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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

[REDACTED]

Date: **JAN 28 2014** Office: NEBRASKA SERVICE CENTER [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:

[REDACTED]

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 immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a limited liability company formed under the laws of the State of California on December 9, 2005. It seeks to employ the beneficiary as President. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition based on two independent and alternative grounds, concluding that the petitioner failed to establish: (1) that the beneficiary was and will be employed in a primarily managerial or executive capacity with either the employer abroad or the U.S. petitioner; and (2) that the beneficiary was an “employee” of the foreign entity because the foreign entity is a sole proprietorship owned by the beneficiary.

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 asserts that the beneficiary has been and is employed in an executive capacity in the foreign and U.S. entities, and that the foreign entity can be an “employer,” notwithstanding it is also a sole proprietorship. Counsel submits a brief and additional evidence in support of the appeal.

The AAO provided the petitioner with a notice of derogatory information (NDI) notifying the petitioner that, according to the records at the California Secretary of State’s public website, the petitioner is in “cancelled” status. In response to the NDI, counsel for the petitioner acknowledges that “the LLC status of the petitioning company has been in fact canceled,” but asserts that “100% of the assets would be transferred to [redacted] which by operation of law is a successor-in-interest and a partnership of the former members.”

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 regulation at 8 C.F.R. § 204.5(j) states:

(1) 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.

(2) *Definitions.* As used in this section:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (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.

* * *

Doing business means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

Executive capacity means an assignment within an organization in which the employee primarily:

- (A) Directs the management of the organization or a major component or function of the organization;
- (B) Establishes the goals and policies of the organization, component, or function;
- (C) Exercises wide latitude in discretionary decision-making; and
- (D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Managerial capacity means an assignment within an organization in which the employee primarily:

- (A) Manages the organization, or a department, subdivision, function, or component of the organization;

- (B) 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;
- (C) 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
- (D) 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.

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

II. Statement of Facts and Procedural History

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, listing its company name as [REDACTED]. On the Form I-140, the petitioner indicated that it was a wholesale/retail business established in 2005, and employed "4-5 employees/indep. contractors."

In a letter submitted with the initial petition, the petitioner reaffirmed that it, [REDACTED], was formed on December 9, 2005, under the laws of the state of California. The petitioner asserted that in April 2008, it acquired 50% of another business, [REDACTED], a retail dealer in hard and soft surface floor and wall coverings operating since 1978.

The petitioner asserted that it is a subsidiary of the beneficiary's former employer, [REDACTED] (the foreign entity), in that the foreign entity owns a 75% controlling interest in the U.S. petitioner. The petitioner asserted that [REDACTED] owns the remaining 25% of the U.S. entity. The petitioner asserted that the foreign entity is a sole proprietorship, 100% owned by the beneficiary. The petitioner described the foreign entity's business activities as engaging in wholesale and retail distribution of construction materials, including tiles, floor coverings, and bathroom and kitchen appliances.

With respect to the U.S. entity's business activities, the petitioner submitted, *inter alia*:

1. The petitioner's Limited Liability Company Articles of Organization, filed with the State of California on December 9, 2005;
2. Several invoices issued by the petitioner to various customers;
3. The petitioner's 2007 IRS Form 1065, U.S. Return of Partnership Income, indicating that the petitioner has two partners: [REDACTED] who owns 25%; and the beneficiary, who owns 75%.
4. Purchase Agreement, dated April 29, 2008, stating that the petitioner purchased the rights to be 50% owner of [REDACTED] which has been in business since 1978 and employs three employees;
5. Fictitious Business Name Statement, filed on April 17, 2008 with the Recorder/County Clerk, County of [REDACTED] registering the fictitious business name of [REDACTED]. This document indicates that the business is conducted by a general partnership between [REDACTED] and the beneficiary, and that its first day of business was December 1, 1988;
6. Several invoices issued by [REDACTED] to various customers; and
7. IRS Form Schedule C (Form 1040), Profit or Loss from Business (Sole Proprietorship), filed by [REDACTED] in 2007 and 2006 confirming his ownership of [REDACTED].

