 1 and Original Equipment Manufacturer customers to obtain business awards.</p> <p>Established and directed company's design processes based on interpretation of and in accordance with regulatory, industry and company guidelines and other protocols and based on expertise and managerial experience working with DFMEA, Design Timelines, Virtual Model Reviews, Project Budget Tracking, Performance Analysis.</p> <p>Developed, implemented and directed action plans with respect to adherence to design processes and ensured</p>	<p>40%</p>



	<p>adherence to and successful completion of plans.</p> <p>Maintained and ensured implementation of Design Blue Book Guidelines and DFMEA templates.</p> <p>Established Customer Design guideline to update and document company-wide knowledge [ ]of Foam.</p> <p>Ensured customer involvement in and satisfaction with design process by leading presentations related to design function activities and innovations to both internal and external candidates.</p> <p>Directing the 3D and 2D design work of lower level employees including Design Engineers and Project Coordinator (listed above) for Seat Cushioning, Seat Frame Components, Interior Soft Trim, Occupant Safety Components, Noise/Vibration/Harshness solution, Cargo Management components, and Composite sheet foam products.</p> <p>Overseeing and supervising design of assembly parts related to for Seat Cushioning, Seat Frame Components, Interior Soft Trim, Occupant Safety Components, Noise/Vibration/Harshness solution, Cargo Management components, and Composite sheet foam products.</p> <p>Upon design completion, manage and conduct product reviews with customers[.]</p> <p>Based on feedback from the customer, develop and manage continuous improvement initiatives to enhance end product and customer satisfaction.</p>	
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The foreign entity's organizational chart depicted the beneficiary's direct supervisor as [REDACTED], Senior ED&D Manager. The chart depicted the beneficiary as the direct supervisor of three subordinates: (1) Design Engineer, [REDACTED] (2) Design Engineer, [REDACTED] and (3) Sales Coordinator, [REDACTED]. The engineers were responsible for "design and development" and the sales coordinator was to "organize and facilitate automotive seat and related product sales to Japanese customers." All three employees were described as having a "university degree." The petitioner also provided a second organizational chart depicting the beneficiary as a direct report to the foreign affiliate's president, [REDACTED]. This second organizational chart still depicted the beneficiary as subordinate to [REDACTED] but

the nature of that relationship was altered because the chart depicted the relationship connected by a dotted line indicating a weaker relationship than indicated in the first chart.

In its June 25, 2014 letter, the foreign entity provided a brief description of its product design and development function and stated that the beneficiary was "tasked with overseeing the execution of all of these steps including all of its sub-stages and had overall responsibility for ensuring the design project culminated in a product that best met the needs of customer and conformed to multiple sets of industry and international regulations." The letter also stated that the beneficiary would establish goals and set policies for the overall product design process and that he engaged in discretionary decision-making by dictating how the design team should execute each stage of the design projects and tasking design team members with various duties within the design projects.

Specifically, the letter states:

Because our clients are automotive companies whose top priorities are safety and quality in their products, our product design process follows a strict, regimented and proprietary process involving three major stages: analysis, concept and synthesis. Within each of those stages there are several steps. Within the analysis stage falls both the "accept situation" step in which the product design team commits to a project and pools resources to determine how to most efficiently meet the design challenge and the analyze step in which research is conducted as to how to resolve design issues. In the concept stage, the key issue of the matter is defined and parameters around the design and design solutions are established. Finally in the Synthesis stage solutions to design problems are brainstormed, the best solutions are selected, prototypes of the design are built, followed by the actual design itself, and then finally the product is tested and improvements are made.

The petitioner acknowledged the director's request for salary and payroll information and provided the beneficiary's information. The petitioner declined to provide the payroll or salary information for any of the beneficiary's subordinates after determining that the request was not relevant or required for approval of this petition.

The director found that the petitioner provided insufficient evidence to establish that the beneficiary was employed in a qualifying capacity. Specifically, the director found insufficient evidence that the beneficiary was performing as a manager of professionals or that he was managing the product production function rather than actually performing the function.

On appeal, the petitioner asserts the following: (1) the director erred in applying an incorrect standard of proof; (2) the director incorrectly interpreted the definition of "managerial capacity;" (3) the director failed to consider, analyze, and discuss all evidence submitted in response to the RFE; (4) the director erred by denying the petition for omission of evidence not previously

requested and not required by the regulations; (5) the director misstated numerous facts related to the evidence submitted in response to the RFE. The petitioner submits a brief and asserts that it has met its burden and this petition should be approved.

