



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF F-T- INC.

DATE: APR. 25, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140 IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an importer of beauty supplies, seeks to permanently employ the Beneficiary, , seeks to permanently employ the Beneficiary as its President under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director, Texas Service Center, denied the petition. The Director determined that the evidence of record did not establish: (1) that the Beneficiary would be employed in the United States in a qualifying managerial or executive capacity; or (2) that the Beneficiary was employed by a qualifying foreign entity in a managerial or executive capacity for at least one year in the three years preceding his entry to the United States as a nonimmigrant.

The matter is now before us on appeal. In its appeal, the Petitioner submits a brief and copies of supporting documents and asserts that the Director’s conclusion was based on an incorrect interpretation of the law.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

A U.S. employer may file a petition on Form I-140, Immigrant Petition for Alien Worker, 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.

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 the alien 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 only to 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.

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 beneficiary.

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY IN THE UNITED STATES

The first issue addressed by the Director was whether the Petitioner established that the Beneficiary will be employed in the United States in a qualifying managerial or executive capacity.

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

- (A) 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.

(B) 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, U.S. Citizenship and Immigration Services (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.

A. Evidence of Record

The Petitioner filed the Form I-140 on April 14, 2014. The Petitioner stated on the petition that it operates a beauty supply import and export business with five employees. The record also contains a letter from the Petitioner stating that the Beneficiary is currently serving as president of the U.S. entity and will continue to have the following responsibilities:

- Creating, communicating and implementing the organization's vision, mission, and overall direction.
- Leading, guiding, directing, and evaluating the work of other executive leaders.
- Soliciting advice and guidance, when appropriate, from a Board of Directors.
- Formulating and implementing the strategic plan that guides the direction of the business.
- Forming, staffing, guiding, leading, and managing the organization to accomplish the strategic plan of the business.
- Overseeing the complete operation of the Company in accordance with the established in the strategic plans [*sic*].
- Evaluating the success of the organization.

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- Maintaining awareness of both the external and internal competitive landscape, opportunities for expansion, customers, markets, new industry developments and standards, and so forth.
- Represent the organization in civic and professional association responsibilities and activities in the local community, the state, and at the national level.

The Petitioner also lists the following “Duties:”

- Plan, develop, organize, implement, direct and evaluate the organization’s fiscal function and performance.
- Participate in the development of the corporation’s plans and programs as a strategic partner.
- Develop credibility for the finance group by providing timely and accurate analysis of budgets, financial reports and financial trends in order to assist the Board and senior executives in performing their responsibilities.
- Enhance and/or develop, implement and enforce policies and procedures of the organization by way of systems that will improve the overall operation and effectiveness of the corporation.
- Provide technical financial advice and knowledge to others within the financial discipline.
- Continual improvement of the budgeting process through education of department managers on financial issues impacting their budgets.
- Provide strategic financial input and leadership on decision making issues affecting the organization.
- Optimize the handling of bank and deposit relationships and initiate appropriate strategies to enhance cash position.
- Develop a reliable cash flow projection process and reporting mechanism, which includes minimum cash threshold to meet operating needs.
- Evaluation of the finance division structure and team plan for continual improvement of the efficiency and effectiveness of the group as well as providing individuals with professional and personal growth with emphasis on opportunities (where possible) of individuals.

The letter indicated that the Beneficiary spends his time as President as follows:

Planning and Analyzing	30%
Supervision	30%
External representation of the Company	30%
Operational	10%

The Petitioner submitted two different organizational charts. The first shows the Beneficiary as President with three direct reports: an Administrative Assistant, Purchasing & Logistics Coordinator, and a Sales & Marketing Manager. The Sales & Marketing Manager is shown as having one direct

report: the Warehouse & Office Manager. The second organizational chart shows a similar structure but also includes a “Shipping & Receiving Expediter” who reports to the Sales & Marketing Manager. The Petitioner also submitted IRS Form W-2 for 2012 for the Beneficiary and all of the individuals named on the two organizational charts.

The Director issued an RFE and stated that the Petitioner had not submitted sufficient evidence to establish that the Beneficiary would be acting in a qualifying capacity. The Director instructed the Petitioner to submit additional evidence describing the Beneficiary’s proposed position; as well as evidence documenting the Petitioner’s employment of the claimed subordinate employees and a description of the jobs these subordinates perform. The Director also requested copies of the Petitioner’s Form 941 Federal Quarterly Tax Report for each quarter of 2013 and for the first two quarters of 2014.

