



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: MAY 05 2014

OFFICE: TEXAS SERVICE CENTER

FILE: 

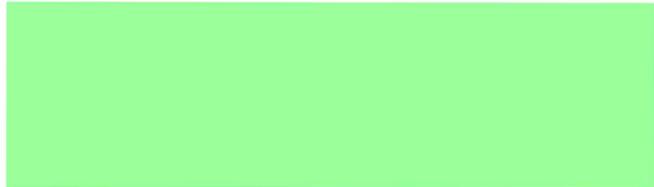
IN RE:

Petitioner: 

Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this Form I-140, Immigrant Petition for Alien Worker, to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The petitioner, a New York corporation engaged in the design, manufacture and sale of technology products, claims to be an affiliate of [REDACTED] Ltd., the beneficiary's former employer in the United Kingdom. The petitioner seeks to employ the beneficiary in the position of Design and Production Technology Executive.

The director denied the petition based on three independent and alternative grounds, concluding that the petitioner failed to establish: (1) that it has a qualifying relationship with the beneficiary's foreign employer; (2) that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and (3) that it had the ability to pay the beneficiary's proffered wage at the time the Form I-140 was filed.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel submits a brief disputing the director's adverse findings. Counsel contends that the director misinterpreted and overlooked key evidence, thus resulting in an erroneous conclusion regarding the petitioner's eligibility.

I. THE LAW

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

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

* * *

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

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

Additionally, the regulations at 8 C.F.R. § 204.5(j)(3)(i) state that the petitioner must provide the following evidence in support of the petition in order to establish eligibility:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

II. THE ISSUES ON APPEAL

A. Qualifying Relationship

The first issue to be addressed in this proceeding is whether the petitioner has a qualifying relationship with the entity where the beneficiary was employed 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 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).

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.

In the present matter, the petitioner claims to be an affiliate of the [REDACTED] Ltd., where the beneficiary was employed prior to coming to the United States to work for the petitioner. This claim is based on the assertion that the CEO and sole owner of the U.S. petitioner is the same individual who owns 50% of the foreign entity where the beneficiary was previously employed. Although the petitioner provided foreign documents and the petitioner's share certificate in support of this claim, the director determined that the petitioner provided information on Schedule K of its 2011 IRS Form 1120, U.S. Corporation Income Tax Return, that is not consistent with the petitioner's claimed ownership. Specifically, the director pointed out that the petitioner marked the box for "no" in response to no. 4b of IRS Form 1120, Schedule K, which asks the petitioner to indicate whether an individual or estate owns directly 20% or more of its voting class stock, or owns directly or indirectly 50% or more of its voting class stock. The director determined that by responding "no" to this query the petitioner contradicted the information provided in its share certificate, which names Dr. [REDACTED] as the sole owner of all 200 issued shares of the petitioner's stock.

On appeal, counsel asserts that the director did not properly construe Schedule K, no. 4b, contending that the question being posed seeks to determine "whether the U.S. petitioner, . . . rather than any individual, owns and controls 20% or more shares and 50% or more of controlling power of any other foreign or domestic corporation." The AAO has reviewed the passage in question and finds that this interpretation is incorrect. Schedule K, no. 4a, which precedes the query addressed in the director's decision, does use the term "foreign or domestic corporation" in an attempt to determine whether the entity filing the Form 1120 was owned in some part by a foreign or domestic corporation at the time of filing the tax return. In addition, Schedule K at no. 5a inquires about the U.S. corporation's stock ownership in other domestic and foreign corporations. However, subsection 4b of Schedule K expressly asks the filing entity whether an individual or an estate directly owns 20% or more, or owns indirectly 50% or more of its voting class stock. The director properly determined that responding "no" to this question is not consistent with the petitioner's claim that all of its stock is owned by one individual shareholder.

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). For the reasons stated, counsel's assertions on appeal do not effectively address and reconcile the anomaly pointed out in the director's decision. Given that ownership of the petitioning entity is germane to establishing the existence of an affiliate relationship between the petitioner and the beneficiary's employer abroad, the petitioner's failure to provide consistent and reliable evidence to identify its owner(s) precludes the AAO from concluding that the petitioning U.S. employer and the beneficiary's employer abroad are commonly owned and controlled. See *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Assoc. Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In light of this unresolved inconsistency, the petitioner has not

established that it maintains the requisite qualifying relationship with the beneficiary's foreign employer and on the basis of this initial adverse conclusion the instant petition cannot be approved.