## 2. Analysis

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

The definitions of executive and managerial capacity each 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 show 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. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

According to the record, the beneficiary devoted 40% of his time to supervising teams of product development professionals in the execution of design projects and five tasks were listed under that responsibility. Those five tasks included non-qualifying duties such as serving as a customer contact and liaison and participating in weekly company meetings. Other tasks indicate that the foreign entity relied on the beneficiary's high level of expertise but they do not necessarily qualify as high-level managerial tasks; those tasks included instructing teams on technical point of design and conducting designer meetings and advising designers on correction direction of projects. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The petitioner asserted that another 40% of the beneficiary's time was devoted to the essential function of managing product design and development. Fourteen responsibilities were listed under this heading and many of them were non-qualifying. For example, tasks such as developing and implementing action plans, maintaining and ensuring implementation of Design Blue Book Guidelines and DFMEA templates, establishing Customer Design guideline to update and document company-wide knowledge, and directing the 3D and 2D design work of *lower* level employees including Design Engineers and Project Coordinators may be non-qualifying. In other words, the beneficiary was not merely overseeing these functional tasks but he was performing them. 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)).

According to the petitioner, the beneficiary devoted the remaining 20% of his time to supervising professionals, specifically two design engineers and a sales coordinator. The evidence submitted does not sufficiently demonstrate that the beneficiary was primarily performing qualifying managerial or executive duties.

This failure of documentation is important because several of the beneficiary's daily tasks, as discussed, do not fall directly under traditional managerial duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, we cannot determine what proportion of those duties would be managerial or executive, nor can we deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. See section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that her/his duties are "primarily" managerial.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 204.5(j)(4)(i). 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. § 204.5(j)(2).

In this matter, the petitioner asserted that the beneficiary was a personnel manager who oversaw professional employees, specifically two design engineers and a sales coordinator. The

beneficiary is not required to supervise personnel, but if the petitioner claims that the beneficiary's 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 evaluating whether the beneficiary managed 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 the 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 this matter, the petitioner asserted that the beneficiary's three subordinate employees were professionals yet it provided no independent evidence demonstrating their degrees, no express claim that their positions required a degree, and no pay documentation demonstrating their actual employment and remuneration. 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)). Moreover, the petitioner acknowledged the director's express request for the subordinates' payroll evidence, yet the petitioner declined to provide it. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Therefore, we are unable to determine that the petitioner provided sufficient evidence to establish that the beneficiary oversaw professional employees.

We acknowledge the petitioner's claim that the beneficiary "supervised teams of product development professionals" however the record does not support the claim. First, the petitioner provided no evidence of any employees subordinate to the beneficiary other than the three employees previously discussed. We have no evidence of any "teams" supervised by the beneficiary. Further, the beneficiary's duty description indicates that the beneficiary reviewed the performance of the three previously referenced employees and had the authority to hire and fire. The beneficiary was assigned none of these personnel tasks for the "teams of product development professionals" that the petitioner claims in his duty description. Therefore, we are unable to determine that the beneficiary supervised personnel as required under the regulations required for approval of this petition. Again, 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. at 158.

In addition, the petitioner has not shown that any of the beneficiary's subordinate employees supervise employees or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Moreover, the petitioner asserted that the beneficiary managed the foreign entity's essential function of product design and development. As discussed, however, the petitioner did not submit sufficient evidence to establish that the beneficiary primarily managed the function rather than the tasks necessary to perform the actual function.

On appeal, the petitioner acknowledges that it did not provide a more detailed breakdown of the beneficiary's duties but concludes that the evidence meets the requirements of the petition since 100% of the beneficiary's duties were identified as supervisory or managerial. We disagree. The petitioner asserts that the foreign entity's June 25, 2014 letter sufficiently supported its claim that the beneficiary was employed in a primarily managerial capacity. We find that the letter described the overall product development process and stated that the beneficiary oversaw that process. Further, the letter described the analysis, concept, and synthesis stages as major stages in the product design process along with sub-stages for which the beneficiary was responsible. The letter further stated that the beneficiary "engaged in discretionary decision making by dictating how the design team should execute each stage of the design project, tasking design team members with various duties within the design project and in signing off on the ultimate product design." The letter indicates that the beneficiary is very involved in the direct oversight of the project but the record does not clearly establish the tasks and responsibilities assigned to the beneficiary's subordinates. Based on this description, along with the allocation of 80% of the beneficiary's time engaged in both qualifying and non-qualifying tasks, we are unable to determine how much time the beneficiary devoted specifically to qualifying tasks, aside from the 20% of time devoted to supervision and personnel matters.

