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File: WAC 07 168 52871 Office: CALIFORNIA SERVICE CENTER Date: **DEC 26 2007**

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

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its vice president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California corporation, is engaged in the import and distribution of marble products. It states that it is a subsidiary of [REDACTED], located in Guangdong, China. The beneficiary was initially granted L-1A status in 2004 and the petitioner now seeks to extend his status for three additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in a primarily 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 the AAO for review. On appeal, counsel for the petitioner asserts that the director erroneously characterized the beneficiary's job duties and job description, and failed to consider whether the beneficiary would be employed in an executive capacity. Counsel further contends that the director's analysis as to whether the petitioner established that the beneficiary would be employed in a managerial capacity was irrelevant. Counsel submits a brief in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed by the United States entity in a primarily 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

- (1) 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.

The nonimmigrant petition was filed on May 8, 2007. In a letter dated April 3, 2007, the petitioner indicated that the U.S. company has 12 employees, including salaried employees and "independent contracting sales." The petitioner described the beneficiary's proposed duties as vice president as follows:

1. Assisting President setting all of the corporate policies and develop policies for import/export, marketing, business development, and all other business matters. 15%
2. Directing various domestic sales and marketing activities to promote the sales of the products imported from the parent company. Market and collate the most updated information regarding the market demand for a wide variety of products. 15%
3. Taking responsibilities for all daily communications with business partners and representing the company in various trade shows and exhibitions to promote the company's existing products and new product lines. 10%
4. Participating in business negotiations with domestic buyers and clients and acting as the authorized signatory of all major business contracts. 10%
5. Overseeing the implementation of the strategies in all departments to ensure efficient operation and maximum profits. 10%
6. Conducting regulatory meetings with staff for discussion regarding management problems and formulate future expansion projects. 10%
7. Preparing monthly reports on the business transactions of the department and submitting them to the President and then to Parent Company, upon request of the Board of Directors. 10%
8. Supervising the work of managers and professionals within the above departments and evaluating their performance. 10%
9. Acting as the highest executive of the company during the President's absence when going backing [sic] to Parent Company to report business. 10%

The petitioner submitted an organizational chart indicating the staffing of the company as of January 2007. The organizational chart depicts the beneficiary as vice president and chief executive officer with four direct subordinates: a marketing department employee, a coordination department employee, a sales department/customer service employee, and a chief financial officer/accountant. The chart shows a web developer working in the marketing department, but the petitioner also indicates that this employee, Lei Yan, is in the financial department. The chart lists four "outside sales" employees working in the sales department, and two accounting employees of the foreign entity who report to the financial officer. The petitioner provided a copy of its California Form DE-6, Quarterly Wage and Withholding Report, for the fourth quarter of 2006, which confirmed the employment of seven employees on the organizational chart. The petitioner indicated that the outside sales representatives are paid on a commission basis.

The petitioner also provided an employee list with brief position descriptions for each worker. The beneficiary's position was described therein as follows:

- Manages marketing department, coordination department and sales department.
- Provides managerial vision on business strategy and marketing plan.
- Makes decision on product selection and purchase from factory overseas
- Designs pricing structure for distributors, wholesalers and retailers in the United States.
- Operates and monitors daily procedure in office and warehouse.

- Reports business status and any required information to president and ERP program.

The petitioner also provided brief position descriptions for all other employees of the U.S. company.

The director issued a request for additional evidence on June 20, 2007, in which the petitioner was instructed to submit the following: (1) the total number of employees at the beneficiary's worksite; (2) a more detailed organizational chart for the U.S. company which includes each employees' job title, job duties, educational level, annual wages and immigration status; (3) a more detailed description of the beneficiary's duties and the percentage of time he spends on each duty; (4) clarification regarding the employment status of the "outside sales" staff; (5) copies of the petitioner's California Forms DE-6 for the last four quarters; (6) copies of the U.S. company's payroll summary, and IRS Forms W-2 and W-3 for 2006; and (7) if the petitioner claims that the beneficiary manages professional employees, evidence of the number of hours the beneficiary has devoted to supervising professional employees for the last six months, and evidence of the educational credentials for the professional employees.