B. U.S. Employment in a Managerial or Executive Capacity

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

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

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and

- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

1. Facts

The petitioner has offered the beneficiary the position of Design and Production Technology Executive. In a letter dated February 28, 2012, the petitioner described the beneficiary's duties as follows:

The beneficiary's primary responsibilities consist of overseeing the operations of [the petitioner] and the employees of the company. He oversees the management at [the petitioner's] joint venture partner, [REDACTED] as well. [REDACTED] has a total staff of fifteen. Additionally, [the beneficiary] reviews [REDACTED] output and production, and instructs the management of the company in its continued manufacture of [the petitioner's] products. In addition to overseeing [REDACTED] he has a staff directly beneath him consisting of three professional-level workers He was responsible for hiring this staff, and indeed continues to have complete latitude in deciding hiring, firing, and other staffing matters at [the petitioner].

In addition, he has both the authority and the ability to direct the operations of [the petitioner]. The staff of [the petitioner] includes an engineer who tests finished products and subsequently reports his findings to [the beneficiary], who reviews them and personally decides whether the findings are acceptable. . . . [H]e's able to direct the staff in continued research and testing without input from any other individuals. As such, thanks not only to his experience but also to his technical knowledge of [the foreign entity's] products he is uniquely able to manage the operations of [the petitioner]

Further, he is answerable only to Dr. [REDACTED] the owner of [the petitioner] and [the foreign entity], and to no one else. Therefore the beneficiary works as an executive at [the petitioner] in accordance with 8 U.S.C. § 1101(a)(44)(B).

The petitioner stated on the Form I-140 that it had one employee at the time the petition was filed. In the supporting letter, the petitioner stated that it employs the beneficiary, an office manager, a sales manager and the aforementioned engineer. The petitioner's supporting evidence, which included IRS Forms 941, Quarterly Federal Tax Returns, and its New York state quarterly wage reports, indicate that the beneficiary was the company's only employee in 2011.

The initial evidence included a copy of the petitioner's one-page "Design and Manufacturing Agreement" with [REDACTED] d/b/a [REDACTED] which is dated October 1, 2008. The terms of the agreement provide that the petitioner will "design, develop, manage and supervise the manufacturing of 'Digital Interactive Photo Album' and related products exclusively for [REDACTED] to market in North

America." The petitioner provided evidence of the foreign entity's U.S. patent for this product and explained its plans for marketing the product.

The director issued a request for additional evidence (RFE) on June 6, 2012. The director requested, in part, a definitive statement from the petitioner regarding the offered position, including the beneficiary's job title, all specific daily duties, and the percentage of time he will spend on each duty. The director also instructed the petitioner to submit an organizational chart, with brief descriptions of job titles, job duties and educational levels for any employees who report to the beneficiary. The director requested evidence of wages paid to employees in 2011 and the first quarter of 2012. Finally, the director requested that the petitioner document the number of contractors the petitioner uses and the duties they perform, if applicable.

In a letter dated August 16, 2012, the petitioner described the beneficiary's duties as follows:

[The beneficiary's] daily job duties include: being in charge of the designing and development of our patented product the [REDACTED]; prototyping, testing, and modifying the design of our products involving our innovative technologies; [the beneficiary] exercises executive level supervisory duties over the [REDACTED] personnel including reviewing the reports from [REDACTED] lower level management in terms of the final engineering design and manufacture, such as our [REDACTED]. [The beneficiary] has overall supervisory authority on prototyping, testing and modifying the design of the products handled by the [REDACTED] engineering department and manufacturing department. [The beneficiary] spends 30% of his working time on this executive function.

Besides, [the beneficiary] confers with management and engineers at the UK company in terms of the invention of new technology and integration of new technology through email, tele-conference, correspondences, telephone and Skype; advising our patent attorneys He is in charge of the registration of our patents in the U.S. [The beneficiary] spends 25% of his working time on this executive function.