We acknowledge the petitioner's claim that beneficiary is an engineering manager with a great deal of discretion and who reports directly to the president of the company. The petitioner, however, has not demonstrated that the beneficiary is primarily engaged in those managerial duties; especially in this matter where the beneficiary's expertise and technical knowledge is so heavily relied upon. 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. at 165. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, we cannot determine what proportion of his duties were managerial, nor can we deduce whether the beneficiary was primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d at 24.

In addition, we observe that the first organizational chart identified [REDACTED] as the beneficiary's direct supervisor while the second organizational chart identified the president of the company as the beneficiary's direct supervisor. Although [REDACTED] is still depicted as senior to the beneficiary in the second chart, he no longer holds a direct supervisory relationship with the beneficiary. The petitioner asserts the importance of the beneficiary's role with the foreign entity and cites the fact that he reports directly to the president, yet this was not the structure initially claimed and the petitioner did not explain the inconsistency. 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).

Alternatively, the petitioner asserts that the beneficiary was a function manager who managed and exercised direction over the day-to-day operations of the essential Product Development and Design function in Japan. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary was "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary was an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties were "primarily" managerial. As already discussed, the petitioner has not demonstrated that the beneficiary was primarily engaged in managing as opposed to actually performing the required duties or functions.

We find that the petitioner failed to establish that the beneficiary had subordinates sufficient to relieve him from primarily performing tasks and functions that he was charged with overseeing. The petitioner's description of the beneficiary's three subordinate employees was limited to "design and development" and "organize and facilitate automotive seat and related product sales to Japanese customers." Given the breadth of the requirements and tasks suggested in the record, the petitioner has not sufficiently established that the beneficiary's three employees could handle all of the duties without the beneficiary's assistance. Furthermore, the petitioner stated that the beneficiary devoted 40% of his time to overseeing "teams of product development professionals" but the organizational chart depicted only two engineers and one coordinator subordinate to the beneficiary. Based on this evidence, we cannot find that the beneficiary had sufficient subordinates to relieve him from primarily performing the non-qualifying tasks or functions. As previously noted, 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. at 165.

The petitioner reiterates on appeal that the beneficiary oversees the automotive seat process and provides additional documentation including a flow chart dated March 31, 2008. The petitioner indicates that the flow chart depicted the beneficiary's responsibilities highlighted in green and his subordinates' responsibilities highlighted in orange. In addition, the petitioner provided duty descriptions, duty qualifications, and resumes for all three of the beneficiary's subordinates.

Engineer [REDACTED] resume indicated that he attended the [REDACTED] and that he worked on the design of automobile interiors including the seat and cushion along with five other parts of the vehicle interior. Engineer [REDACTED] resume does not clearly demonstrate when he worked for the foreign entity or when he worked as a subordinate to the beneficiary; his resume indicates that he attended [REDACTED] for three years. The sales coordinator was required to have a bachelor's degree and five years of experience in one of three areas. The petitioner submits [REDACTED] resume indicating that he attended school for varying periods of time starting in October 2002 through September 2007 but it does not clearly indicate that he earned a college degree. The resume also indicates that he worked for an advertising agency for just over two years.

The petitioner submits the above documentation for the first time on appeal and asserts that the director's request called for a "summary" of the employees' duty descriptions, and that the summary was already provided. We note that the petitioner's duty descriptions for the beneficiary's subordinates were inadequate, even as summaries. Nevertheless, we will consider the evidence on appeal. The material submitted on appeal is insufficient to meet the requirements for approval of this petition. The petitioner asserts that the subordinate employees have university degrees but provides no independent evidence to demonstrate the claim. 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. at 165. Furthermore, the employee resumes do not clearly indicate that any of the three subordinates completed a degree. In addition, the sales coordinator appears to lack the experience required to hold his position since he does not have five years of experience with any company. Regarding the second engineer, it is unclear where he was employed and when he worked for the beneficiary. Additionally, the first engineer appears to have been engaged in a number of automotive design projects and was not limited to seat cushions, the beneficiary's scope of work. Finally, the flow charts provide no clarification regarding the actual duties and time spent by any of the employees or the beneficiary.

Despite the petitioner's assertion on appeal that the director failed to apply the preponderance of evidence standard, we do not agree and we find that the preponderance of evidence standard has not been met.

