



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: APR 03 2014

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed 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, Nebraska Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss appeal.

The petitioner filed the Immigrant Petition for Alien Worker (Form I-140) to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner, a Washington corporation, states that it engages in the import and wholesale of seafood products with seven current employees and a gross annual income of "over \$3 million." The petitioner seeks to employ the beneficiary as its president/CEO.

The director denied the petition on three alternate grounds, concluding that the petitioner failed to establish 1) the existence of an affiliate relationship with the beneficiary's foreign employer or that such foreign entity is currently doing business as defined by regulation; 2) that the beneficiary was employed in an executive or managerial capacity for at least one year during the three-year period preceding his admission to the United States; and 3) that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner contends that the petitioner and Marine Wind have a qualifying affiliate relationship, the beneficiary was employed in an executive capacity at the foreign entity, and the beneficiary will be employed in an executive capacity in the United States. Counsel submits a brief and additional evidence in support of the appeal.

## 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.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

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.

## II. THE ISSUES ON APPEAL

### A. Qualifying Relationship and Doing Business

The first issue addressed by the director is whether the petitioner has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." See generally § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); see also 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

*Affiliate* means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

\* \* \*

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

One of the issues addressed by the director is whether the petitioner established that it is doing business in the United States, as that term is defined at 8 C.F.R. § 214.2(l)(1)(ii)(H):

*Doing business* means the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner filed the Form I-140 on October 15, 2012. In support of the petition, the petitioner submitted a letter and identified the beneficiary's last foreign employer as "Marine Wind Co., Ltd." and stated that the



companies have an affiliate relationship based on the same proportion of ownership by the same shareholders: [REDACTED] 38, 5%, and the beneficiary 23%.

In support of the petition, the petitioner submitted the following evidence relating to the petitioning U.S. company:

- Its Articles of Incorporation, dated December 13, 2007, indicating that the U.S. company is authorized to issue 10,000 shares at \$0.001 par value.
- An undated document titled, Consent to Action of Board of Directors in lieu of Organizational Meeting of Directors, indicating that the beneficiary was issued 1,200 shares, [REDACTED] was issued 1,900 shares, and [REDACTED] was issued 1,900 shares, at \$10 per share. Although the document is officially not dated, it states, "[d]ate effective this \_ day of December, 2007."
- Share certificate number 1 issuing 1,200 shares of the petitioning U.S. company to the beneficiary, dated December 13, 2007.
- Share certificate number 2 issuing 1,900 shares of the petitioning U.S. company to [REDACTED] dated December 13, 2007.
- Share certificate number 3 issuing 1,900 shares of the petitioning U.S. company to [REDACTED] dated December 13, 2007.
- Its 2011 IRS Form 1120, U.S. Corporation Income Tax Return, showing that [REDACTED] owns 38%, the beneficiary owns 24%, and [REDACTED] owns 38% of the petitioning U.S. company.

In support of the petition, the petitioner submitted the following evidence relating to the foreign entity:

- An incomplete translation of the Articles of Incorporation, dated August 24, 2006, indicating that the foreign entity is authorized to issue 200 shares and that it does not issue stock certificates. The incomplete translation omits sections eight through 11 of chapter two and all of chapters three, four, and five.
- A translation of a document titled, Certificate of All Matters in the Record, dated January 15, 2009, listing the company name as [REDACTED]. The document reflects that the number of shares authorized to issue is 300, which was changed on October 2, 2006 and registered on October 23, 2006. The document further reflects that the total number of shares issued is 260 and the amount of capital is 13,000,000 yen, both of which were changed on November 20, 2006 and registered on November 28, 2006.
- A partial translation of an undated document titled, Details [R]egarding Family Owned Business, indicating that the total number of shares issued is 260 to the following shareholders: the beneficiary 60 shares, [REDACTED] 100 shares, and [REDACTED] 100 shares. The document includes a "translator's note" indicating that the percentage of ownership for each shareholder is the beneficiary 23%, [REDACTED] 38.5%. The AAO notes that the top right corner of the document indicates that it is "appendix 2" to an unidentified document.
- The petitioner's 2011 Form 100, California Corporation Franchise or Income Tax Return, including an attached explanation for Schedule Q, Question K, #3, stating that as of December 31, 2011, the foreign entity has the same individual owners as the petitioner: [REDACTED] 38%, [REDACTED] 30%, and the beneficiary 24%.

- The foreign entity's tax return for the fiscal year April 1, 2011 to March 31, 2012 and April 1, 2012 to March 31, 2013, listing the total number of shares issued as of term end as 260 and the "judgment ratio of family corporation" 100%. The document lists the shareholder as the beneficiary 60 shares, [REDACTED] 100 shares.

The director issued a request for additional evidence ("RFE") on July 8, 2013, noting that the petitioner submitted various documents pertaining to the foreign entity which contained discrepancies with each other, such as the foreign entity's name, date of incorporation, and number of shares authorized to issue. The director requested the petitioner to submit additional corporate records for the foreign entity, to include complete Articles of Incorporation, all By-Laws, and all Board minutes pertaining to the change in authorized shares for issuance.

