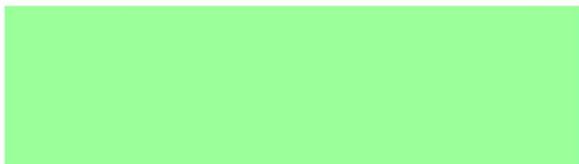




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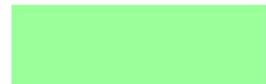
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OFFICE: TEXAS SERVICE CENTER

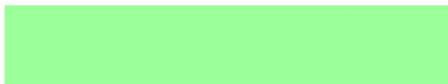
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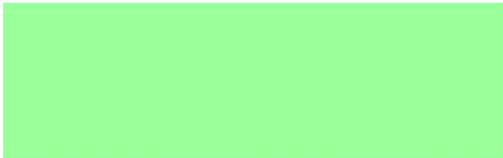
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center ("the director") denied the employment-based immigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this Immigrant Petition for Alien Worker (Form I-140) 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 petitioner, a heavy duty equipment supplier to the oil and gas industry, claims to be a subsidiary of [REDACTED] a Nigerian company. It seeks to employ the beneficiary as its president/managing director.

The director denied the petition, concluding that the petitioner failed to establish: (1) that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity; or (2) that it has the ability to pay the beneficiary's proffered wage.

On appeal, the petitioner asserts that the director placed undue emphasis on the size of the petitioning company in determining that the beneficiary will not be employed in a qualifying managerial or executive capacity. In addition, the petitioner claims that the director overlooked evidence of its ability to pay the proffered wage.

## I. THE LAW

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

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. THE ISSUES ON APPEAL

### A. Managerial or Executive Capacity

The first issue to be addressed is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity.

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

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other

personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Finally, 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.

#### 1. Facts

The petitioner filed the Form I-140 on November 15, 2013. The petitioner stated on Form I-140 that it is a supplier of heavy equipment to the oil and gas industry, with six employees and gross revenue of \$555,000. The petitioner indicates that the beneficiary is employed as its president/managing director.

In a letter in support of the petition, the petitioner asserted that the beneficiary supervises managers and professionals in the United States and provided a general overview of his duties. Specifically, the petitioner asserts that the beneficiary supervises a vice president who, in turn, supervises the office manager, shipping officer and purchasing officer.

In response to the director's request for additional evidence (RFE), the petitioner provided the same description of duties it provided at the time of filing and added the percentage of time the beneficiary allocates to each listed responsibility, as follows:

Defining the strategic vision and mission of the company (10%); making long term business plans for the company (5%); directing and overseeing the overall operation of the corporation (10%); making personnel decisions regarding hiring, firing, promoting and transferring high-level management (5%); representing the company in meetings with industry leaders and potential clients (20%); keeping abreast of industry trends to help advantageously position the company (5%); coordinating with outside legal representatives, accountants, and other advisors to help evaluate and advance the company's position (5%); working with financial institutions to secure lines of credit for the company (10%); supervising high-level management (5%); signing contracts on behalf of the company (15%); and making all final decisions on matters affecting the company (10%). He exercises wide latitude in discretionary decision making for the company and only receives general direction from the Board of Directors.

The petitioner submitted an organizational chart depicting a vice president reporting to the beneficiary. The chart depicts an office manager reporting to the vice president, as well as a shipping officer and a purchasing officer, reporting to the office manager. Finally, the chart identifies a business consultant, [REDACTED] reporting to the beneficiary.

The petitioner provided a brief description of job duties performed by each employee, noting that: the vice president is "responsible for management of day-to-day operations of the company" and arranges important business meetings; the office manager "oversees flow of documents to and from the Vice President," manages company's operations, and analyzes market and business opportunities; the purchasing officer is responsible for the purchase of equipment and materials for shipment overseas; the shipping officer is responsible for the shipment of equipment and materials overseas; and the business consultant (a contractor) is "responsible for business transactions with other organizations." The petitioner indicated that all positions subordinate to the beneficiary are part-time. The petitioner also submitted evidence that the vice president has a degree in library and information science from [REDACTED] in Nigeria.

The petitioner submitted copies of six Internal Revenue Service (IRS) Form W-2, Wage and Tax Statements for tax year 2013 for the following part-time employees: (1) vice president - \$10,000; (2) shipping officer - \$6,000; (3) office manager - \$12,555; and (4) \$5,000 and \$6,000, respectively, to two individuals who do not appear on the petitioner's most recent organizational chart – [REDACTED] and [REDACTED].<sup>1</sup>

<sup>1</sup> According to the petitioner's organizational chart submitted in response to the RFE, its purchasing officer is [REDACTED] is identified as "administration officer" on a previous organizational chart.