Accordingly, for the reasons set forth above, the petitioner has not established that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

#### B. U.S. Employment in a Managerial or Executive Capacity

The second issue is whether the petitioner established that it will employ the beneficiary in the United States in a qualifying managerial or executive capacity.

## 1. Facts

The petitioner filed this Form I-140 on September 30, 2013. The petitioner is the parent company with a number of subsidiaries located across the globe. The company claims a gross annual income of \$1.75 billion and 1650 employees. The petitioner is involved with the design, manufacture, and sales to industries of molded and cut foam products to serve the automotive and commercial vehicles industry, among others. The beneficiary has been performing duties as a senior project manager at the petitioner's sales and engineering facility located in Michigan in an L-1A status since July 2010. The beneficiary's proffered wage is \$99,750.00 per year.

The petitioner states that the beneficiary will supervise a product engineer in Michigan while also supervising two product engineers and a technical sales coordinator based with the foreign entity in Japan. The petitioner states that the positions all require the completion of a college degree. The petitioner further states that the beneficiary will "lead teams of other professionals in product development projects."

The petitioner provided a list of activities for which the beneficiary would be responsible, including tasks such as directing the design of company products, overseeing the design of assembly parts, managing the direction of the company's design capabilities and requirements, managing design flow, leading presentations to customers, overseeing lab technicians, managing design projects, managing product reviews with the customers, and maintaining design bluebook guidelines.

The petitioner explained that the beneficiary would be responsible for the following activities:

- Directing the 3D design and 2D the drawings for polyurethane foam cushions, formed plastics, parts, products including headliners, package trays, beauty covers, headrests, armrests, and encapsulated components (anchor brackets, attachment wires, strip fasteners, cloth materials, headrest and armrest components, plastic and trim);
- Overseeing design of assembly parts for headrests, armrests, and seats;
- Managing the direction of design capabilities and requirements to Senior Advance Purchasing and Engineering Management at Tier 1 and OEM customers with intent of obtaining business awards;
- Managing design flow as per TS 16949 standards including DFMEA, Design Timelines, Virtual Model Reviews, Project Budget Estimation, Project Budget Tracking and Performance Analysis;

- Leading presentations of Design Department activities and innovations to both Internal and External customers;
- Overseeing lab technicians validating testing relating to OEM and FMVSS tests;
- Managing 3D and 2D design projects with off-shore and on-site resources;
- Managing product reviews with customer and both propose and manage continuous improvement items identified by manufacturing; and
- Maintaining Design Bluebook Guidelines and DFMEA templates.

The petitioner further explained:

[The beneficiary] will be responsible for making decisions on the product design that meets manufacturing, customer, and parts requirements. He will manage the product design teams and set the design standard. He will review and address the performance of the professional employees whom he supervises and will ensure that each of them carries out their objectives. He will make recommendations for his direct reports concerning employment termination and salary adjustments.

The petitioner included an organizational chart depicting the beneficiary as one of five subordinates reporting directly to Sr. Design Mgr., [REDACTED]. As Sr. Project Mgr. Asian Cust., the beneficiary supervised one product engineer, [REDACTED] and oversaw three other individuals employed in Japan; specifically [REDACTED].

The director's April 21, 2014 RFE advised the petitioner that the beneficiary's duty description was too brief and generalized without any indication as to the percentage of time the beneficiary would spend on any particular duties. The RFE requested evidence such as a list of employees in the beneficiary's immediate division, department or team along with evidence regarding their duties, salaries, and educational levels, as well as payroll documentation for the beneficiary and all of his subordinates. The director also requested evidence relating to the petitioner's claim that the beneficiary was a functional manager, such as how the beneficiary exercised direction over the day-to-day operations and how the beneficiary would perform at a senior level as a functional manager.

In response to the RFE, the petitioner requested deference to previously L-1A status approvals for the beneficiary. The petitioner provided a letter dated July 7, 2014, explaining that since filing the Form I-140 petition the beneficiary's supervisor role has expanded. The petitioner submits an organizational chart indicating that the beneficiary supervises two designers, one data management technician, and one data technician. The petitioner reiterates that the beneficiary continues to oversee three employees still working overseas for the subsidiary. According to this

new organizational chart, the beneficiary manages an employee who in turn manages a lower-level employee. The petitioner asserts that three of the beneficiary's subordinates are professionals based on their attainment of bachelor's degrees.

Despite the director's request for payroll information for the beneficiary's subordinates, the petitioner opted not to submit the evidence, determining that the evidence was not relevant or required for approval of the petition.

