



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 19 2014** OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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)

IN 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, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New Jersey corporation that has filed a nonimmigrant visa petition seeking to employ the beneficiary in the position of operations manager for a period of one year 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 director denied the petition concluding that the petitioner did not establish that: 1) the beneficiary was employed abroad in a qualifying managerial or executive capacity; and, 2) the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal seeking to overturn the director's decision. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review.

I. The Law

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.

II. Qualifying Employment Abroad

The first issue to be addressed in the present matter is whether the beneficiary was employed abroad in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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.

The record shows that the petition was filed on March 1, 2013. In support of the Form I-129, the petitioner provided a statement, dated February 6, 2013, stating that the foreign entity where the beneficiary is currently employed is doing business as a manufacturer, buyer, seller, and an importer and exporter of Turkish carpets, rugs, and ceramics. The petitioner stated, and provided evidence to show, that the beneficiary is a 23%

shareholder of the foreign entity, which has ten employees. The petitioner explained that while the beneficiary originally assumed a managerial role when he commenced his employment for the foreign entity in July 2010, his role has since “evolved to an executive capacity.” The petitioner further described the beneficiary’s overseas employment as follows:

As a shareholder and executive manager, [the beneficiary] receives only general supervision and now directs the management of the employer abroad as well as oversees and directs the employer abroad’s [sic] business operations with foreign markets. He is also responsible for the financial planning of the company and for determining and implementing the corporate policies and standards. His capacity as an executive has been key in our plans to further expand the employer abroad’s [sic] marketing and sales activities in the international market.

Additionally, the petitioner provided an organizational chart showing the beneficiary in his position as manager alongside an assistant manager with both individuals subordinate to the company president. The next tier of the organizational hierarchy shows two sellers and an accountant. As the organizational chart does not distinguish the beneficiary’s hierarchical placement from that of the assistant manager, it is unclear whether the beneficiary, the assistant manager, or a combination of the two, manages the three employees who are identified at the third tier of the organization.

On March 14, 2013, the director issued a request for evidence (RFE) informing the petitioner that the record lacked sufficient documentation establishing that the beneficiary was employed abroad in a qualifying managerial or executive capacity. The director observed that the organizational chart the petitioner submitted in support of the Form I-129 did not provide a detailed position description for the beneficiary’s subordinates. The director further noted that the statements pertaining to the beneficiary’s employment abroad provided an insufficient job description as it was broad in scope and failed to identify the beneficiary’s job duties with specificity to explain how the employment abroad fit the definition of managerial or executive capacity.

In response, the petitioner provided a statement dated April 9, 2013 and signed by the beneficiary in his capacity as president of the foreign entity. The beneficiary provided the following description of his position abroad:

- Manage the purchase activities with conjunction of company costs. This is an essential function of our organization’s business:
 - This control includes choosing [sic] suppliers
 - Choosing [sic] the material that will be sold by our company
 - Negotiating cost and transportation with suppliers
- Supervise and coordinate all exports to the United States and European [c]ountries
 - [M]onitoring employee’s [sic] in charge of packing the carpets and ceramics sold
 - [T]ouch[ing] base with supervisors coordinating deliveries
- Develop [sic] and implement special procedures for the sales department of the company to control its customer base
- Provide personnel administration
 - This includes firing and hiring employees as necessary
- Managing the sales and marketing practices of carpet and ceramic products [sic] by creating

and implementing company application to better monitor materials.

Upon review of the petitioner's submissions, the director determined that the petitioner failed to establish that the beneficiary's employment abroad was within a qualifying managerial or executive capacity. The director therefore issued a decision citing this deficiency as one of two grounds for denying the petition. The director observed that although the beneficiary's position calls for supervising two sales people and one accountant, the petitioner did not provide evidence to establish that the sales people are employed in a professional capacity.¹ The director further found that the petitioner failed to provide evidence to show that the foreign entity had direct employees or contractors who can relieve the beneficiary from having to primarily perform non-qualifying tasks. The director concluded that the petitioner failed to provide the requested day-to-day breakdown of the beneficiary's specific tasks and the percentage of time the beneficiary allocated to each of the daily functions.