In response to the RFE, the petitioner submitted a letter by [REDACTED] a visiting Japanese attorney, addressing the director's concerns regarding the qualifying relationship. [REDACTED] clarifies that the Certificate of All Matters in the Record is the public record of the Japanese government and is equivalent to the Articles of Incorporation under U.S. law. Although the petitioner submitted a document for the foreign entity titled, Articles of Incorporation, dated August 24, 2006, [REDACTED] explains that the August 24 date is the date the articles were signed and sealed, not the official date of incorporation under Japanese law, which is the date the Certificate of All Matters in the Record is recorded, August 29, 2006 in this instance. [REDACTED] also explains that the total number of shares authorized to issue is the number reflected on the Certificate of All Matters in the Record, which is the official document establishing the foreign entity. Additionally, the Certificate of All Matters in the Record specifically states that the number of shares authorized to issue was changed (presumably from 200) to 300 on October 2, 2006 and registered on October 23, 2006. [REDACTED] further clarifies that the foreign entity's name reflected on the Certificate of All Matters in the Record is the Japanese name of the foreign entity; the words "Kabushiki Kaisha" is the Japanese term equivalent to "Co., Ltd."

In response to the RFE, the petitioner also submitted the following evidence relating to the foreign entity's continuity of business:

- An Engagement Letter and Compensation Agreement, dated September 11, 2006, between [REDACTED] and the foreign entity for a term of 24 months. This document is only signed by the beneficiary on behalf of the foreign entity on September 1, 2006.
- An Engagement Letter and Compensation Agreement, dated September 5, 2006, between [REDACTED] and the foreign entity for a term of 24 months. This document is only signed by the beneficiary on behalf of the foreign entity on September 1, 2006.
- A single invoice for each month (January to December) of 2011 and 2012 from the foreign entity to [REDACTED] Limited for an "agent fee" of \$15,000.
- The foreign entity's tax return for the fiscal year April 1, 2012 to March 31, 2013, showing an "income or deficit amount" of 2,018,042 yen.
- The foreign entity's balance sheets for the fiscal year April 1, 2011 to March 31, 2012 and April 1, 2012 to March 31, 2013.
- A 2012 "Withholding slip for salary income" for [REDACTED] showing a payment amount of 3,600,000 yen by the foreign entity.



- Pay statements to [REDACTED] from the foreign entity from January 2011 to August 2013.

The director denied the petition on December 2, 2013, concluding, in part, that the petitioner failed to establish that it has a qualifying relationship with the foreign entity. In denying the petition, the director found that the petitioner presented inconsistent evidence relating to the number of shares the foreign entity is authorized to issue. The director observed that [REDACTED] letter provided sufficient clarification for the discrepancies in the foreign entity's name and date of incorporation. However, the director noted that the petitioner failed to submit the foreign entity's complete Articles of Incorporation or relevant Board minutes recording its decision to increase the number of shares authorized for issuance, thus not resolving the discrepancy between the certificates showing issuance of shares substantially in excess of the number authorized by the foreign entity's Articles of Incorporation. In denying the petition, the director further noted that the petitioner failed to show that the foreign entity "is not merely an office with any 'business' between it and outside entities done elsewhere by the petitioner's chief marketing officer or others." The director observed that the agreements between the foreign entity and third parties require a former employee who is now the chief marketing officer of the petitioner to perform the duties associated with those agreements and that a single employee in an administrative role is not sufficient to establish that the foreign entity can continue to do business.

On appeal, counsel for the petitioner reiterates the previously presented evidence and contends that the evidence of record clearly shows that the petitioning U.S. company and the foreign entity have an affiliate relationship. Counsel asserts that the U.S. company and the foreign entity are owned by the same individuals in roughly the same proportion. In reference to the director's findings that the foreign entity does not continue to do business, counsel for the petitioner asserts that the foreign entity is not merely an agent or office. Counsel references the foreign entity's balance sheets for 2011-2012, showing net sales of 8,998,701 yen, service revenues of 12,000,000 yen, warehousing fees of 557,628 yen, and other selling, general and administrative expenses of 14,216,227 yen, and for 2012-2013 showing net sales of 20,648,127 yen, warehousing fees of 2,099,128 yen, and other selling, general, and administrative expenses of 16,525,165 yen. Counsel also addresses the invoices to [REDACTED] is one of the foreign entity's regular customers for whom the foreign entity serves as agent to provide supplies for vessels, including machinery, spare parts, electronics, and bunker fuel, as well as arranging for cold storage and product inspection in South Korea.

Upon review, the AAO finds that the record is persuasive in establishing that the U.S. company has an affiliate relationship to the foreign entity, thus the existence of a qualifying relationship. However, the AAO finds that there is insufficient evidence to establish that the foreign entity continues to do business as defined in the regulations and is not merely an agent or presence abroad.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are either the same employer (i.e. a U.S. entity with a foreign office) or that the two entities are related as a "parent and subsidiary" or as "affiliates." See generally § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); see also 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").



In the instant matter, the petitioner submitted sufficient evidence to establish that the foreign entity officially changed the number of shares it is authorized to issue with the Japanese government. The foreign entity's Certificate of All Matters in the Record clearly records the date that the total number of shares was changed and registered, which is prior to the date that the 260 shares were issued to the beneficiary and the remaining two shareholders.

In his decision, the director failed to give deference to the listed dates and actions on the Certificate of All Matters in the Record, even after the petitioner provided a letter from [REDACTED] explaining the Japanese requirements for establishing a business. Here, the petitioner provided sufficient information to establish that the foreign entity and U.S. company are owned by the same individuals holding practically the same percentage of shares.

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

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

Here, the submitted evidence is relevant, probative, and credible. The petitioner has established that a qualifying relationship exists between the U.S. and foreign entities. The AAO withdraws the director's decision as it pertains to this issue.