The petitioner submitted a table further demonstrating the beneficiary's allocation of duties as follows:

<b>Duty</b>	<b>Daily tasks Related to Duty</b>	<b>Percentage of Time Spent Performing Duty</b>
Supervise 2 designers, 1 data management technician and 1 data technician (U.S. based); 2 Product Engineers (Japan based)	<p>Supervise employees in their daily tasks to ensure each carries out duties efficiently and effectively. Reviews performance of professional employees.</p> <p>Lead team and data management meetings to confirm design project/process progress and ensure customer's demands are met.</p> <p>Had authority to hire, fire, promote and take and recommended other personnel actions.</p>	20%
Supervised teams of product development professionals in execution of design projects.	<p>Provide technical advice and organize and lead global meetings between Japan and North American operations to facilitate cooperation, efficiency, streamlining of design projects between entities.</p> <p>Manage the transfer of data related to customer's design projects and [ensure] product development [teams] are meeting customer demand.</p> <p>Conduct and direct design and product review with the customer and provide updates to our NA management and operations. Participate in designer meetings to ensure projects are taking on correct direction.</p> <p>Instruct teams on technical point of design and</p>	30%

	<p>technical foam knowledge to improve our company's capabilities and documentation abilities.</p>	
<p>Manage product design and development function of the company</p>	<p>Responsibility and oversight of the entire product design process including all major stages: analysis, concept and synthesis.</p> <p>Liaise with Visit customer plant and our NA operations to resolve customer issues and further enhance end product.</p> <p>Bears overall responsibility for the management and ultimate success of 3D and 2D design projects with off-shore and on-shore resources.</p> <p>Manage the direction of [redacted] design capabilities and requirements with respect to Senior Advance Purchasing and Engineering Management at Tier 1 and Original Equipment Manufacturer customers to obtain business awards.</p> <p>Establish and direct company's design processes in accordance with regulatory and company guidelines and other protocols and based on expertise and managerial experience working with DFMEA, Design Timelines, Virtual Model Reviews, Project Budget Estimation, Project Budget Tracking, Performance Analysis.</p> <p>Maintain and ensure implementation of Design Blue Book guidelines and DFMEA templates.</p> <p>Establish the Customer Design guideline and update company-wide knowledge of specialized foam.</p> <p>Ensure customer involvement in design process and satisfaction by leading presentations related to design function activities and innovations to both internal and external candidates.</p> <p>Direct the 3D and 2D design work of lower level employees including Design and Product Engineers</p>	<p>50%</p>

	<p>listed above for Seat Cushioning, Seat Frame Components, Interior Soft Trim, Occupant Safety Components, Noise/Vibration/Harshness solution, Cargo Management components, and Composite sheet foam products.</p> <p>Oversee and supervise design of assembly parts related to Seat Cushioning, Seat Frame Components, Interior Soft Trim, Occupant Safety Components, Noise/Vibration/Harshness solution, Cargo Management components, and Composite sheet foam products.</p> <p>Operate in a department with a \$1,000,000 budget.</p> <p>Upon design completion, manage and conduct product reviews with customers[.]</p> <p>Based on feedback from the customer, develop and manage continuous improvement initiatives to enhance end product and customer satisfaction.</p>	
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The petitioner's updated organizational chart depicted the beneficiary as Sr. Project Manager with full-time duties of development manager overseeing two direct subordinates in the United States and two direct subordinates in Japan. One of the beneficiary's U.S. subordinates is a designer and the second subordinate is a data management technician who, in turn, oversees two employees. The Japanese employees, [REDACTED] and [REDACTED], are identified as full-time product engineers having university degrees and responsible for "design and development." The petitioner stated that this undated organizational chart represents the company structure as of the time the document was submitted in response to the RFE, not at the time the petition was filed.

The director denied the petition finding that the petitioner failed to establish that the beneficiary was employed in a qualifying executive or managerial capacity. Specifically, the director stated that the petitioner did not establish that the beneficiary advised and controlled the work of other supervisory, professional, or managerial employees. The director also found that the petitioner failed to establish that the beneficiary was a functional manager. The director found that the petitioner failed to demonstrate that the beneficiary had employees to perform tasks or functions in order to relieve him from performing them himself.

On appeal, the petitioner asserts that it provided nearly all the evidence required to meet the requirements of the regulations but claims that the director ignored or mischaracterized most of the evidence. The petitioner asserts that the evidence is sufficient for this petition's approval. The petitioner reiterates the information already provided in the record, and criticizes the director's failure to accept its broad allocation of duties performed by the beneficiary. The petitioner acknowledges that it did not assign percentages of time to each of the duty categories listed because it would not be an accurate reflection of what the beneficiary actually does, since the beneficiary's duties change on a daily basis depending on the project.