With respect to the qualifying relationship between the petitioner and the foreign entity, the petitioner submitted:

1. Certificate of Interest number 1 issued by the petitioner, [REDACTED] to the foreign entity for 75% interest, dated December 20, 2005; and
2. Certificate of Interest number 2 issued by the petitioner, [REDACTED] for 25% interest, dated December 20, 2005.

The director issued a request for evidence (RFE) instructing the petitioner to submit, *inter alia*: a more detailed description of the beneficiary's job duties abroad and in the United States; evidence of employment of all employees depicted in the foreign entity's organizational chart; a detailed organizational chart for the U.S. entity; the petitioner's state quarterly withholding returns for all four quarters of 2008; and the petitioner's 2008 federal tax return.

After considering the petitioner's response, the director denied the petition based on two independent and alternative grounds, concluding that the petitioner failed to establish: (1) that the beneficiary was and will be employed in a primarily managerial or executive capacity with either the employer abroad or the U.S. petitioner; and (2) that the beneficiary was an "employee" of the foreign entity because the foreign entity is a sole proprietorship owned by the beneficiary.

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 asserts that the beneficiary has been and is employed

in an executive capacity in the foreign and U.S. entities, and that the foreign sole proprietorship can be an “employer.”

In support of the appeal, counsel submits the Partnership Agreement between the petitioner and [REDACTED] dated April 29, 2008, which states that the petitioner purchased the right to be the 50% owner of [REDACTED]. The Partnership Agreement specified the following division of labor: the beneficiary as President; [REDACTED] as Administrative Assistant. Counsel also submits the foreign entity’s payroll records as of September 2005, reflecting the following employees: [REDACTED]

The AAO provided the petitioner with a notice of derogatory information (NDI) notifying the petitioner that, according to the records at the California Secretary of State’s public website, the petitioner is in “cancelled” status. The AAO advised the petitioner that the petitioner’s “cancelled” status raised questions as to whether the petition has become moot, as well as other questions pertaining to the petitioner’s eligibility for the requested visa, such as whether it continues to exist as an importing employer, whether the petitioner maintains a qualifying relationship, and whether it is authorized to conduct business in a regular and systematic manner. *See* section 203(b)(1)(C) of the Act; *see also* 8 C.F.R. § 204.5(j)(2). The AAO allowed the petitioner 30 days in which to provide a certificate of good standing or other proof that the petitioning business has not been cancelled and is currently in active status.

In response to the NDI, counsel for the petitioner acknowledges that “the LLC status of the petitioning company has been in fact canceled,” but asserts that “pursuant to the Agreement of Dissolution and Winding-Up of [REDACTED], the members provided that 100% of the assets would be transferred to [REDACTED], which by operation of law is a successor-in-interest and a partnership of the former members- the foreign entity and [REDACTED].” Counsel asserts that, in essence, the petitioning company was converted from a LLC to a general partnership, and asserts that “[a] partnership is an entity distinct from its partners.” Counsel further asserts that the petitioner “continues to exist as a business entity and is currently in active status.” Counsel cites to *Sherron Associates Loan Fund Mars Hotel LLC v. Saucier*, No. 28238-4-III, 2010 Wash. App. LEXIS 1800 (Wash. Ct. App. Aug. 5, 2010) and the USCIS Memorandum, D. Neufeld, Acting Associate Director, Domestic Operations “Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions.”