However, in his decision, the director noted that the foreign entity appears to be merely an agent or office abroad. The director observed that the foreign entity only has one remaining employee and its shareholders, listed as the president, chief marketing officer, and chief financial officer, have all come to the United States to work for the petitioning U.S. company.

On appeal, counsel discusses the foreign entity's financial records, contending that the foreign entity is doing business, as defined in the regulations, evidenced by its net sales, service revenues, warehousing fees, and other selling, general, and administrative expenses. Counsel also discusses the foreign entity's remaining employee and emphasizes the evidence of salary paid to that employee, who is the foreign entity's accountant. Neither counsel nor the petitioner explain how or who carries out the duties or tasks associated with the foreign entity's role as [REDACTED] agent or those described in the foreign entity's engagement letters

with [REDACTED] On appeal, the petitioner emphasizes that each of its executives, presumably the beneficiary, [REDACTED] "will devote 100% of their efforts to promoting [the petitioner's] sales and marketing activities." The petitioner further states, "[t]o the extent that [the petitioner's] executives must perform nominal duties on behalf of affiliated companies, we plan to put service agreements in place." The petitioner does not include these service agreements. 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).

Accordingly, based on the evidence in the instant record, the petitioner has not established that the foreign entity engages in the regular, systematic and continuous provision of goods and/or services. Rather, it appears that the foreign entity is merely an agent or office of the petitioner abroad. Therefore, the petitioner has not sufficiently demonstrated that the foreign entity continues to do business as defined in the regulations. For this reason, the appeal will be dismissed.

#### B. Employment Abroad in an Executive or Managerial Capacity

The second issue addressed by the director is whether the petitioner established that the beneficiary was employed in an executive or managerial capacity for at least one year during the three-year period preceding his admission to the United States.

In support of the petition, the petitioner submitted a letter describing the beneficiary's position abroad as follows:

[The beneficiary] has 36 years of experience in the fisheries industry and 19 years of experience in managerial and executive positions in the industry. . . . He served as the Chairman of the [REDACTED] Company from March 2002 to March 2007, and has been serving as the [REDACTED] since April 2007. Concurrently, [the beneficiary] has been serving as the [REDACTED] in Japan since its inception in 2006, and will continue in that role while serving as President CEO of [the petitioner].

The petitioner submitted a letter from the foreign entity, dated July 1, 2009, certifying that the beneficiary is the president of the foreign entity. The letter further states that his employment began on August 29, 2006. The letter is signed by [REDACTED]

The petitioner submitted the foreign entity's payroll records for the beneficiary for 2007 showing that he was compensated for employment from June 2007 to December 2007. The petitioner submitted an untranslated

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<sup>1</sup> The Engagement Letters and Compensation Agreements between [REDACTED] and the foreign entity and [REDACTED] and the foreign entity do not contain the signatures of representatives for [REDACTED]. Nor does the record include evidence, that if the agreements had been signed by such representatives, the agreements were extended beyond the September 2008 termination date.



document with the foreign entity's name and simply wrote the beneficiary's name at the top, the months of the year, January through July, and "pay record for 2008."

The director issued an RFE in which he specifically instructed the petitioner to submit a detailed statement regarding specific job duties performed by the beneficiary for the foreign entity (from August 2006 to March 2009), including the approximate percentage of time devoted to each duty, and a detailed organizational chart for the beneficiary's foreign employer, showing all employees by job title in relation to the beneficiary. The petitioner also specifically requested contemporaneous corporate records such as employment agreements or contracts between the foreign entity and the beneficiary, any position description of record, and other corporate records that specify the beneficiary's duties and responsibilities to that employer. The director noted that because the beneficiary was also employed by [REDACTED] (March 2002 to March 2007) and [REDACTED] (April 2007 to present), the percentage of time for specific duties requested should account for the beneficiary's concurrent employment for both outside entities.

In response to the RFE, counsel for the petitioner submitted a letter listing the beneficiary's duties abroad, very similar to those submitted at the time of filing for the proposed position in the United States. Counsel for the petitioner described the beneficiary's duties at the foreign entity as follows:

Please see the following description of [the beneficiary's] specific duties performed for [the foreign entity] between March 2006 and March 2009, and the approximate time devoted to each duty. . . .

40% - Management

- Oversees all [of the foreign entity's] operation and manages its compliance with legal and regulatory requirements.
- Directly responsible for identifying, negotiating and managing strategic alliances and business concept development from conception through operation.
- Ensures that staff and the Board have sufficient and up-to-date information.
- Business trips abroad to assure great communication with actual and potential future clients.
- Evaluates the organization's and the staff's performance on a regular basis.

30% - Strategic Planning & Operations Leadership

- Set Financial Objectives and manage corporate resources in development completion.
- Responsible for strategy, operations, and overall performance of the [REDACTED], as well as brand development and management.
- In charge of creating annual operating plans that support strategic direction set by the Board and correlates with annual operating budgets.
- Develop and direct strategic, product development, business development and business operations as required to achieve strategic and financial objectives.

15% - Financial Leadership

- Led [*sic*] teams and coach team members, as appropriate, to develop skills and confidence in their ability to examine work processes, create solutions, and measure improvements.



- Creates and analyze[s] strategies in order to ensure the short, mid and long-term financial viability of the organization.
- Manage [the foreign entity's] resources within budget guidelines according to current laws and regulations.
- Provides prompt, thorough, and accurate information to keep the Board appropriately informed of the organization's financial position.