On appeal, counsel objects to the director's reliance on the foreign entity's personnel size as an indicator of the beneficiary's employment capacity, asserting that the foreign entity's reasonable needs are met with its current staff of ten employees and further contending that "it should be clear that [the beneficiary] does not function merely as a first-line supervisory [sic]." Counsel indicates that the beneficiary is a function manager, whose focus is "overseeing essential functions," which others perform. Counsel points to the beneficiary's discretionary decision-making authority and his role as the company's policy maker, which he claims cannot be attributed to a first-line supervisory. Counsel claims that the beneficiary oversees and directs the foreign entity's management as well as the company's "relations with foreign markets" and further notes that the beneficiary is responsible for financial planning and making and implementing corporate policies. Counsel rejects the notion that the beneficiary's more frequent interaction with the foreign entity's workers takes away from the beneficiary's overall function.

The AAO finds that the counsel's assertions lack probative value and fail to overcome the key deficiencies that resulted in the director's adverse finding pertaining to the beneficiary's employment abroad.

In general, when examining the executive or managerial capacity of the beneficiary, the AAO reviews the totality of the record, starting first with the petitioner's description of the beneficiary's job duties. See 8 C.F.R. § 214.2(l)(3)(ii). 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). The AAO will then consider this information in light of other relevant factors, including personnel size, job descriptions of the beneficiary's subordinates and other employees who carry out the daily operational tasks, the nature of the business conducted, and any other facts that may contribute to a comprehensive understanding of the beneficiary's actual role within the petitioning organization.

Accordingly, while counsel is correct in stating that an entity's personnel size should not be the sole determining factor of whether the beneficiary is or will be employed in a qualifying managerial or executive

¹ The director erred in his interpretation of the foreign organizational chart, stating that the president of the foreign entity is shown directly supervising two sales people and an accountant. In fact, the chart shows the beneficiary and an assistant manager as the president's direct subordinates.

capacity, an entity's personnel size is relevant and should be considered as a reasonable indicator of whether or not an entity has the ability to relieve the beneficiary from having to allocate his time to the performance of tasks that are primarily non-qualifying.

Looking at the totality of the evidence, the petitioner has failed to provide a detailed description of the beneficiary's job duties or the job duties of his subordinates to explain what actual tasks the beneficiary carries out on a daily basis and who, if not the beneficiary, carries out crucial operational tasks that are necessary for the foreign entity's continued operation. Although the RFE distinctly focused on a detailed list of the beneficiary's functions and asked that specific time constraints be assigned to those functions, the petitioner did not provide this information and instead included a job description indicating that the beneficiary's current employment with the foreign entity is comprised of a mixture of both qualifying and non-qualifying tasks. 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). In the job description the petitioner provided, the beneficiary was described as someone who negotiates cost and transportation with suppliers, coordinates deliveries with supervisors of other entities, and monitors presumably non-professional employees who pack the carpets and ceramics. The petitioner provided no clarifying information to explain how any of these job duties may be deemed to be within a qualifying managerial or executive capacity.

Although counsel claims on appeal that the beneficiary assumes the role of a function manager, he fails to point to evidence in the record that substantiates this claim. 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, 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. 8 C.F.R. § 214.2(l)(3)(ii). In the present matter, the petitioner did not initially claim that the beneficiary assumes the role of a function manager and counsel provides no specific information other than to state that the foreign entity's essential function is the production and transportation of carpets.

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 employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As discussed above, the record indicates that an undetermined portion of the beneficiary's time is allocated to job duties that cannot be deemed as qualifying within a managerial or executive capacity. Given the petitioner's failure to provide the requested time constraints, the AAO is unable to conclude that the beneficiary primarily spends his time performing tasks at a managerial or executive level. The AAO further cautions that the petitioner must not claim to employ the beneficiary in the role of a function manager as a default mechanism when the record lacks sufficient evidence to demonstrate the beneficiary's role as a personnel manager whose primary concern is to manage a subordinate staff of managerial, supervisory, and/or professional employees. In this matter, the petitioner has

not established that the beneficiary manages an essential function.