In a response received on July 23, 2007, the petitioner included the following position description for the beneficiary:

- (1) to recruit, train, supervise, promote or otherwise terminate all the supervisory, professional and managerial employees;
- (2) to manage and supervise the marketing, sales, logistic, finance and administrative functions and to make managerial decisions for the USA operations on the daily basis;
- (3) to formulate the long and short term business plans for the USA operation;
- (4) to safeguard the company's assets and other financial resources;
- (5) to properly account for the operation results of the company;
- (6) to work closely with the group's head office in China and Hong Kong to ensure that the USA operations meet or exceed the overall objective of the group;
- (7) to report to the president of the company.

The petitioner clarified that the 12 employees claimed at the time of filing included six payroll staff and six outside sales representatives, and provided evidence of payments to the commissioned sales employees.

The petitioner provided an updated organizational chart depicting the staffing structure of the company as of July 1, 2007. The beneficiary was still shown as supervising four employees, but only one subordinate, the sales department employee, appears on both organizational charts. The beneficiary's direct subordinates also include a marketing department employee, a logistics and distribution department employee, and an accounting and administration department employee. The chart also depicts five outside sales representatives, and open positions for a sales employee and an e-commerce and web administration employee.

In an attached statement, the petitioner indicated that all employees have a "university" education level. The petitioner stated that the beneficiary's subordinates are responsible for marketing planning, communication, promotion, sales and logistics coordination, sales force management, accounting, banking and office support. The petitioner identified the beneficiary's subordinates as professional employees who hold the titles of "supervisor, marketing operations," "supervisor, logistic & distribution," "manager, sales," and "accounting

officer." The petitioner indicated that the marketing, logistics and distribution, and accounting employees were hired in May and June 2007.

The petitioner submitted a copy of its California Form DE-6 for the second quarter of 2007, which lists a total of ten employees and includes one employee who is not identified on either organizational chart. The Form DE-6 indicates that the petitioner had six employees in April and May, and seven employees as of June 2007. The petitioner clarified that the employee identified in the original organizational chart as chief financial officer was terminated in May 2007, the previous marketing employee resigned in March 2007, and the employee previously identified as "web development" resigned in June 2007.

Finally, the petitioner provided copies of its IRS Forms W-2 and W-3 for 2006. The Form W-3 shows that a total of \$128,213.18 was paid to ten employees in 2006. However, the AAO notes that the 2006 Forms W-2 show payments to employees who, according to the petitioner, were not hired until the second quarter of 2007. For these employees, the amount indicated on the 2006 Form W-2 is equal to the amount paid to the employees during the second quarter of 2007. Furthermore, at least one employee who, according to the petitioner, was employed in 2006, [REDACTED], did not receive a Form W-2. In addition, the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, indicates that the company paid salaries and wages of \$194,206 in 2006, thus there is a significant discrepancy between the wages reported on Form W-3 and the wages reported on Form 1120. 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).

The director denied the petition on August 9, 2007, concluding that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director observed that the petitioner employs six to seven staff members, and noted that the claimed "outside sales" staff and foreign accounting employees would not be considered for the purpose of analyzing whether the beneficiary would be employed in a qualifying capacity. The director further found that the petitioner had failed to establish that the beneficiary's subordinate employees are professionals, as no documentary evidence was submitted to support the petitioner's claims that these employees have the appropriate degrees, or that their positions require a degreed individual to perform the assigned duties.

In addition, the director determined that the petitioner's description of the beneficiary's duties was too vague to demonstrate what the beneficiary does on a day to-day basis, and thus failed to establish that he primarily performs qualifying tasks. The director concluded that the beneficiary appears to be a first-line supervisor, with no managerial, supervisory, or professional staff to relieve him from performing non-qualifying duties.

On appeal, counsel for the petitioner asserts that the petitioner clearly established that the beneficiary would be employed in an executive capacity as the petitioner's primary executive, yet the director only considered whether the beneficiary would be employed in a managerial capacity and did not address the issue of executive capacity. Counsel asserts that the director's conclusion "that the beneficiary's duties do not fit the definition of managerial capacity is not relevant or dispositive."

Counsel further objects to the director's findings that the beneficiary's job description is too vague, asserting that the petitioner provided specific information showing that the beneficiary is primarily engaged in executive duties.