15% - Board Support & Community Relationships

- Serves as the primary spokesperson and representative for [the foreign entity].
- Maintain[s] approachable, community friendly image. Trains, motivates and manages its company's personnel.
- Ensures that the organization and its mission, programs, and services are consistently presented in a strong and positive image.
- Builds relationships with peer organizations when appropriate.
- Advises the Board on the development of policies and planning recommendations.

The petitioner submitted an organizational chart, dated "as of 9/1/2007," for the foreign entity depicting the beneficiary at the highest tier of management as president and CEO. The beneficiary directly supervises ( [REDACTED] ) who, in turn, directly supervises [REDACTED] as "admin/acctg [manager]" and [REDACTED] as operations manager.

The petitioner submitted a second organizational chart, dated "as of 10/1/2007," for the foreign entity depicting the beneficiary at the highest tier of management as president and CEO. The beneficiary directly supervises ( [REDACTED] ) as "admin/acctg [manager]."

The petitioner submitted a third organizational chart, dated "as of 2/14/2011," for the foreign entity depicting the beneficiary at the highest tier of management as president and CEO. The beneficiary directly supervises [REDACTED] as "admin/acctg [manager]."

The petitioner provided a brief list of job duties for the beneficiary's employment with [REDACTED] as follows:

- Directed short-term and long-range planning and budget development to support strategic business goals.
- Defined and articulated the organization's vision and to developed [sic] strategies for achieving that vision.
- Established the performing goals, allocated resources, and managed contracts and our vessels fleet equipment.
- Developed and directed the execution of operating policies, activity base costing and processes to support company policies and objectives.
- Traveled abroad to communicate with clients and operational staff from other companies within the [REDACTED]

- Created annual operating plans that supported strategic direction set by the Board and correlates with annual operating budgets.
- Prudently managed the organization's resources within budget guidelines according to the current laws and regulations.
- Developed fundraising strategies.
- Oversaw staff in the timely submission of progress reports for funders.
- Served as the primary spokesperson and representative for the organization.
- Ensured that the organization and its mission, programs, and services are consistently presented in a strong and positive image.
- Supported operations and administration of the Board by advising and informing Board members and interfacing between Board and staff.

The director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary was employed in an executive or managerial capacity for at least one year during the three-year period preceding his admission to the United States. In denying the petition, the director found that the duties presented by the petitioner for the beneficiary's employment abroad were either generalized, or did not qualify as executive or managerial. The director observed that several of the described activities pertain to the beneficiary's relationship to the foreign entity's Board of Directors; however, the beneficiary and his direct subordinate are two of the three members of the Board of Directors, therefore questioning how much time the beneficiary realistically devoted to those tasks involving communication with the Board of Directors. The director further noted that other tasks, such as traveling abroad to meet with actual and potential future clients, do not qualify as executive capacity duties as they are non-qualifying operational tasks associated with wholesaling or brokering.

On appeal, counsel for the petitioner asserts that the beneficiary was employed by the foreign entity in an executive capacity. Counsel states that the beneficiary's primary responsibility at the foreign entity was to provide the overall direction and management of the company. Counsel provides a list of job duties, with accompanying percentages, identical to those submitted at the time of filing describing the beneficiary's employment at the petitioning U.S. company. However, at the time of filing, the list consisted of only 95% of the beneficiary's time; counsel for the petitioner now adds the remaining 5% and allocates it to "Board Support and Leadership." Counsel further addressed United State Citizenship and Immigration Services' (USCIS) observations of the foreign entity's size and employment of board members. Counsel asserts that such communications are performed on an informal basis through day-to-day conversations and are simply not recorded.

On appeal, the petitioner submits a letter restating counsel's assertions and providing the same list of job duties for the beneficiary's foreign employment.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary was employed in an executive or managerial capacity for at least one year during the three-year period preceding his admission to the United States.

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. § 204.5(j)(5). A detailed job description is crucial, as



the duties themselves will reveal the true nature of the beneficiary's foreign and proposed employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The AAO will then consider this information in light of other relevant factors, including (but not limited to) job descriptions of the beneficiary's subordinate employees, the nature of the business conducted by the entities in question, the size of the subordinate staff of the entity in question, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the foreign entity.

The petitioner's description of the beneficiary's duties fails to establish that the beneficiary was primarily employed in a qualifying executive position. The petitioner provided a very broad and vague list of job duties for the beneficiary's position abroad that did not indicate what actual specific day-to-day tasks were involved with the completion of each overall duty. When asked to describe the duties in much greater detail, the petitioner submitted an equally broad and vague list of duties, grouping several tasks together, and simply attached percentages to each of them. The petitioner did not break down the beneficiary's daily duties or elaborate on any of the groups of duties listed. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. See 8 C.F.R. § 103.2(b)(8). The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather simply allocated specific percentages to groupings of duties. When asked to submit corporate records in support of the beneficiary's executive position, the petitioner failed to submit any such evidence. On appeal, counsel for the petitioner claims that the beneficiary's duties as Chairman of the companies of the [REDACTED] "are subsumed and accounted for in [the beneficiary's] duties listed above." However, absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In the instant matter, the petitioner indicated that the beneficiary has been the president and CEO of the foreign entity since its inception in 2006. The petitioner further indicated that the beneficiary was not only working on establishing [REDACTED] but also continued to carry out his duties as chairman of [REDACTED] but failed to provide any specifics as to his role in those companies. The lack of specificity for each of the beneficiary's listed duties raises doubts as to the actual tasks being carried out by the beneficiary. The petitioner submitted three different organizational charts for the foreign entity throughout the beneficiary's employment. Each of the organizational charts illustrate that the beneficiary supervised [REDACTED] the COO, who in turn supervised an "admin/acctg manager." The very first organizational chart also lists [REDACTED] as operations manager under the COO's supervision. Although the organizational chart includes two (or three) subordinate positions, the petitioner did not submit any descriptions of the beneficiary's subordinates' positions or job duties in order to determine if they relieve him from performing non-qualifying operational or administrative duties. Therefore, it cannot be determined that the beneficiary's time is primarily devoted to executive duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 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)).