In response to the NDI, counsel submits, *inter alia*, the following:

1. Agreement of Dissolution and Winding-Up of [REDACTED], dated December 27, 2007, entered into between the beneficiary on behalf of the foreign entity and [REDACTED] providing that the members agree to liquidate and dissolve the company and “shall have the authority to wind up the Company’s business, including full power and authority to: (a) Transfer all the Company’s assets and essential rights to [REDACTED] to enable it to continue the Company’s business in the same manner”;
2. Business license of [REDACTED], effective February 27, 2013; and
3. Recent invoices issued by [REDACTED]

III. Analysis

A. Successor in Interest Claims

As an initial matter, beyond the decision of the director, the AAO finds that the petitioner does not qualify as a United States employer that has a qualifying relationship with the foreign entity as a subsidiary or affiliate. See Section 203(b)(1)(C) of the Act (requiring the beneficiary to render services to the same employer or a subsidiary or affiliate thereof); 8 C.F.R. § 204.5(j)(3) (requiring a United States employer to file the Form I-140, and defining the terms “affiliate,” “subsidiary” and “doing business” as requiring the petitioner to be a legal entity).

At issue here is the cancellation and dissolution of the petitioner as a limited liability company (LLC) in 2007, in the State of California, prior to filing this petition. The petitioner does not dispute the fact that the petitioner’s LLC status has been cancelled. The fact that the petitioner voluntarily dissolved as an LLC in December 2007 raises questions as to why the petitioner still listed its name on the Form I-140 as “ [REDACTED] LLC” and represented itself as an LLC formed in the State of California in the initial documentation submitted with the Form I-140. The petitioner did not acknowledge the dissolution of the LLC until the AAO issued the NDI, and did so without explaining why it failed to disclose this fact at the time of filing.¹

In response to the NDI, the petitioner claims that it still exists as a legal business entity in the form of a general partnership. Specifically, counsel asserts that “pursuant to the Agreement of Dissolution and Winding-Up of [REDACTED] the members provided that 100% of the assets would be transferred to [REDACTED] which by operation of law is a successor-in-interest and a partnership of the former members- the foreign entity and [REDACTED].” Counsel asserts that, in essence, the petitioning company was converted from a LLC to a general partnership, and asserts that “[a] partnership is an entity distinct from its partners.”

With reference to business entities, the term “successor-in-interest” is defined as “a corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation.” Black’s Law Dictionary, 1569 (9th Ed, 2009). Policy and precedent allow USCIS to reaffirm the validity of a previously approved labor certification or I-140 petition in successor-in-interest scenarios, e.g., when a prior entity has been bought out, merged, or had a significant change in ownership. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm’r 1986); see also, Neufeld, “Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions,” at 2.

In *Dial Auto Repair Shop*, the Commissioner stated that if the successor petitioner’s “claim of having, assumed all of [predecessor’s] rights, duties, obligations, etc., is found to be untrue, then grounds would exist for invalidation of the labor certification Conversely, if the claim is found to be true, and it is

¹ When asserting a successor-in-interest claim, the successor petitioner most often files the Form I-140 since the predecessor entity is frequently dissolved or cancelled, as in the present case. See, e.g. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm’r 1986). Even if the petition were approved on behalf of a dissolved or cancelled business entity, the approval would be immediately subject to automatic revocation based on the termination of the employer’s business. 8 C.F.R. § 205.1(a)(iii)(D).

determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown" 19 I&N Dec. at 482-83.

According to USCIS policy and the *Dial Auto Repair Shop* precedent decision, the factors to consider when making such determinations are:

1. The job opportunity offered by the successor must be the same as the job opportunity originally offered on the labor certification;
2. The successor bears the burden of proof to establish eligibility in all respects, including the provision of required evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage, as of the date of filing of the labor certification with DOL; and
3. For a valid successor-in-interest relationship to exist between the successor and the predecessor that filed the labor certification, the petitioner must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor.

Memo at 3.

While the successor-in-interest evaluation most frequently arises in the context of Department of Labor (DOL) labor certifications and the related I-140 visa petitions, there is nothing to bar a petitioner from making a similar claim in the context of an I-140 petition filed under section 203(b)(1)(C) of the Act. In such a petition, the AAO would expect the petitioner to demonstrate that:

1. The managerial or executive job opportunity offered by the successor remains the same as that originally offered;
2. The successor satisfies the burden of proof by establishing eligibility in all respects, including the successor's maintenance of a qualifying relationship with the beneficiary's overseas employer; and
3. The petitioner must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor.