The petitioner also submitted IRS Form 941, Employer's Quarterly Federal Tax Return for all four quarters of 2013 and the first quarter of 2014. The documentation indicates that the petitioner paid three employees during the first quarter, five employees during the second quarter, six employees during the third quarter, and two employees during the fourth quarter of 2013. The total amount paid to all employees in the 4<sup>th</sup> quarter of 2013 was \$10,682.00. The petitioner's Form 941 for the first quarter of 2014 indicates that it paid four employees a total of \$12,637.00. However, the petitioner also provided copies of the beneficiary's pay stubs indicating that it paid him net wages of \$13,468.50 during the first three months of 2014.

The petitioner submitted its 2013 IRS Form 1120, U.S. Corporation Income Tax Return, indicating that it paid \$34,000 to officer compensation but failed to include a Form 1125-E to demonstrate the allocation of those payments. The petitioner's Form 1120 also indicated that it paid a total of \$29,555.00 to salaries and wages for the year. The petitioner did not provide evidence of payments made to [REDACTED], the contracted business consultant identified on its organizational chart.

The petitioner submitted business documents such as a Joint Venture agreement it claims to have entered into on December 31, 2012 with [REDACTED]. In this agreement, the petitioner claims it is "engaged in diversified business activities including Engineering, Installation and maintenance services, and construction." In this document, the petitioner agreed, in part, to "appoint and supervise all contractors and consultants that may be needed for the development of the requisite infrastructure. . ." relating to a land parcel that is to be developed into residential plots requiring infrastructure.

The petitioner also provided a memorandum of understanding that it entered on June 17, 2014 with [REDACTED] that it is "discussing entering into Long Term Contractual arrangement to cover the potential Contracts from the Nigerian and International Oil and Gas Industries operating in Nigeria . . . ."

The petitioner submitted a business document dated March 25, 2013 indicating the beneficiary's ongoing involvement in the petitioner's contract negotiations and contract enforcement. The petitioner provided a copy of an independent contractor agreement dated August 12, 2013 in which the petitioning company identified the independent contractor agreeing to "perform services and labor and/or furnish materials with respect to the Project." The precise nature of the agreement is not clearly established within this contract.

The director denied the petition determining that the petitioner failed to establish that the beneficiary will be employed in a qualifying managerial or executive capacity. The director concluded that given the part-time status of the beneficiary's subordinates and the duties attributed to them, the record did not establish that the beneficiary would be performing primarily managerial or executive duties.

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The petitioner did not include a duty description for this position or otherwise claim that it currently employs an administration officer.

On appeal the petitioner asserts that the director erred by relying exclusively and improperly on the company's small size. The petitioner now asserts that the beneficiary occupies an executive position "rather than a managerial or first-line supervisor position."

## 2. Analysis

Upon review, the petitioner has not established that the beneficiary will be employed in the United States in a qualifying 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 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).

Here, the petitioner's description of the beneficiary's duties is vague and non-specific, and thus provides little insight into what tasks the beneficiary performs on a day-to-day basis. For example, his duties include broad areas of responsibility such as defining the company's strategic vision and mission, directing and overseeing the overall company operations, and keeping abreast of industry trends. In response to the RFE, the petitioner indicated that the beneficiary spends a total of 45% of his time signing contracts, making decisions, and meeting with industry leaders and potential clients, but it offered no explanations of the types of contracts he signs, the types of decisions he makes or the nature of his client interactions to support a finding that these duties are qualifying managerial or executive tasks. Overall, the beneficiary's broadly described duties convey little understanding of how he actually spends his time on a daily basis. 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. *Id.*

While we do not doubt the beneficiary's authority over the company as the president and sole full-time employee, the broad job description alone is insufficient to establish whether the claimed managerial or executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-qualifying administrative or operational duties. Although the petitioner assigned percentages to general areas of responsibility, the petitioner's description of the beneficiary's job duties does not provide sufficient information regarding what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Beyond the required description of the job duties, we review the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

Upon review of the entire record, we find that there are several unresolved inconsistencies in the petitioner's evidence. For example, the petitioner has not sufficiently established its staffing levels and organizational structure as of the date this petition was filed. The petitioner asserted that it had five employees in its letter but claimed six employees on its Form I-140. The petitioner's organizational chart identifies five individuals, other than the beneficiary, and it provided six Form W-2s for the 2013 tax year. However, despite the organizational chart and the petitioner's claimed number of employees, the petitioner's IRS Form 941 for the fourth quarter of 2013 indicates that the petitioner had only two employees during the quarter in which the petition was filed. Thus, the record does not support a finding that all five claimed subordinates who received IRS Form W-2 in 2013 were actually employed by the company at the time of filing. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Given these discrepancies, it is unclear which employees were actually working for the petitioner in November 2013 when the petition was filed.