Counsel asserts that the beneficiary sets and develops marketing goals and policies and must communicate with business partners and customers to perform this duty. Counsel asserts that "when he engages in activities that the decision describes as first-line supervising or providing services or products he is doing so as a mere corollary to his larger duties."

Counsel asserts that the director also failed to correctly address the significance of the beneficiary's role with respect to the parent company's accounting department and the petitioner's outside force. Counsel notes that there is nothing prohibiting the beneficiary from having contact with the petitioner's parent company, and states that the beneficiary's contact with the foreign entity is for the benefit of the U.S. company. With respect to the outside sales employees, counsel asserts that "the independent contractors are an indication that the beneficiary is an executive." Counsel asserts that "each of the four elements of the definition of executive capacity . . . is involved in the on-going business relationship between the petitioner and the independent contractors."

Counsel states that the beneficiary would be the petitioner's primary executive "since the company president would be working for the parent company in China for an extended period."

Counsel's assertions are not persuasive. The petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. Although counsel insists that the petitioner has consistently identified the position as being executive in nature, the AAO will consider the statutory criteria for both managerial and executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(1)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

At the time the petition was filed, the petitioner submitted two different position descriptions for the beneficiary's position. The petitioner's letter dated April 3, 2007 included a list of duties and indicated the percentage of time the beneficiary would devote to each duty. However, many of the duties were not clearly described, and, overall, the description fell significantly short of establishing that the beneficiary's duties would be primarily managerial or executive in nature. For example, the petitioner indicated that the beneficiary devotes 15 percent of his time to directing sales and marketing activities but some portion of this time is spent collating information regarding market demand, a task that would not be considered executive or managerial in nature. The petitioner indicated that the beneficiary would simultaneously devote only ten percent of his time to acting as the highest executive in the president's absence, while "working most of his time as the number one executive of our company during the absence of the president." Regardless of how much time the beneficiary devotes to acting on the president's behalf, the petitioner never specifically stated what duties the beneficiary would perform in this regard. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The fact that the beneficiary would spend 15 percent of his time "assisting the President" with corporate policies and business matters suggests that the president maintains authority over the beneficiary, even when not in the United States.

The petitioner's description also included such vague duties as "overseeing the implementation of strategies," "conducting regulatory meetings with staff," and "preparing monthly reports on the business transactions of the department." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Finally, the petitioner indicated in its initial letter that the beneficiary devotes 20 percent of his time to "all daily communications with business partners and representing the company in various trade shows and exhibitions," and "participating in business negotiations with domestic buyers and clients." These duties suggest the beneficiary's involvement in routine business transactions and sales activities and have not been demonstrated to be managerial or executive in nature.

The alternate position description submitted at the time of filing included similarly vague duties such as "provides managerial vision on business strategy and marketing plan," "operates and monitors daily procedure in office and warehouse," and "reports business status to the president." Furthermore, the petitioner stated that the beneficiary "makes decision[s] on product selection and purchase from factory oversea[s]," but did not clearly identify any subordinate employees to perform the purchasing or import function. Given that the description included in the petitioner's letter accounted for 100 percent of the beneficiary's time, the simultaneous submission of a different list of duties raises questions regarding the accuracy or completeness of either description. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The director identified these deficiencies and requested a more detailed description of the beneficiary's duties with the percentage of time spent in each of the listed duties. However, rather than expanding upon its original list of nine duties provided at the time of filing, the petitioner provided a list of seven duties that were more vague than those previously outlined and offered no clarification as to how the beneficiary's time would be allocated. The petitioner indicated that the beneficiary would "manage and supervise" all functions, "formulate the long and short term business plans," "safeguard the company's assets and other financial resources," and "properly account for the operation results." It is impossible to determine what specific tasks the beneficiary performs based on these general statements. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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). Contrary to counsel's assertions on appeal, the petitioner's descriptions of the beneficiary's duties do not provide specific information regarding the beneficiary's claimed executive duties.

The definitions of executive and managerial capacity have two specific requirements. 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. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While the petitioner places considerable emphasis on the fact that the beneficiary is often the highest-level employee present in the United States due to its president's travels to China, the fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987).