In the present matter, the petitioner failed to provide any credible documentary evidence to support its successor-in-interest claims. Counsel has not established that the former members of [REDACTED] have entered into a legal partnership named [REDACTED] which can be considered a successor-in-interest of the cancelled petitioning organization, [REDACTED]

Foremost, counsel submits no partnership agreement or any other evidence to establish that a partnership was formed between the foreign entity and [REDACTED] under the laws of the State of California or any other state in the United States. 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)). 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).

Further, counsel cites to no statute, regulation, code, or case law to support the assertion that the dissolution of the petitioner's LLC status resulted in the formation of a general partnership "by operation of law." To the contrary, the case cited by counsel, *Sherron Associates Loan Fund Mars Hotel LLC v. Saucier*, 2010 Wash. App. LEXIS 1800, held that the assets of a cancelled LLC pass to the owners of the LLC, subject to creditor claims. This case does not support counsel's claim that a cancelled LLC results in the formation of a general partnership by operation of law. Instead, Cal. Corp. Code § 17353 (2013) confirms that the remaining assets of a dissolved limited liability company pass to the members of the limited liability company (except as otherwise provided in the articles of organization or written operating agreement, and after all liabilities and debts are paid and provided for).

Therefore, assuming that the petitioner's articles of organization or written operating agreement did not otherwise provide and that all liabilities and debts were paid and provided for, the petitioner's dissolution as a LLC resulted in the remaining assets being transferred to the individual members, not in the creation of a general partnership "by operation of law." A favorable successor-in-interest finding requires more than the passing of the predecessor's assets to the former members or owners, it requires an actual successor entity. Absent evidence of a legal partnership entered into by the foreign entity and [REDACTED] the record reflects that the petitioner in this case remains the dissolved or cancelled LLC.²

Finally, assuming *arguendo* that the foreign entity and [REDACTED] entered into a legal partnership named [REDACTED] the petitioner failed to establish that [REDACTED] can be considered a "successor-in-interest" according to the [REDACTED] "Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions." Here, the petitioner did not fully describe and document the transfer and assumption of the

² The fact that the petitioner remains the dissolved or cancelled LLC compounds the already confused record regarding the claimed qualifying relationship with the beneficiary's overseas employer. In the original petition, the cancelled petitioner claimed that it was the subsidiary of the overseas employer, [REDACTED]. In support of this claim, the petitioner submitted two "Certificates of Interest" for [REDACTED] representing [REDACTED] as the 75% owner. However, the petitioner also submitted its 2007 IRS Form 1065, U.S. Return of Partnership Income, along with two Schedule K-1s, which represent the beneficiary as the 75% owner and not the foreign business.

If accepted as valid, the "Certificates of Interest" and the tax return are clearly conflicting. However, given the subsequent revelation that the petitioning LLC had already been cancelled and wound up, the evidence submitted to demonstrate a qualifying relationship must be deemed to lack any probative value. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

ownership of [REDACTED] The Agreement for Dissolution and Winding Up of [REDACTED] LLC merely states that the members “shall have the authority to wind up the Company’s business, including full power and authority to: (a) Transfer all the Company’s assets and essential rights to [REDACTED] to enable it to continue the Company’s business in the same manner.” The agreement does not establish that [REDACTED] LLC, actually transferred the company’s assets, essential rights, and ownership to Solid Tile.

At best, the assets of the dissolved petitioner have passed to the former members, the foreign entity and Magdolna Fischer. However, a foreign entity with no location in the United States is not an employer and, therefore, cannot offer permanent employment in the United States to an alien. Only a U.S.-based branch office, affiliate, or subsidiary of a foreign organization may file such a petition. *Matter Of A. Dow Steam Specialities, Ltd.*, 19 I&N Dec. 389 (Comm’r 1986); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm’r 1982). Furthermore, a nonimmigrant alien is not competent to offer permanent employment to an alien beneficiary for the purpose of obtaining an immigrant visa for the beneficiary under section 203(b)(1)(C) of the Act. *See Matter of Thornhill*, 18 I&N Dec. 34 (Comm’r 1981).