Furthermore, while the beneficiary has discretionary authority in terms of choosing suppliers, determining which inventory the foreign entity will sell, and maintaining hiring and firing authority over all of the foreign entity's personnel, the petitioner did not explain what tasks the beneficiary performs as part of his responsibility to develop and implement sales procedures, nor did the petitioner clarify what is meant by "managing the sales and marketing practices" or "creating and implement company application to better monitor materials." Given the lack of meaningful content in these vague statements, the AAO is unable to determine whether the beneficiary himself is carrying out the marketing function and possibly creating software as a means of maintaining control over the foreign entity's inventory. Again, while the beneficiary's contributions to the foreign entity may be valuable, the petitioner must establish that the job duties the beneficiary has performed for the foreign entity meets the criteria of the statutory definition of either managerial or executive capacity.

Despite counsel's assertion that "it should be clear" that the beneficiary does not merely function in a first-line supervisory role, the AAO cannot assume that the beneficiary primarily performs tasks of a qualifying nature simply based on his placement as the head of the foreign organization or his overall discretionary authority. If the AAO were to make such assumptions in every scenario where the beneficiary occupies the senior-most position within an organization, there would be no need to review the job duties at all. Moreover, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Turning to the organizational chart the petitioner provided originally in support of the petition, it is clear that the chart is not an accurate representation of the foreign entity's organizational hierarchy, or the beneficiary's placement therein. Given the petitioner's claim that the foreign entity's president was working in the United States at the time of filing and the follow-up claim that the beneficiary assumed the role of acting president in the absence of the president himself, a chart that depicts the beneficiary's position as that of manager, who is directly subordinate to the president, fails to properly illustrate the beneficiary's role. As indicated in the RFE, if the beneficiary is charged with employee oversight, the record should contain sufficient information about the beneficiary's direct subordinates and the time spent overseeing those subordinates to establish that the beneficiary is not tasked with overseeing the work of non-professional employees. In the present matter, neither the foreign entity's organizational chart nor the beneficiary's statement addressing his employment abroad specifically discusses the beneficiary's supervisory tasks other than in broad terms. Therefore, no conclusions can be made as to whom the beneficiary directly supervises, whether such supervision is over professional or supervisory employees, and how much of his time the beneficiary allocated to the supervision of subordinate employees.

Notwithstanding the beneficiary's discretionary authority and his top placement within the foreign entity's organizational hierarchy, the AAO finds that the petitioner has failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity and on the basis of this conclusion the petition cannot be approved.

III. Proposed Employment in the United States

The second issue to be addressed is whether the petitioner will employ the beneficiary in the United States in a primarily managerial or executive capacity.

The Form I-129 shows that the petitioner claimed five employees and a gross annual income approaching \$400,000 at the time the petition was filed. In its February 6, 2013 supporting statement the petitioner stated that the beneficiary “will be given full responsibility for the overall direction, policies, and expansion practices of the U[.]S[.] employer.” The petitioner described the beneficiary’s job duties in the proposed position of operations manager as follows:

The alien will locate U[.]S[.] buyers, negotiate and sign contracts and devise plans for expansion of the U[.]S[.] employer. He will be the key executive in charge of import and export operations. He will oversee all independent accounting work. He will review the financial statements and records indicating account balances, inventory levels and business transactions. He will supervise the marketing and administrative personnel. He will determine and implement corporate export and import policy, conduct reviews of company activities to analyze and determine costs, future activities, profits and losses, expenditures, and progress. He will hire additional employees during the first year of operation.