Additionally, the broad groupings of job duties and the vague tasks listed for each, such as "[o]versees all [of the foreign entity's] operation and manages its compliance with legal and regulatory requirements;" "[r]esponsible for strategy, operations, and overall performance of the Seafood Company, as well as brand development and management;" "[c]reates and analyze strategies in order to ensure the short, mid and long-term financial viability of the organization;" and "[e]nsures that the organization and its mission, programs, and services are consistently presented in a strong and positive image," do not describe the beneficiary's actual role in the foreign entity with any specificity. 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.<sup>2</sup> The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. 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.*

Furthermore, on appeal, counsel and the petitioner submit a different list of job duties and percentage groupings for the beneficiary's employment abroad. It appears that counsel and the petitioner mixed up the beneficiary's duties abroad and those at the U.S. company on appeal. Although the lists of job duties are very similar, the AAO cannot determine what actual duties or tasks the beneficiary performed at the foreign entity or that such duties were executive in nature. 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).

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 must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Due to the deficiencies outlined above, it cannot be determined that the beneficiary was employed in an executive or managerial capacity for at least one year during the three-year period preceding his admission to the United States. Accordingly, the appeal will be dismissed.

#### C. Employment in an Executive or Managerial Capacity in the United States

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<sup>2</sup> Counsel's reference to the Department of Labor's *Occupational Outlook Handbook's* (*Handbook*) report on top executives, in response to the director's reference to the *Handbook's* report on wholesale representatives is noted. However, the *Handbook* necessarily provides a generalized description when outlining the range of duties that may be performed within an occupation. Such a broad description cannot be relied upon by a petitioner when discussing the duties attached to specific employment. Rather, the petitioner must describe the specific duties to be performed by a beneficiary in relation to its particular business interests.

The third issue addressed by the director is whether the petitioner established that the beneficiary will be employed in an executive or managerial capacity in the United States.

In support of the petition, the petitioner submitted a letter describing the beneficiary's position in the United States as follows:

[The beneficiary] continues to be employed as the President and CEO of the company. His salary has increased to \$159,210 per year and his main duties and responsibilities continue to be the same as those described in the most recent L-1A petition extension filed on his behalf in 2012, as follows:

Planning – 30%

- Collaborates with the Board to define and articulate the organization's vision and to develop strategies for achieving that vision.
- Creates annual operating plans that support strategic direction set by the Board and correlates with annual operating budgets.
- Develops and monitors strategies for ensuring the long-term financial viability of the organization.

Management – 40%

- Oversees the operations of the organization and manages its compliance with legal and regulatory requirements.
- Ensures that staff and the Board have sufficient and up-to-date information.
- Evaluates the organization's and the staff's performance on a regular basis.

Financial Leadership – 15%

- Prudently manages the organization's resources within budget guidelines according to current laws and regulations.
- Provides prompt, thorough, and accurate information to keep the Board appropriately informed of the organization's financial position.

Fund Raising – 7%

- Develops fundraising strategies with the Board and supports the Board in fundraising activities.
- Oversees staff in the development and implementation of fundraising plans.
- Oversees staff in the timely submission of progress reports for funders.

Community Relationships – 3%

- Serves as the primary spokesperson and representative for the organization.
- Ensures that the organization and its mission, programs, and services are consistently presented in a strong and positive image.
- Actively advocates for the organization, its beliefs, and its efforts.
- Acts as a liaison between the organization and the community, building relationships with peer organizations when appropriate.

\* \* \*

... [the beneficiary] has been serving as the President and CEO for [REDACTED] in Japan since its inception in 2006, and will continue in that role while serving as President CEO of [the petitioner].

The AAO notes that the above percentages amount only to 95% of the beneficiary's time.

The petitioner went on to state that it has hired seven full-time employees to include: the beneficiary, president and CEO; [REDACTED] chief financial officer; [REDACTED] manager; [REDACTED]

The petitioner submitted an undated organizational chart for the U.S. company depicting the beneficiary as president directly supervising [REDACTED], the chief financial officer. The vice president directly supervises [REDACTED], the general manager, who then supervises [REDACTED], the logistics manager. The chief financial officer directly supervises [REDACTED] the senior accountant, who supervises [REDACTED], the receptionist.