Upon review, the LLC petitioner in this matter has been cancelled and administratively dissolved; it does not maintain standing to file this petition as an employer. First-preference immigrant status under section 203(b)(1)(C) of the Act requires that the beneficiary have a permanent employment offer from the petitioner. For this reason, the petition may not be approved.

B. Beneficiary’s employment capacity abroad

Upon review of the evidence, the petitioner has also failed to establish that the beneficiary was employed abroad in an executive capacity. Sec. 101(a)(44)(B) of the Act. The petitioner does not assert that the beneficiary will be employed in a managerial capacity. Therefore, the AAO will only analyze the beneficiary’s employment in an executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner’s description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner’s organizational structure, the duties of the beneficiary’s subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner’s business, and any other factors that will contribute to a complete understanding of a beneficiary’s actual duties and role in a business.

In the instant matter, the petitioner described the beneficiary’s job duties in very broad and duplicative terms. For instance, in describing the beneficiary’s duties abroad, the petitioner asserted that the beneficiary’s duties consisted of being “[i]n charge of business development and directing and planning the growth and development of the company,” “establishing, developing and implementing financial, administrative and operational policies and objectives,” “[directing] and [coordinating] the formulation of financial, sales and marketing programs to provide funding and strategic support for new and continuing operations,” “[assessing] international markets for potential growth and expansion,” “[developing] and [overseeing] implementation of

product management strategies” and “[overseeing] and [directing] the company’s operations, exercising wide latitude in discretion.”

The petitioner's description does not clearly identify the executive duties to be performed with respect to the actual operation of the company, and instead merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). 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. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient.

While the petitioner separately listed the beneficiary’s day-to-day tasks within each broad category of duties, the listed day-to-day tasks were also too vague and duplicative as to give any meaningful insight into the beneficiary actual day-to-day duties. Notably, the petitioner listed the beneficiary’s job duty of meeting with various employees and outside firms as eight separate day-to-day tasks, and his duty of delegating unspecified duties as two separate day-to-day tasks. The petitioner’s description fails to provide any meaningful detail or explanation of the beneficiary's actual day-to-day duties in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F.Supp. at 1108.

Thus, while most of the duties generally described by the petitioner would generally fall under the definition of executive capacity, the lack of specificity raises questions as to the beneficiary's actual responsibilities. Overall, the position description alone is insufficient to establish that the beneficiary's duties were primarily in an executive capacity. Accordingly, the totality of the record must be considered in analyzing the beneficiary’s employment capacity.

In the instant matter, the petitioner failed to provide credible and accurate evidence of the foreign entity’s staffing and organizational structure. According to the organizational chart, the foreign entity employed nine employees (including the beneficiary and two commission-based salesmen), plus an unspecified number of independent contractors for warehouse staff and one market research analyst who worked on a project basis. However, the petitioner failed to submit evidence consistent with the staffing depicted in the organizational chart. The petitioner submitted payroll evidence dated September 2007 reflecting that the foreign entity employed only four employees: [REDACTED]. The petitioner submitted no payroll evidence or other evidence of employment compensation to [REDACTED] and the two commission-based salesmen. The petitioner also submitted no evidence of

³ While the petitioner also submitted the foreign entity’s payroll records as of September 2005, these records were submitted on appeal for the first time, and therefore will not be considered. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and submits it for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Even if the AAO were to consider this evidence, it does not appear to give an accurate depiction of the foreign entity’s staffing as of the time the beneficiary was last employed by the foreign entity in January 2007.

payment to its claimed independent contractors, including the entire warehouse staff and the market research analyst. The AAO notes for the record that [REDACTED] is depicted as the CFO in both the foreign and U.S. entities. The petitioner submitted no explanation for how [REDACTED] could be concurrently employed by both the foreign and U.S. entities.