The petitioner has not enumerated the specific managerial or executive job duties to be performed by the beneficiary on a daily basis as the company's vice president, or in his claimed role as acting president. While the AAO is prepared to conclude that some of the beneficiary's tasks are qualifying, the petitioner has the burden of establishing that a majority of his tasks would be qualifying. This determination cannot be based on the beneficiary's management of subordinates, the petitioner's gross income, or a job description that fails to clarify the beneficiary's specific daily tasks. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The record does not include a sufficiently detailed description of the beneficiary's proposed day-to-day duties, which is germane to a determination regarding the beneficiary's employment capacity in the United States.

Although the beneficiary is not required to supervise personnel, if it is claimed that his 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 response to the director's request for evidence, the petitioner stated that the supervisor, marketing operations, supervisor, logistics & distribution, sales manager, and accounting officer are all professional positions. However, of these employees, only the "manager, sales" was employed by the petitioner at the time the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the duties of the sales manager, whose duties were originally described as "coordinates with outside sales representatives." This employee was also initially described as

holding the concurrent role of "customer service" with responsibility for "receiving orders, order process, visitor reception," duties which have not been shown to require an employee with a bachelor's degree.

Furthermore, as noted by the director, the petitioner chose not to provide the requested evidence of the educational credentials for the beneficiary's subordinates or a sufficiently detailed description of their duties. 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). Thus, even if the AAO considered the employees hired subsequent to the filing of the petition, the petitioner has not established that these employees possess or require a bachelor's degree, such that they could be classified as professionals. Nor has the petitioner shown that any of these employees supervise subordinate staff members such that they could be classified as managers or supervisors. Only the sales department manager is claimed to supervise employees, however, as noted above, the petitioner initially stated that he "coordinates sales" and performs customer service duties. His duties were only later amended to "manage sales force" in response to the request for evidence, therefore his actual degree of supervisory authority over the petitioner's independent sales representatives is unclear. 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.

On appeal, counsel asserts that the director improperly applied the statutory definition of managerial capacity, and asserts that the beneficiary would instead be employed in an executive capacity. 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. As discussed above, the job descriptions provided for the beneficiary are so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, the record does not establish that the beneficiary was managing a subordinate level of managerial employees. The petitioner's claim that the beneficiary will be the company's "primary executive" while the petitioner's president is abroad is also not persuasive, as the petitioner has not described the duties he would perform as acting president, and the petitioner's conclusory assertions regarding the beneficiary's executive capacity are insufficient. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

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 USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who 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. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

As noted above, there are several irregularities in the petitioner's tax and payroll records which raise questions regarding their credibility. Most notably, the petitioner's 2006 Forms W-2 show payments to employees who were not hired until 2007, while the total amount paid to the petitioner's employees is significantly different from the amount shown on the company's 2006 IRS Form 1120. Although the petitioner claims that its original marketing department employee, [REDACTED], resigned in March 2007, the petitioner's quarterly wage reports show that he was actually last paid by the petitioner during the last quarter of 2006, and it is unclear why the petitioner claimed him as an employee at the time of filing. The "coordination department" employee also appears to have left the company in April 2007, prior to the filing of the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

The petitioner operates as an importer and distributor of marble and granite products, and has leased a 6,450 square foot industrial warehouse space. At the time of filing, it employed a president, a vice president (the beneficiary), a web developer/finance employee, an accountant, a sales department employee, and outside sales staff. While the petitioner later hired a marketing employee, a logistics and distribution employee, and an accounting and administration officer, there is no evidence that the petitioner had employees to perform duties related to marketing, administration, or import, logistics, warehousing and distribution functions at the time of filing. Thus while the petitioner appears to have sufficient sales staff to relieve the beneficiary from performing this function, the lack of staff to perform other essential functions raises questions as to how much time the beneficiary would reasonably devote to the claimed executive duties. The absence of a subordinate staff sufficient to perform the non-qualifying duties of the petitioner's business is a proper consideration in the analysis of the beneficiary's employment capacity. See *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 25, 29 (D.D.C. 2003).

Contrary to counsel's assertions, the fact that the beneficiary often acts as the most senior employee within the petitioner's five- to seven-person company is not sufficient to establish that he will serve in a primarily managerial or executive capacity for purposes of this visa classification. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Here, the petitioner has not established that the beneficiary will be performing primarily non-qualifying duties.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.