The petitioner provided a document dated May 2012, briefly listing the job duties for the president, vice president and chief marketing officer, chief financial officer, general manager, senior accountant, logistics manager, and receptionist. The beneficiary's duties as president were described as follows:

- Ensure that all lines of business within an organization are running efficiently and within the budget set forth by the board of directors and finance director.
- Works with mid- to senior-level managers to devise a strategic plan that will generate revenues, create new opportunities for business and help the company to remain competitive in the marketplace.
- Ensures that appropriate business strategies are in place and that these are acted upon according to the priorities established by the Board of Directors and in a manner that is consistent with accepted and necessary business practices.
- Establishes and communicates the business's overall vision and purpose to all interested parties.
- Ensures that sufficient human, financial, technological, informational, and material resources are available to carry these out.
- Ensures that necessary business relationships, organizational structures, and motivational schemes are in place.

The petitioner submitted copies of the beneficiary's IRS Form W-2, Wage and Tax Statement, from the petitioner in 2009 for \$92,647.36 and another in 2009 for \$33,168.75, and in 2010 for \$159,210.00.



The petitioner submitted copies of pay stubs for the beneficiary from October 2009 to August 2012. The petitioner also submitted its payroll records from May 1, 2012 to July 15, 2012 indicating that it employed the beneficiary, [REDACTED]

The petitioner submitted the beneficiary's resume, which shows the beneficiary's present employment as follows:

From	To	Name of Organization and Title
04/02/2007	Present	Chairman of the Board of Directors of [REDACTED]
06/2006	Present	[REDACTED]
10/2008	Present	[REDACTED]

The director issued an RFE in which he specifically instructed the petitioner to submit corporate records to establish facts about the proposed employment, such as employment agreements or contracts between the petitioner and the beneficiary, any position description of record, and other corporate records that specify the beneficiary's duties and responsibilities to the petitioner. The director noted that because the beneficiary will continue to be employed by [REDACTED] (Japan), the petitioner is requested to submit corporate records from each to establish the amount of time required of the beneficiary in connection with that employment.

In response to the RFE, counsel for the petitioner submitted a letter specifically describing the beneficiary's duties in the United States as follows:

As noted in the letter from [the petitioner], [the beneficiary] directs the work of the Chief Marketing Officer and the Chief Financial Officer, and indirectly, the work of the Logistics Manager and the Senior Accountant. Through the network of affiliated companies, agents, contractors and other professionals, he also directs the work of a large group of professionals and service providers to perform the work of [the petitioner].

\* \* \*

In this case, each of the officers performs a specific function, and is assisted in the performance of their work by two professionals, [REDACTED] together with managers and employees of a large group of affiliated companies, unaffiliated contractors and service/product suppliers, and various professionals such as lawyers, bankers and CPAs to generate \$16 million in annual sales.

\* \* \*

As shown in the Organization Chart . . . the [REDACTED] which is primarily owned by [the beneficiary], has many different entities, many for which [the beneficiary] serves as Chairman. However, his duties in this regard are to provide strategic direction, and not to control day to day operations which are in the hands of the resident executives and managers.

An example of this is [REDACTED]. In other respects, [the beneficiary] is leveraging his ownership and relationship with other group companies to benefit [the petitioner] . . .

In response to the RFE, the petitioner submitted a letter describing the beneficiary's duties in the United States and percentage of time breakdown identical to that submitted by counsel in response to the RFE, but in reference to the beneficiary's employment abroad. The petitioner's letter further states:

[The beneficiary's] primary responsibility as the President/Chief Executive Officer is to provide overall direction and management of the company to help [the petitioner] meet the challenges we face in competing in the current global economy and the help [sic] grow its gross annual sales which have recently reached the \$16 million level, with total income of over \$2 million. As the President/CEO, [the beneficiary] is responsible for managing the work of the Chief Marketing Officer and the Chief Financial Officer, and indirectly, the work of the Logistics Manager and the Senior accountant. Through the network of affiliated companies, he manages and provides direction to the many affiliates, including [the foreign entity] and Sea Eagle which provide services and products to [the petitioner]. He also manages the company's relationship with the many countries in which the company and its suppliers do business.

\* \* \*

[The beneficiary's] position as President/CEO of the [the petitioner] is a full-time position which requires that he works 40-60 hours a week, and travel frequently (about 50%) in the U.S. and abroad. While he serves on the Board of Directors of several [REDACTED] companies, and is President and CEO of [the foreign entity], at all times he is working on behalf of [the petitioner], which serves as the headquarters company for the [REDACTED] companies. Although only [the petitioner], [the foreign entity] and [REDACTED] are affiliates within the meaning of the immigration law, [REDACTED] and many of the other companies of the [REDACTED] are 80% or more owned by [the beneficiary], which means that he is able to control their overall strategic direction to ensure that their goals are aligned with those of [the petitioner]. In addition, he is able to instruct managers and other employees of those companies to perform work on behalf of [the petitioner]. . . . Even while he is traveling, he maintains constant communication with the [petitioner's] office by email and telephone communication.

. . . each of the CEO, CFO and CMO have distinct and important functions within our organization, and while we have a relatively small office, we direct the work of a broad range of service providers . . .

[The beneficiary] is further indirectly assisted in the performance of his duties by [REDACTED], the Senior Accountant, each of whom is an experienced professional with a college degree. . . . However, the day to day work of the company is performed not only by these two professionals, but by a whole host of service providers.



The petitioner submitted another list of duties for the beneficiary's position in the U.S. and for his subordinates. The petitioner's description is almost identical to its initial description of the beneficiary's duties in the U.S. at the time of filing, which grouped the duties into five clusters and included percentages of time for each cluster. Although the petitioner did not include the percentages in the new list of duties, it did add the following two duties to the previously submitted list:

- Supports operations and administration of the Board by advising and informing Board members and interfacing between Board and staff.
- Advises the Board on the development of policies and planning recommendations.