Notably, the director's RFE specifically instructed the petitioner to submit evidence of employment of all employees depicted in the foreign entity's organizational chart, as well as evidence showing payment to any individual who was not a direct employee. The petitioner failed to submit such evidence or any explanation for why such evidence was not available. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner submitted an excerpt from a Collaboration Agreement between the foreign entity and [REDACTED] stating that the parties "are agreeing in the field of market research and market acquisition. [The foreign entity] agrees to give an 8% commission to [REDACTED], as well as will provide continuous furnishing of materials and will defer payment with monthly invoicing." The petitioner also submitted a letter from [REDACTED] verifying that the foreign entity and [REDACTED] Marketing company have an independent contractor relationship since 2008, in which [REDACTED] provides marketing services in exchange for an 8% discount on merchandise. These documents do not constitute credible evidence that [REDACTED] is an independent contractor of the foreign entity as a market research analyst. The documents only vaguely state that [REDACTED] will provide "marketing services." They do not detail [REDACTED] contracted duties, payment/compensation, or any other specific terms of the agreement other than the foreign entity's provision of an 8% commission in the form of merchandise discount given to [REDACTED]. The provision of a discount on merchandise does not evidence an independent contractor relationship.

Similarly, the petitioner submitted an excerpt from a Collaboration Agreement between the foreign entity and [REDACTED] indicating that the foreign entity will be a reseller, and [REDACTED] will be a wholesaler. The petitioner also submitted letters from [REDACTED] verifying that the foreign entity and [REDACTED] have independent contractor relationships, in which the companies receive a contractor's discount off purchased merchandise. These documents also do not constitute evidence that the above entities or individuals are independent contractors of the foreign entity. The relationship of the foreign entity and [REDACTED] as a reseller-wholesaler, and the provision of a contractor's discount to the various companies or individuals, do not evidence an independent contractor relationship. Furthermore, the petitioner does not claim any of the above entities or individuals to be the contracted "warehouse staff" depicted on the organizational chart.

Based on the above, the petitioner failed to submit credible, accurate evidence of the foreign entity's actual staffing and organizational structure. As the director discussed, since the beneficiary's time reportedly consisted largely of meeting with these claimed employees and independent contractors and delegating duties to them, the petitioner's failure to establish the foreign entity's staffing raises questions as to the accuracy of the petitioner's description of the beneficiary's duties. Furthermore, without credible, accurate evidence of

the foreign entity's staff and independent contractors, the petitioner failed to establish that the petitioner had a sufficient organizational structure to relieve the beneficiary from performing non-qualifying duties.

As such, the petitioner failed to establish that the beneficiary spent the majority of his time performing qualifying duties within the foreign entity. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Based on the above, the petitioner failed to establish that the beneficiary was employed abroad in an executive capacity. For this reason, the appeal must be dismissed.

C. Employment capacity in the United States

Upon review of the evidence, the petitioner has also failed to establish that the beneficiary will be employed in the United States in an executive capacity. Sec. 101(a)(44)(B) of the Act. The petitioner does not assert that the beneficiary will be employed in a managerial capacity. Therefore, the AAO will only analyze the beneficiary's employment in an executive capacity.

Similar to the petitioner's description of the beneficiary's job duties abroad, the petitioner's description of the beneficiary's job duties in the United States is overly broad and duplicative. The petitioner asserted that the beneficiary performs duties such as "[p]lans, develops and establishes financial, administrative and operational policies and objectives," "[d]irects and coordinates the formulation of financial, sales and administrative areas," "[e]stablishes responsibilities and procedures for attaining sales and market expansion objectives," and "[o]versees the company's day-to-day operations, exercising wide latitude in discretion." His day-to-day duties also largely consist of meetings with various employees and delegating unspecified duties.