In addition, [the beneficiary] makes the final decision on the technological modification concerning after-sale returned products in the U.S. market, and he is also in charge of all the legal matters relating to the after-sale returned products in the U.S. As our after-sale return rate is 5% in the U.S. market, [the beneficiary] therefore has to spend a considerable amount of his working time on this part of job duties. He reports directly to Dr. [REDACTED] in the UK for all relevant issues and results. [The beneficiary] spends 20% of his working time on these executive level job duties.

[The beneficiary] participates in negotiation and signing of new contracts with U.S. business partners. He is in charge of the supervision of the execution of all U.S. contracts and generates executive reports [The beneficiary] spends 25% of his working time on these executive job duties.

The petitioner stated that all of the beneficiary's functions are executive and managerial in nature, while all "administrative and day-to-day operations are handled by [REDACTED] personnel." The petitioner explained that [REDACTED] CEO and owner of [REDACTED] "supervises and manages all the day-to-

day operations of the [redacted] stuff, and Mr. [redacted] reports directly to [the beneficiary] as to all business and manufacture matters relating to the production and sale of the products containing the patented technologies from [the petitioner]."

The petitioner's response to the RFE included two organizational charts. One shows the beneficiary supervising the areas of design and development for the interactive photo album, prototyping and testing, and manufacturing of the product, with supervision over three unnamed [redacted] employees for manufacturing. These same employees also report to [redacted] management, and the chart shows that [redacted] is responsible for marketing and sales. The second chart is focused solely on the beneficiary and his claimed subordinates. It shows that he directly supervises Mr. [redacted] who in turn supervises an engineer, a design and development manager, two manufacturing managers, and two manufacturing employees.

The petitioner also submitted a letter from Mr. [redacted] who describes his company's relationship with the petitioner as a joint venture partnership. He stated that the beneficiary performs executive level job duties for the partnership and "is responsible for all the ultimate business and technological decisions concerning the patented technologies from [the petitioner]." Mr. [redacted] further indicated that the beneficiary has the authority to hire and fire [redacted] staff, as he follows the beneficiary's recommendations. The petitioner included a copy of Mr. [redacted]'s personal income tax return and his Form W-2 for 2011, but did not provide any additional evidence related to [redacted]

Finally, the petitioner submitted a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, which indicates that it had one employee at the time of filing the Form I-140.

The director denied the petition on February 21, 2013, concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity. In denying the petition, the director determined that the petitioner provided an overly broad job description that failed to convey an understanding of what the beneficiary primarily does on a day-to-day basis. The director further noted that the beneficiary is the petitioner's sole employee and that no documentary evidence was submitted to corroborate its claim of the joint venture partnership with [redacted]. The director concluded that the beneficiary would not supervise a staff comprised of subordinate managerial, supervisory or professional employees, or that he would otherwise be relieved from primarily performing non-managerial and non-executive functions associated with the operation of the petitioner's business.

On appeal, counsel asserts that the director misinterpreted the nature of the petitioner's business, and failed to understand the complexity of the process of designing patented technologies, integrating them into products, and then contracting for their manufacture. Counsel asserts that "the complexity and sophisticated nature of the global development, manufacture, marketing and sale process ensure that there is a need for the position of Design and Production Technology Executive." Counsel also refers to two new contracts relating to the petitioner's products which were signed in June and July of 2012 and states that such contracts further establish the need for the beneficiary's position.

In addition, counsel contends that the director placed undue emphasis on the petitioner's staffing levels, and failed to take into account the company's reasonable needs in light of its overall purpose and stage of development. Counsel suggests that the director overlooked the "joint venture agreement" between the

petitioner and [REDACTED] and improperly disregarded the organizational charts submitted in response to the RFE which show the beneficiary's supervision of managerial and supervisory personnel.