In response to the RFE, the Petitioner resubmitted the description of duties for the proposed position, along with a revised organizational chart and a 2013 catalogue of products sold. The Petitioner also submitted W-2 Wage and Tax Statements for 2013 for the Beneficiary indicating that he earned \$72,000, along with Form 941 Quarterly Income Tax Statements for all quarters of 2013 and the first and second quarter of 2014, which indicated that the Petitioner had five employees.

On February 5, 2015, the Director denied the Petition stating in part, that the Petitioner did not demonstrate that the Beneficiary would be employed in an executive capacity. The Director pointed specifically to the list of duties submitted by the Petitioner indicating that they were vague and did not convey an understanding of what the Beneficiary would actually be doing on a daily basis.¹

On appeal, the Petitioner maintains that it has submitted sufficient evidence of the Beneficiary’s employment in an executive capacity.

B. Analysis

Upon review, and for the reasons stated below, we find that the Petitioner has not established that the Beneficiary’s proposed position with the Petitioner is in a qualifying managerial or executive capacity.² In this case, the Petitioner does not assert that the Beneficiary will be employed in a managerial capacity; therefore we will restrict our analysis to whether or not the Beneficiary will be serving in an executive capacity.

¹ We note that the Notice of Denial contains a list of responsibilities that are not reflected in the record. Therefore, we withdraw this portion of the Director’s decision and have evaluated the record based upon a *de novo* review of the entire record of proceedings, including the specific list of duties submitted by the Petitioner.

² The Director also took issue with whether or not the proposed employment would be fulltime. The Director notes that according to tax returns for 2009 through 2013, the Beneficiary indicates he spends 50% of his time working for the Petitioner. We do not consider this evidence inconsistent with the proffered employment and do not consider the Beneficiary’s past employment with the Petitioner indicative of his future employment, if the petition in question was granted.

The definitions of managerial and executive capacity each have two parts. First, the Petitioner must show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (table). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. See *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. §1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the Beneficiary to direct and the Beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The Beneficiary must also exercise "wide latitude in discretionary decision making" and "receive only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

While the Petitioner submitted a long list of duties with the initial submission, some of the duties themselves are vague. Duties such as "[e]valuating the success of the organization," "[p]articipate in the development of the corporation's plans and programs as a strategic partner," and "[e]nhance and/or develop, implement and enforce policies and procedures of the organization by way of systems that will improve the overall operation and effectiveness of the corporation" do not meaningfully describe the tasks to be performed by the Beneficiary on a daily basis, nor do they provide insight into the Beneficiary's work as it relates to the Petitioner's specific business model. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Reciting the beneficiary's vague job responsibilities or broadcast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *Id.*

Furthermore, the claimed responsibilities also include duties that appear incongruous with the stated organization and staffing structure. For example, one of the Beneficiary's proposed duties is, "Leading, guiding, directing, and evaluating the work of other executive leaders." The record, however, does not contain evidence of these other executive leaders. The descriptions also indicate that the Beneficiary is tasked with "evaluation of the finance division structure and team plan for continual improvement of the efficiency and effectiveness of the group as well as providing individuals with professional and personal growth with emphasis on opportunities where possible of individuals." "[d]evelop credibility for the finance group by providing timely and accurate analysis

of budgets . . .” and “[p]rovide technical financial advice and knowledge to others within the financial discipline.” However, there is no finance group or division noted in the organizational charts and no subordinate employees have been identified as working “within the financial discipline.” The record does not specify who is included in the finance division or team and none of the subordinate positions appear to include finance; the only identified departments are administrative, sales and marketing, purchasing and warehouse office manager. The inconsistencies noted raise some doubt as to the veracity of the job description presented. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Absent further explanation or evidence, it does not appear that the information provided is an accurate representation of the Beneficiary’s duties.

Moreover, while the Petitioner assigned a percentage of time spent on four broad categories of duties, these categories appear to include both qualifying and non-qualifying tasks and responsibilities. As such, we are unable to determine whether the claimed executive duties constitute the Beneficiary’s primary duties, or whether the Beneficiary will primarily perform non-executive administrative or operational duties associated with the day-to-day operation of the business. The Petitioner’s description of the Beneficiary’s job duties does not establish what proportion of the Beneficiary’s duties is executive in nature, and what proportion is actually non-qualifying. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Beyond the required description of the job duties, we review the totality of the record when examining whether a beneficiary is employed in a qualifying managerial or executive capacity, 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 understanding a beneficiary’s actual duties and role in a business. Here, the Petitioner has also not established that it has sufficient staff to relieve the Beneficiary from performing the non-qualifying duties associated with running its business. The Petitioner operates an import/export business and has documented its employment of a four person subordinate staff identified on its organizational chart at the time of filing. Although requested by the Director, the Petitioner did not provide job duties for any subordinate staff members. Without information on the duties and responsibilities of the claimed subordinate staff, we cannot determine that the Beneficiary would be relieved from performing non-qualifying duties, such as general administrative, bookkeeping, customer service, sales, and purchasing tasks, that are associated with running a beauty supply import and export business.