Finding the above information to be insufficient to conclude that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity, the director addressed the evidentiary deficiency in an RFE. The director observed that the petitioner alternated referring to the beneficiary’s proposed position as manager and an executive. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. Accordingly, the director instructed the petitioner to provide sufficient evidence to establish whether the beneficiary would be employed in a managerial or in an executive capacity. The director also asked for a detailed list of the beneficiary’s proposed job duties with time allocations indicating how much time the beneficiary would spend carrying out each duty. Additionally, the director instructed the petitioner to provide an organizational chart illustrating the beneficiary’s proposed position, the company’s organizational structure, staffing levels, employee names and job titles accompanied by employee job duties and educational credentials.

In response, the petitioner provided a statement, dated April 12, 2012, signed by [REDACTED] the company’s president. Mr. [REDACTED] acknowledged that his organization has fewer employees than larger corporations, but claimed that the beneficiary’s role within the petitioning organization would not be that of a first-line supervisor. Mr. [REDACTED] provided the following description of the beneficiary’s proposed employment:

- 30% Monitor[ing] our team of employees and independent contractors who are responsible for carrying out various duties associated with the production and transportation of our rugs and ceramics. Such includes:
 - Coordinating the employees for warehouse pickups and deliveries[.]
 - Commanding employees to specific drop[-]off locations[.]

- Hiring and firing of employees, interviewing prospective employees as well as contracting per diem employees for special transportation needs[.]
 - We plan on increasing our personnel as the company's growth is requiring more personnel and [the beneficiary] will be responsible for doing so[.]
- 30% Monitoring quality control over the sales, transportation, and packing logistics of the carpets and ceramics sold[.]
 - paying [sic] special attention to sales destined to areas outside of New Jersey which require special shipping arrangements[.]
 - Mr. [REDACTED] will be the immediate personel [sic] to be contacted when corrective measures are needed, including returns and refunds[.]
 - Mr. [REDACTED] will aslo [sic] be installing the same company application he created and implemented at [the foreign entity] at our New Jersey location to better monitor our materials in stock[.]
- 15% Negotiating with suppliers on wholesale prices
- 25% Formulating the strategic marketing development of our business[.]
 - This includes coordinating special rug showcases across the country such and [sic] identifying trade shows and fairs in the U.S. and negotiating terms of participating with other vendor[s.]
 - Identifying and analyzing the needs of customers and managing our team to ensure that we meet those needs[.]
 - Developing our overall strategic framework, building brand positioning and marketing strategies via maintaining an [sic] supplier network as well as a high quality website[.]

The petitioner also provided an organizational chart, which depicts the company president at the top of the hierarchy, followed by two "seller" positions, each with a driver or "driver/seller" as their direct subordinate. It is noted that the chart did not depict the beneficiary's proposed position as operations manager despite the express RFE instructions asking the beneficiary to include the beneficiary in the chart. A separate document was provided listing the job descriptions, salaries, and educational credentials of the company's employees. The document indicates that both sellers engage in customer care and sales of the company's products and both are shown as possessing baccalaureate degrees from foreign institutions.

The director concluded that the petitioner failed to provide sufficient evidence to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. With regard to the claim that the beneficiary's sales subordinates hold baccalaureate degrees, the director observed that the petitioner failed to provide supporting evidence to corroborate its claim. Moreover, the director determined that merely possessing an advanced degree would not be sufficient if the subordinate employees would carry out job duties that do not require such a degree. The director further observed that the petitioner's organizational chart does not establish that it has direct or contracted employees to relieve the beneficiary from having to carry out the job duties of a first-line supervisor. Looking to the beneficiary's job description, the director determined that the beneficiary would carry out other non-qualifying tasks, including marketing initiatives, supplier negotiations, and customer service functions.

On appeal, counsel focuses on the needs of the petitioner, stating that due to the anticipated departure of the petitioner's current president to return to Turkey, the petitioner is in need of a manager. Counsel does not

address the beneficiary's job description or discuss how the beneficiary would function in a qualifying managerial or executive capacity within the petitioner's organizational structure at the time of filing.