In support of the appeal, the petitioner submits 2010 IRS Forms W-2 for four of the [REDACTED] staff depicted on the organizational chart. The petitioner also re-submits a copy of the previously submitted one-page "Design and Manufacturing Agreement" with [REDACTED].¹

2. Analysis

When examining the executive or managerial capacity of the beneficiary, we review the totality of the record, starting first with the petitioner's description of the beneficiary's proposed 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 job descriptions of the beneficiary's subordinate employees, the nature of the business that is conducted, the petitioner's subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioning entity. While an entity with a limited support staff will not be precluded from the immigration benefit sought herein, it is subject to the same burden of proof that applies to a larger entity with a moderate or large subordinate staff. In other words, regardless of an entity's size or support staff, the petitioning entity must be able to provide sufficient evidence showing that it has the capability of maintaining its daily operations such that the beneficiary would be relieved from having to primarily perform the operational tasks.

In the present matter, upon review of the totality of the record, the evidence does not support a finding that the beneficiary would allocate his time primarily to the performance of tasks that are within a qualifying managerial or executive capacity.

First, the petitioner did not fully comply with the director's express RFE instructions, which asked the petitioner to list the beneficiary's daily job duties and to assign a time allocate to each job duty rather than to categories of job duties. Looking to the job description the petitioner provided in response to the RFE, we observe that the petitioner assigned a percentage breakdown to groups of actions rather than to individual tasks. For instance the first group of duties consists of the following: designing and developing the petitioner's patented product; prototyping, testing, and modifying product designs; and overseeing another entity's personnel by reviewing management's reports concerning a product's final engineering design and manufacture. The petitioner assigned a single time allocation – 30% - to this entire group of tasks rather than indicating how much time would be spent performing each task individually. The petitioner maintained this pattern in another portion of the job description indicating that 25% of the beneficiary's time would be spent negotiating and signing contracts with U.S. business partners, supervising contract execution, and generating reports for the petitioner's owner to review.

¹ We note that on the previously submitted copy of this document, two words had been covered with correction fluid. The newly submitted copy reveals that the document is actually the "Rider to Design and Manufacturing Agreement." The petitioner has not provided any other portion of the agreement with [REDACTED].

Additionally, the petitioner stated that the beneficiary would allocate 25% of his time to conferring with the foreign entity's management and engineers through emails, teleconference, and Skype regarding the integration of new technology and the remaining 20% of his time to making final decisions regarding product modification and legal matters associated with the post-sale return of products.

Despite the petitioner's failure to comply with the instructions in the RFE, the job duties as stated conveyed that the beneficiary would allocate a significant portion of his time to the petitioner's daily operational tasks. We do not dispute that designing and developing a patented product, which the petitioner can then market and sell, are essential for the petitioner's business success. However, these job duties, along with prototyping and modifying product designs, negotiating contracts, handling after-sale returns, and generating reports regarding work being done in the United States, are all indicative of operational tasks whose end result is to provide a viable product for the petitioner to sell. 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 will perform are only incidental to the position in question. 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'r 1988).

The petitioner has also failed to provide evidence establishing who, if not the beneficiary, would carry out the petitioner's administrative and sales-related tasks. In its letter dated February 28, 2012, the petitioner stated that it "has hired three new workers and begun marketing and sale of the [redacted] its flagship product, as well as developing of future products." The petitioner went on to state that it "expected to hire three new workers in the past year – an office manager, an engineer, and a sales manager – and they [sic] have done so." The petitioner did not corroborate its hiring or continued employment of any of these workers, and the record shows that the petitioner employed only the beneficiary throughout 2011 and up to the date of filing in March 2012. Further, in response to the RFE, the petitioner attributed performance of administrative and sales tasks to unidentified [redacted] employees. 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).

Although counsel indicates that the petitioner has a joint venture agreement with a company, [redacted] that will manufacture and distribute the products that the petitioner designs, the document that counsels claims is evidence of the joint venture lacks sufficient information to corroborate the claims being made. More specifically, the document titled "Rider to Design and Manufacturing Agreement," dated October 1, 2008 states only that the petitioner is obligated to "design, develop, manage and supervise the manufacturing of [redacted] and related products exclusively for [redacted] to market to North America and any other territories that is felt to be appropriate." While the petitioner clearly promised to oversee the manufacturing of a product that [redacted] will sell, there is no clause in the document, which expressly states that [redacted] is obligated to undertake the manufacturing of the product. Furthermore, if the document is meant to represent a joint venture agreement between two companies, it is unclear why it has no provisions explaining how profits will be divided from the sale of the products or how the joint venture will be managed. Finally, there are no terms providing that [redacted] will perform the petitioner's administrative, marketing and sales tasks or that it will grant authority over its

operations and employees to the beneficiary, who was employed by the foreign entity at the time this agreement was signed.