The brief list of duties for the beneficiary's subordinates included a list of job duties for the chief marketing officer, the chief financial officer, [REDACTED] (listed as senior accountant in organizational chart), and [REDACTED] (listed as logistics manager in organizational chart). The list of job duties for the chief marketing officer and the chief financial officer are greatly elaborated from the previous list. The list of job duties for [REDACTED] is identical to the one previously provided except that one duty from the previous list has been removed. The list of job duties for [REDACTED] is almost identical to the previous list for the logistics manager; however, one duty has been removed from, and two duties have been added to, the current list.

The petitioner submitted copies of the beneficiary's IRS Form W-2 from the petitioner in 2012 for \$159,210.00, in 2011 for \$159,210.00, and in 2010 for \$159,210.00. The petitioner also submitted a copy of the beneficiary's IRS Form 1099-MISC, Miscellaneous Income, from the petitioner in 2012 for \$258,705.21. The petitioner then submitted copies of pay stubs for the beneficiary from January 2013 to September 2013.

The petitioner submitted copies of pay stubs for all of its employees in the United States for 2012 and 2013. The petition was filed on October 15, 2012 and according to the pay stubs, the petitioner employed the following individuals at that time: [REDACTED]

[REDACTED] and the beneficiary. The very first pay stub for [REDACTED] was issued on April 22, 2013, and, although he appears on the very first organizational chart submitted by the petitioner, there were no pay stubs submitted for [REDACTED]

The petitioner submitted a new, undated organizational chart for the U.S. company depicting the beneficiary as president/CEO. The beneficiary appears to be linked to the foreign entity, [REDACTED], [REDACTED] other crab and other seafood suppliers, [REDACTED], "global customers," and "U.S. customers."

The beneficiary directly supervises [REDACTED] the chief financial officer. The chief marketing officer directly supervises [REDACTED] the logistics manager, [REDACTED] the senior accountant, and the following services: "marine documentation," "brokers/shipping agents," "brokers/marketing agents," "forwarding agents," "importers/distributors," "technical advisors," "fishing boat/gear supplier & brokers," "banks/financial services," "lawyers," and "CPAs." It also appears that [REDACTED] also supervise "banks/financial services," "lawyers," and "CPAs." The chief financial officer, also directly supervises [REDACTED] the receptionist, and [REDACTED] the payroll service company.

The petitioner also provided a list of third-party brokers and agents it uses; however, failed to submit copies of any contracts or agreements with those parties to establish that they carry out day-to-day functions of the U.S. company.

The director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. In denying the petition, the director found that, rather than providing a comprehensive description of the beneficiary's duties in the United States, the petitioner provided four differing descriptions of his duties in the U.S. and failed to reconcile all of the duties, thus creating inconsistencies in the descriptions. The director observed that several of the described activities pertain to the beneficiary's communication with the Board of Directors; however, the beneficiary is one of the three members of the Board of Directors and his direct subordinates, who are the remaining two members, are the ones providing the data being reported to the Board. The director further observed that the organizational structure is inconsistent with the beneficiary's listed duties in that it is not apparent how he would regularly devote time to evaluating staff performance, when the staff consists of 6 employees. The director further found that the U.S. company employs three senior executive positions, including the beneficiary, two manager positions, and two workforce employees, the accountant and the receptionist, thus, except for the accounting function, it remains unclear who conduct the day-to-day wholesale/import functions of the business.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed by the petitioner in an executive capacity. Counsel states that the beneficiary's primary responsibility at the U.S. company is to provide the overall direction and leadership of the company. Counsel reiterates that the beneficiary exercises wide latitude in decision-making and directs the work of the chief marketing officer, the chief financial officer, and indirectly, the logistics manager and the senior accountant. Counsel provides a list of job duties, with accompanying percentages, identical to those submitted in response to the RFE describing the beneficiary's employment at the foreign entity. Counsel then states that, in response to the RFE, the petitioner described its organizational structure and how its executives, staff, affiliates, and independent contractors/providers all work together to support the marketing and financing function of the U.S. company, under the beneficiary's direction. Counsel further addressed USCIS' observations of the foreign entity's size and employment of board members. Counsel asserts that such communications are performed on an informal basis through day-to-day conversations and are simply not recorded.

On appeal, the petitioner submitted a letter restating counsel's assertions and providing the same list of job duties for the beneficiary's position at the U.S. company.

Upon review, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity.

Again, 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. § 204.5(j)(5). As discussed above, 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. at 1108. As stated above, the AAO considers this information in light of other relevant factors, including (but not limited to) job descriptions of



the beneficiary's subordinate employees, the nature of the business conducted by the entities in question, the size of the subordinate staff of the entity in question, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioning entity.

The petitioner's description of the beneficiary's duties fails to establish that the beneficiary will be employed in a qualifying executive position. The petitioner has not provided sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify him as an executive. At the time of filing the petition, the petitioner characterized the beneficiary as an executive and identified his job duties as: "[c]ollaborates with the Board to define and articulate the organization's vision and to develop strategies for achieving that vision;" "[o]versees the operations of the organization and manages its compliance with legal and regulatory requirements;" "[p]rudently manages the organization's resources within budget guidelines according to current laws and regulations;" "[d]evelops fundraising strategies with the Board and supports the Board in fundraising activities;" and "[a]cts as a liaison between the organization and the community, building relationships with peer organizations when appropriate." Such duties are broad and vague and are not indicative of a position that is executive or managerial in nature.