A review of the petitioner's organizational chart shows a staffing hierarchy that is one half the size of the foreign entity. Given that the petitioner failed to comply with the director's request for an organizational chart that would include the beneficiary's proposed position, the AAO can make no determination as to the beneficiary's placement with the organizational hierarchy. While counsel makes references to the departure of the petitioner's current president, he does not clarify how such a departure would affect the beneficiary's proposed employment with the petitioning entity. Although counsel's statement implies that the beneficiary would assume the responsibilities of the current president, there is no further explanation from the petitioner to establish that this is the intended course of action. Moreover, given that the Form I-129 identified the beneficiary's proposed position as that of operations manager, the implication that the current president intends to depart his current position would significantly alter the petitioner's organizational hierarchy and the beneficiary's role within the organization. It is noted that the record does not contain evidence corroborating counsel's claim, which is inconsistent with the claim that the petitioner seeks to hire the beneficiary to fill the position of operations manager rather than that of president. As previously stated, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Aside from counsel's unsupported claims, his statements do not address the more immediate evidentiary deficiencies pertaining to the beneficiary's proposed position. Looking first at the April 12, 2013 letter from [REDACTED] the petitioner's current president, the beneficiary's proposed position would be comprised of a mix of both qualifying and non-qualifying job duties. However, instead of assigning time constraints to individual job duties, Mr. [REDACTED] assigned time constraints to groups of functions, thus precluding the AAO from being able to determine specifically how much time the beneficiary would allocate to such non-qualifying tasks as interviewing prospective employees, coordinating employees for pick-ups and deliveries, addressing "corrective measures" and returns and refunds, installing an application intended to monitor the petitioner's inventory, negotiating with suppliers, and marketing the petitioner's products by attending trade show events, creating marketing strategies, networking with suppliers, and maintaining a company website. While these functions may be highly valuable to the petitioner's business success, their value does not determine whether they fit the statutory criteria for what is deemed as being within a managerial or executive capacity. 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. In the present matter, the beneficiary's job description indicates that a significant, and most likely the majority, of the beneficiary's time would be allocated to the petitioner's daily operational tasks that involve marketing the petitioner's products, ensuring that merchandise is accounted for and properly delivered to the intended buyers, and maintaining good customer service. Despite information in the petitioner's organizational chart, which indicates that the petitioner has sales and delivery personnel to sell and deliver the petitioner's products, there is no evidence that the petitioner has other direct or contracted employees to carry out the remainder of the operational tasks that would be assigned to the beneficiary. While the AAO acknowledges that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner maintains the burden of establishing that the non-qualifying tasks the beneficiary would perform are

only incidental to the proposed position. Counsel's assertion that the petitioner's small size should not disqualify the beneficiary from the desired nonimmigrant visa category is not applicable in the present matter, where the petitioner's small personnel size and lack of organizational complexity result in the beneficiary having to directly participate in the performance of non-qualifying tasks.

Moreover, the claim that the beneficiary would oversee the work of independent contractors is not corroborated in the record, as the petitioner did not expressly identify the services to be performed by independent contractors or provide evidence to establish that independent contractors were actually hired. With regard to the employees who were identified in the petitioner's organizational chart, the petitioner did not explain how the sales people the beneficiary plans to oversee can be deemed "professional" given the petitioner's failure to provide evidence of their respective educational credentials or further information establishing that such levels of education were actually required for the type of sales work these employees perform. As noted earlier, 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

In summary, the petitioner has failed to establish that at the time of filing it had either the need or the ability to employ the beneficiary in a primarily managerial or executive capacity. While the record indicates that the beneficiary would have discretionary authority over business matters, the evidence does not establish that the beneficiary would primarily perform tasks within a qualifying managerial or executive capacity, a deficiency that is further accented by the lack of clarity about the beneficiary's exact placement within the organization due to the petitioner's failure to include the beneficiary in its organizational chart.

IV. Conclusion

Given the evidentiary deficiencies discussed above, the petitioner has failed to establish that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity. Based on these two adverse findings, the instant petition cannot be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.