We acknowledge that Mr. [REDACTED] provided a letter confirming the existence of a "joint venture partnership" with the petitioner and affirming the beneficiary's responsibility for business and technological decisions related to the petitioner's technologies. However, the letter is vague and is insufficient to establish the beneficiary's claimed supervision of [REDACTED] employees or the existence of a joint venture arrangement that would reasonably give the petitioner or the beneficiary control over the employees of a separate entity. 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, if part of the beneficiary's job is to oversee engineers who will assist in actually making the products to be sold, it is unclear why the petitioner has not provided evidence to establish where it derives the necessary human resources whom the beneficiary would ultimately be overseeing. In fact, the petitioner specifically stated at the time of filing the petition that its own staff includes "an engineer who tests the finished products" and reports his findings to the beneficiary. If this employee does not exist, then it is reasonable to believe that the beneficiary is directly performing products tests. Thus, in addition to providing a job description that indicates that the beneficiary would allocate a significant amount of time to non-managerial tasks, the petitioner also appears to be lacking an organizational complexity that can support the beneficiary in a position in which he would be required to primarily carry out managerial- or executive-level tasks.

The organizational chart that the petitioner has provided merely outlines the beneficiary's responsibilities and suggests that employees of [REDACTED] would be involved in the manufacture of one of the petitioner's products. The petitioner has not provided job duties for the [REDACTED] employees, nor has it submitted evidence that any of them, other than the company's owner, were employed by [REDACTED] at the time the petition was filed. The unsubstantiated organizational chart is not sufficient to establish that the beneficiary would be relieved from having to allocate his time primarily to the performance of non-qualifying 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the petitioner's assertions are true. See *Systronics*, 153 F. Supp. 2d at 15.

Here, the petitioner's assertions that the beneficiary is relieved from performing non-qualifying duties were initially predicated on its claimed employment of a sales manager, an engineer, an office manager, and the

beneficiary's supervision of the staff of a joint venture partnership that it formed with a U.S. manufacturer. The petitioner claimed that this level of staffing is sufficient to establish a reasonable need for a design and production technology executive who performs primarily qualifying duties. However, as discussed, the record does not substantiate that the petitioner actually employs anyone other than the beneficiary, or that the company has a joint venture partnership that gives the beneficiary the stated scope of authority over the staff of [REDACTED]. While the petitioner has established the beneficiary's decision-making authority for design, technology and post-sales issues, the record does not establish that his actual duties are primarily managerial or that he is relieved from performing non-qualifying duties associated with these areas of responsibility based on the petitioner's current stage of development.

Regardless, the petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

In light of the foregoing discussion, the petitioner has not established that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity and on the basis of this second adverse conclusion, this petition cannot be approved.

C. Ability to Pay

The third and final topic to be addressed in this discussion is the petitioner's ability to pay the beneficiary's proffered wage.

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

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

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

The petitioner has offered the beneficiary a wage of \$32,000 per year. As the petition was filed on March 2, 2012, the petitioner must establish its ability to pay the beneficiary the proffered wages as of this date. The petitioner has submitted sufficient evidence to meet this requirement.

The director indicated that the petitioner had not submitted any evidence of wages to verify the beneficiary's employment with the petitioner at the time of filing. Upon review, the petitioner provided a copy of the

beneficiary's IRS Form W-2 for 2011 indicating that the petitioner he received \$32,525 in wages in 2011. In addition, the petitioner provided a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2012 indicating that the beneficiary received \$8,055 in wages in the quarter in which the petition was filed. Accordingly, the petitioner has established the ability to pay the beneficiary's wage and the director's adverse determination with respect to this single issue will be withdrawn.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.