In support of its appeal, the petitioner submits flowcharts dated March and April 2012. The petitioner asserts that the flowcharts depict the beneficiary's responsibilities in green and his subordinates' responsibilities in orange. The petitioner reiterates that the beneficiary supervises professionals as well as a supervisory employee. The petitioner asserts that its employees are engineers and, as such, are considered professionals. The petitioner submits documents including the flowcharts, employee resumes, and job descriptions for the beneficiary's immediate supervisor and direct reports in Japan, as well as resumes and job descriptions of the beneficiary's immediate supervisor and direct and indirect subordinates in the United States.

## 2. Analysis

Upon review, we find that the petitioner has not sufficiently established that the beneficiary will be employed 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, 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.

In this matter, the petitioner described the beneficiary's responsibilities by grouping them into one of three categories and allocating each category a percentage of time, either 20%, 30% or 50%. Two of the categories amounted to 80% of the beneficiary's time and included both qualifying and non-qualifying tasks. The non-qualifying tasks included liaising with the

customers in resolving customer issues, establishing and leading design processes and protocols, ensuring implementation of guidelines and templates, establishing guidelines, providing technical guidance and managing the transfer of data. Based on this description of the beneficiary's duties, we are unable to determine how much of the beneficiary's time is spent engaged in qualifying duties. Therefore, we cannot determine if the beneficiary is primarily engaged in qualifying duties. We acknowledge that no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks; however, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

When considering the petitioner's staffing at the time of filing, we question how the beneficiary could have been supported in his responsibilities by a single subordinate product engineer located in the United States and three Japanese employees abroad. The petitioner initially provided no duty description, qualifications, or remuneration information for the U.S. product engineer. The petitioner failed to explain how the three Japanese employees would support the beneficiary in the United States. We acknowledge that the petitioner provided a second organizational chart demonstrating additional subordinates, but the chart does not represent the petitioner's organizational structure at the time the petition was filed and therefore we will not consider these additional employees. 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; *Matter of Katigbak*, 14 I&N Dec. at 49. 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).

The petitioner claimed that the beneficiary was a personnel manager who oversaw professional and supervisory employees. As discussed above, the pertinent organizational chart identifies four subordinate employees and the petitioner claims that each is a professional and has a university degree. Nevertheless, the petitioner provided no independent documentation to establish that any of these employees had a university degree. 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. at 165. Since the petitioner states that the beneficiary's supervisory duties commenced with the hiring of subordinate employees after the filing of the petition, the beneficiary was not employed in a primarily managerial capacity on the date we received the petition.

Moreover, despite the director's express request for documentation demonstrating the actual employment and payment of the beneficiary's subordinates, the petitioner declined to provide such evidence. The petitioner specifically stated that the information was not relevant to this petition's approval. The petitioner has the burden of showing that it employs the claimed

employees. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Alternatively, the petitioner claimed that the beneficiary was a function manager. 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. In this matter, the petitioner has not provided evidence demonstrating that the beneficiary is primarily performing relating to management of the function rather than performing tasks necessary to the function. *Id.*

The petitioner has failed to provide a sufficiently detailed explanation, along with credible and probative supporting documentation, establishing its staffing levels at the time of filing and establishing that the beneficiary was primarily performing qualifying duties. Accordingly, for the reasons set forth above, the petitioner has not established that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

#### IV. PRIOR APPROVALS

The petitioner noted that USCIS approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether the service center reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. We are not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. at 597. It would be "absurd to suggest that [USCIS] or any agency must treat acknowledged errors as binding precedent." *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit

sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). Moreover, it is worth emphasizing that each petition filing is a separate proceeding with a separate record. *See Hakimuddin v. Dep't of Homeland Sec.*, No. 4:08-cv-1261, 2009 WL 497141, at \*6 (S.D. Tex. Feb. 26, 2009); *see also Larita-Martinez v. INS* 220 F.3d 1092, 1096 (9th Cir. 2000) (stating that the "record of proceeding" in an immigration appeal includes all documents submitted in support of the appeal). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). If a director requests additional evidence that the petitioner may have submitted in conjunction with a separate nonimmigrant petition filing, the petitioner is, nevertheless, obligated to submit the requested evidence, as the record of the immigrant proceeding is not combined with the record of the nonimmigrant proceeding.

## V. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.