Again, the petitioner's description does not clearly identify the executive duties to be performed with respect to the actual operation of the company, and instead merely paraphrases the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. 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. *Id.*

The petitioner seeks to rely upon its claimed 50% acquisition of an existing business, [REDACTED]. The petitioner indicated on its combined organizational chart that it and [REDACTED] employ six employees (including the beneficiary), in addition to an accountant who is an independent contractor and nine subcontractors. However, as with the foreign entity, the petitioner failed to submit credible, accurate evidence of the U.S. entity's actual staffing and organizational structure. The petitioner's state quarterly wage and withholding report for the quarter ending on September 30, 2008 reflects that the company employed two employees at the time the instant petition was filed: the beneficiary and [REDACTED]. The state quarterly wage and withholding report for the quarter ending on September 30, 2008 reflects that the company employed only one employee at the time of filing: either [REDACTED].

Accordingly, the state quarterly wage and withholding reports indicate that the petitioner employed a total of three staff members, including the beneficiary, and not the claimed six employees. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

The petitioner submitted no evidence of wages paid to [REDACTED] all claimed employees, as depicted by the organizational chart. The petitioner also submitted no evidence to establish that it utilizes the services of [REDACTED] Accountant, as an independent contractor or the nine claimed subcontractors.

On the Form I-140, the petitioner indicated that it was a wholesale/retail business established in 2005, and currently employs "4-5 employees/indep. contractors." The purchase agreement indicated that [REDACTED] has three employees. In total, this claimed staffing of 7-8 employees is inconsistent with the staffing depicted in the combined organizational chart as well as in the state quarterly wage and withholding reports.

The AAO finds that the submitted evidence of the petitioner's staffing is not credible. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Without credible, accurate evidence of the U.S. petitioner's staff and organizational structure, the accuracy of the petitioner's description of the beneficiary's duties is questionable. Furthermore, without such evidence, the petitioner failed to establish that the petitioner had a sufficient organizational structure to relieve the beneficiary from performing non-qualifying duties. As such, the petitioner failed to establish that the beneficiary spends the majority of his time performing qualifying duties. Again, an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. at 604.

Based on the above, the petitioner failed to establish that the beneficiary will be employed in the United States in an executive capacity. For this additional reason, the appeal must be dismissed.

D. Beneficiary's Status as an "employee" with Foreign Entity

Upon review, the AAO will reserve the issue of whether the beneficiary was an employee of the sole proprietorship foreign entity. Section 203(b)(1)(C) of the Act requires the beneficiary to have been "employed" abroad for at least one year in the three years preceding the time of the alien's application for classification and admission into the United States.

The question of whether the beneficiary was an employee of the foreign sole proprietorship may be a question of foreign law. On appeal, counsel cites instead to the U.S. Internal Revenue Services' treatment of single member LLC's as sole proprietorships, as well as sole proprietorship retirement plans. In immigration proceedings, the law of a foreign country is a question of fact which must be proven if the petitioner relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973).

While USCIS has not defined the terms "employee," "employer," or "employed" by regulation for purposes of the multinational executive and managerial immigration classification, the Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)).

In the present case, the beneficiary claims to be the owner and sole proprietor of the foreign business. Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). A sole proprietorship is a business in which one individual personally owns all of the assets, personally owes all the liabilities, and operates the business in his or her personal capacity. Black's Law Dictionary, 1520 (9th Ed. 2009).

As the appeal will be dismissed on the previously cited grounds, the AAO will reserve the point of law. However, without reaching the question of the beneficiary's employer-employee relationship with his own sole-proprietorship, it is noted that the regulations require the submission of evidence to establish that the foreign sole proprietorship continues to do business. 8 C.F.R. § 204.5(j)(2). The presence of the sole proprietor beneficiary in the United States, along the meager evidence of the overseas company's business activities, raises the question of whether the foreign business continues to do business abroad in a regular, systematic, and continuous manner.

IV. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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.