Further, while the petitioner's Form 941 for the first quarter of 2014 indicates that the petitioner paid a total of four workers, the total salary and wage payments reflected on this Form 941 do not coincide with the payroll records provided for the beneficiary for the same time period. Specifically, the petitioner's Form 941 for the first quarter of 2014 indicates that it paid four employees a total of \$12,637.00. However, as noted above, the petitioner also provided copies of the beneficiary's pay stubs indicating that it paid him net wages of \$13,468.50 during the first three months of 2014. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

The petitioner also identified a business consultant, [REDACTED] on its initial organizational chart. On appeal, the petitioner asserts that it is paying [REDACTED] \$5,000 per month to have its employees perform day-to-day operational tasks for the petitioner. The petitioner provides a copy of its consulting agreement with [REDACTED] dated May 6, 2013. The agreement indicates that the petitioner seeks to acquire a "Jack Up" offshore drilling rig for use in Nigeria and is seeking experienced assistance with acquisition, including funding, equipment knowledge and business setup. The agreement indicates that the petitioner contracted with [REDACTED] to function as its representative to oversee the selection of the rig presentation and purchase, as well as rig funding, scheduling and company presence in Nigeria.

The agreement states that the petitioner agreed to pay [REDACTED] \$5,000 per month, plus all "out of pocket" expenses. The petitioner also provided invoices from [REDACTED] indicating that this company billed the petitioner for \$45,000 in consulting service fees and \$26,307 in travel and lodging expenses between April and December 2013. The petitioner submitted invoices from 2014, and indicated that [REDACTED] has billed the petitioner in the amount of \$180,710 since April 2013. However, as evidence of the petitioner's payments to [REDACTED] the

petitioner submits: (1) a check for \$1,000 dated May 13, 2014, issued to [REDACTED] from the beneficiary's personal account; (2) a check for \$1,000 dated May 21, 2014, issued to [REDACTED] and [REDACTED] from the petitioner's account with the memo "from [the beneficiary]"; (3) a check for \$2,000 dated May 29, 2014, issued to [REDACTED] from the beneficiary's personal account; and (4) a check for \$1,000 dated June 9, 2014, issued to [REDACTED] from the beneficiary's personal account, for "expenses."

The petitioner has not provided evidence of actual payments made to Mr. [REDACTED] or to [REDACTED] pursuant to the terms of the consultant agreement signed in May 2013. While the record indicates that the petitioner paid \$71,307 to [REDACTED] during the year in which the petition was filed, these expenses are not reflected on the petitioner's 2013 tax return. Further, the evidence submitted to establish that the petitioner is using Mr. [REDACTED] services in 2014 indicates that the beneficiary is personally compensating Mr. [REDACTED] on a piecemeal basis; there is no corroborating evidence that the petitioner is paying the monthly \$5,000 fee. Absent evidence corroborating Mr. [REDACTED] performance of duties for the petitioner pursuant to the consulting agreement, the petitioner has not established that he was working for the petitioner as a contractor at the time of filing. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Overall, the evidence of record supports a finding that the petitioner had as few as two employees at the time the petition was filed in November 2013, despite employing as many as six employees during the preceding quarter. The petitioner did not offer an explanation for this reduction in staffing and simply states that all of its employees work on a part-time basis.

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; If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Section 101(a)(44)(A)(iii) of the Act

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).

Therefore, 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. The petitioner's assertion that the beneficiary oversaw the vice president, an educationally qualified professional, is inadequate because the educational documentation does not clearly indicate the educational level achieved, nor does the petitioner establish that the vice president is required to have an academic background in library science in order to perform her duties.

When examining the managerial or executive capacity of a beneficiary, we review the totality of the record, including descriptions of a beneficiary's duties and his subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his 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.