When asked to submit a detailed description of the beneficiary's duties, including the actual specific, day-to-day tasks involved with the completion of each duty, the petitioner submitted a similar list of job duties, mixed up with those duties listed for his foreign employment, and expanded on several other duties. The petitioner provided a broad and vague position description that again did not indicate what actual specific day-to-day tasks are involved with the completion of each overall duty. The petitioner described the beneficiary's duties as: "provide overall direction and management of the company;" "manag[e] the work of the Chief Marketing Officer and the Chief Financial Officer, and indirectly, the work of the Logistics Manager and the Senior accountant;" "manage and provide direction to the many affiliates, including [the foreign entity] and [redacted] which provide services and products to [the petitioner];" and "manage the company's relationship with the many countries in which the company and its suppliers do business." The petitioner went on to state that the beneficiary is indirectly assisted by the Logistics Manager and the Senior Accountant, and the day to day work of the company is performed not only by these two professionals, but by a whole host of service providers.

The petitioner did not break down the beneficiary's daily duties or elaborate on any of the groups of duties listed. Again, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. See 8 C.F.R. § 103.2(b)(8). The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather provided a new set of job duties loosely related to those previously submitted. When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978).

When asked to submit corporate records in support of the beneficiary's executive position, counsel for the petitioner stated, on appeal, that the petitioner "is a lean operation and does not rely on employment agreements and contracts." On appeal, counsel and the petitioner claim that the beneficiary provides the

overall direction and management of the company. However, absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d at 24.

As mentioned above, on appeal, counsel and the petitioner submit a different list of job duties and percentage groupings for the beneficiary's employment at the U.S. company. It appears that counsel and the petitioner mixed up the beneficiary's duties at the U.S. company and those at the foreign entity on appeal. Although the lists of job duties are very similar, the AAO cannot determine what actual duties or tasks the beneficiary will perform at the U.S. company or that such duties are executive in nature. 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).

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 must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

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* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Although the AAO does not find that the size of the petitioning entity served in any way as an obstacle to establishing eligibility, this factor can and should be considered for the purpose of determining who within the organization would be available to perform the necessary non-qualifying such that the beneficiary is relieved from having to allocate the primary portion of his time to tasks that are not within a qualifying managerial or executive capacity. Neither the petitioner's reasonable needs nor its stage of development can be used to justify a favorable finding when the petitioner is unable to establish that the beneficiary would spend his time primarily performing tasks within a qualifying capacity.

In the instant matter, counsel contends that the beneficiary specifically provides the overall direction and management of the U.S. company. In support of this claim, the petitioner asserts the beneficiary exclusively directs and manages the company and does not perform the specific tasks necessary to carry out the routine operational and administrative functions of the company. The petitioner asserts that employees at its affiliate companies, along with third-party agents and service providers assist the beneficiary in carrying out the day-to-day operational tasks associated with the marketing and financing functions of the U.S. company. In



support of this assertion, the petitioner merely submits a list of service providers and agents without any evidence of actual agreements or contracts with those parties. Absent any clear associations with those third-party agents, by way of service contracts or agreements, the AAO cannot determine that they carry out any of the required operational tasks associated with the beneficiary's listed duties. Furthermore, the petitioner failed to list any subordinate employees in the U.S. or at its affiliated companies abroad that would relieve the beneficiary from performing such day-to-day operational tasks. According to the documentation in the record, the foreign entity does not have any marketing, sales, or operational staff that could assist the beneficiary with such tasks. The petitioner has not submitted any evidence of the existence of employees abroad that would carry out these tasks. 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)).

Further, as observed above, the petition was filed on October 15, 2012 and according to the petitioner's records, the petitioner employed [REDACTED] and the beneficiary at that time. The record does not include evidence that the petitioner employed [REDACTED] when the petition was filed. Accordingly, these individuals could not relieve the beneficiary from performing non-qualifying duties when 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, counsel refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel contends that the instant matter is similar in that "[the beneficiary] functions through the various employees, contractors, and service providers that he directs." However, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision as the petitioner failed to submit evidence of such assistance by other individuals. Similarly, counsel's reference to a second AAO unpublished decision, wherein the AAO noted that a manager or executive in the United States could retain some of his or her authoritative duties to direct the activities of staff and functions at a foreign entity, is unpersuasive. Again, the record does not include probative evidence of contracts or service agreements substantiating that the petitioner's foreign affiliated entities will assist the petitioning U.S. company's business. Moreover, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

When examining the managerial or executive capacity of a beneficiary, USCIS reviews 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. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a

managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. *See* section 101(a)(44)(A)(iv) of the Act.

Here, the petitioner indicates that the beneficiary has two direct subordinates, a chief marketing officer and a chief financial officer, and two indirect subordinates, a logistics manager and a senior accountant. The petitioner also claims that employees at its affiliate companies, along with third-party agents and service providers, will assist the beneficiary with non-qualifying operational duties. However, due to the broad position descriptions and lists of job duties for the beneficiary, the short and vague description of job duties provided for the beneficiary's subordinates, and the lack of contracts or service agreements with any third-parties or employees abroad, it remains unclear how the subordinates will relieve the beneficiary from performing non-qualifying operational duties.

Based on the inconsistencies and deficiencies described above, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States. Accordingly, the appeal will be dismissed.

### III. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.