In this matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. The petitioner's brief employee duty descriptions indicate that both the vice-president and office manager are responsible for company operations. The need for the vice president's added level of management is not adequately supported where her duties appear to duplicate the office manager's responsibilities. The petitioner acknowledged that all of its employees other than the beneficiary are part-time employees. The limited amount of money paid to the employees during the 2013 tax year, as depicted on their Form W-2s, raises the question of how many hours these employees actually worked and how they could have been able to effectively relieve the beneficiary from primarily performing non-qualifying duties. Further, as discussed above, the petitioner's quarterly federal tax return for the fourth quarter of 2013 indicates that the petitioner reported only two employees during the quarter in which the petition was filed. 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).

Based on the brief employee duty descriptions, the employees' part-time status, and the petitioner's failure to establish which employees were actually working for the company as of November 2013, the petitioner has not provided evidence of an organizational structure sufficient to support a finding that the beneficiary is employed in a managerial capacity as a personnel manager. Further, the petitioner has not claimed that the beneficiary manages an essential function of the organization. Finally, even if the petitioner's assertions relating to its managerial structure were supported, the

petitioner's tax filings contradict the petitioner's organizational chart and claimed staffing at the time the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

On appeal the petitioner, claims that the beneficiary "primarily occupies an Executive position" rather than a managerial or first-line supervisory position. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Here, while the petitioner indicates that the beneficiary is responsible for duties such as defining the company's strategies, long-term plans, and overall direction and decision-making, for the reasons discussed, above, the record does not establish that the beneficiary will spend his time primarily on such functions. The petitioner provided an overly generalized description of the beneficiary's position. Further, the petitioner, despite indicating that it has five to six employees, has documented payments to only two employees during the quarter in which the petition was filed. The petitioner has not established that the beneficiary, in a company with only two employees, would be relieved from significant involvement in the day-to-day operations of the company.

In addition, the petitioner correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for us to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when we note discrepancies in the record and fail to believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15. In this matter we have found a number of discrepancies and inconsistencies in the record, and find insufficient evidence to establish that there are employees to perform the non-managerial and non-executive operations of the company. The petitioner claims to be fully staffed with six employees and a contractor, but has not corroborated its claimed staffing levels.

Based on the foregoing discussion, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

#### B. Ability to Pay

The remaining issue to be addressed is whether the petitioner established that it has the ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part, the following:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's Form I-140 indicated that it would be the beneficiary an annual salary of \$24,000. The director found insufficient evidence to show that the petitioner was paying the beneficiary this salary at the time of filing and determined that the petitioner's federal tax returns did not indicate that the company has sufficient net income or net current assets to pay the beneficiary's salary.

On appeal, the petitioner submits a copy of the beneficiary's IRS Form W-2 for 2013 indicating that he received wages of \$24,000.

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary at the time of filing.

The petitioner submitted a copy of the beneficiary's IRS Form W-2, Wage and Tax Statement, for 2013 which indicates that he was paid \$24,000. The petitioner also provided a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, for 2013, which indicates that the petitioner paid \$34,000 in compensation to officers and \$29,555 in salaries and wages. Finally, the petitioner provided copies of IRS Form W-2 issued to five additional employees, and copies of its unsigned IRS Form 941 for all four quarters of 2013, which reflect that the petitioner paid a total of \$63,555 to all employees in 2013.

However, the record contains inconsistent evidence with respect to whether the petitioner continues to pay the beneficiary the offered wage of \$24,000 per year.

As evidence of wages paid to the beneficiary in 2014, the petitioner provided paystubs for the months of January through June 2014 indicating that it paid the beneficiary gross wages of \$5,000 per month, with a year to date amount of \$15,000 as of March 31, 2014. The petitioner also submitted an IRS Form 941 for the first quarter of 2014 which indicates that it paid wages, tips and other compensation to four employees totaling \$12,637.00 through March 31, 2014.

The petitioner's claim that it paid all employees \$12,637.00 during the first three months of 2014 is inconsistent with its claim that it paid the beneficiary \$5,000 per month. The petitioner did not explain this discrepancy. Further, as noted above, there are other discrepancies in the record with respect to the petitioner's claimed staffing levels and its payment of the claimed monthly \$5,000 fee to its contractor. While the petitioner correctly asserts that it is not prohibited from paying the beneficiary a higher wage than what is offered on the petition, it is evident that either the information on the beneficiary's paystubs for the first quarter of 2014 or the information on the petitioner's IRS Form 941 for the first quarter of 2014 contains information that is not true and correct. 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). If we fail to believe that a fact stated in the petition is true, we may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In light of the unresolved discrepancies in the record, the petitioner has not provided sufficient and credible evidence of its ability to pay the beneficiary's proffered wage. For this additional reason, the appeal will be dismissed.

### III. 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.