In this case, the Petitioner has not established that it has sufficient staff to relieve the Beneficiary from performing non-qualifying duties, such that the Beneficiary would be primarily engaged in an executive capacity. The fact that the Beneficiary manages or directs a business does not necessarily establish eligibility for classification as a multinational manager or executive within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of

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a position be “primarily” of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

Accordingly, we find that the Petitioner has not established that the Beneficiary will be employed in the United States in a qualifying managerial or executive capacity.

III. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY FOR AT LEAST ONE YEAR

The Director also denied the petition based on a finding that the Petitioner did not establish that the Beneficiary was employed by a qualifying entity in a managerial or executive capacity for at least one year. There are two parts to this analysis: (1) whether the Beneficiary had one year of employment abroad in the three years preceding his entry to the United States in nonimmigrant status, and (2) whether this employment was in a managerial or executive capacity. We will take each part in turn.

A. Employment for at least one year

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

(3) Initial evidence--

(i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

....

(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;

1. Evidence of Record

As noted, the petition was filed on April 14, 2014. In the initial filing, the Petitioner asserted that the Beneficiary was employed abroad as the President of the “foreign Mexican affiliate company;” [REDACTED] The Petitioner submitted an untranslated organizational chart for the entity listing the Beneficiary as “Director General;” along with what appears to be untranslated position descriptions for the foreign company. The Petitioner also submitted a copy of the Beneficiary’s resume which states that he has been working as the “General Director” of [REDACTED] since 1995. The Petitioner further submitted incorporation documents for the [REDACTED] and a “verification” from [REDACTED]

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██████████, Certified Public Accountant, attesting that the foreign entity was incorporated on ██████████, in ██████████, Mexico.

Regarding the Beneficiary's nonimmigrant status, the Petitioner submitted a copy of the Beneficiary's E-2 visa stamp in his passport, showing the Beneficiary's entry into the United States in E-2 nonimmigrant status on or about November 19, 2008.

The Director issued an RFE requesting, among other things, evidence documenting the Beneficiary was employed overseas by the foreign entity during the requisite timeframe. In response to the RFE, the Petitioner submitted a letter dated October 20, 2014, from the foreign entity stating that the Beneficiary had been employed as the Managing Director since 2008. The RFE response also included a duplicate of the organizational chart for the foreign entity listing the Beneficiary as the "Director General."

The Director denied the petition stating that the evidence regarding the foreign corporation's incorporation and the Beneficiary's nonimmigrant history conflicted with the claimed dates of employment abroad for the Beneficiary.

On appeal, the Petitioner asserts that the foreign entity was incorporated in ██████████ and that the Director erred in relying upon a 2008 amendment to the Articles of Incorporation. The Petitioner maintains that the evidence in the record establishes that the Beneficiary has the requisite year of employment abroad.

2. Analysis

Upon review, we find that the Petitioner has not demonstrated that the Beneficiary has the required one year of employment abroad. As noted, the Beneficiary must, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, have been employed for at least one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and must seek 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. 8 C.F.R. § 204.5(j).

The Director examined the Beneficiary's employment abroad from the date of filing of the petition, finding that the record did not establish that the Beneficiary was employed for one year by the foreign entity in the three years preceding the filing of this petition on April 14, 2014. The Director based his findings largely on the fact that the Beneficiary has spent significant time in the United States in E-2 status since November 2008 and that tax documents report that the the Beneficiary had been devoting 50 percent of his time to the Petitioner from 2009 to present. The Director concluded that, if the Beneficiary began employment with the foreign entity in 2008, entered the U.S. in E-2 status in November 2008, and devoted 50 percent of his time to the Petitioner in each year since 2009, that it was not clear when the Beneficiary would have been employed abroad by the foreign

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entity for one year in the three years preceding the filing of this petition (between April 2011 and April 2014).

However, we note that as the Beneficiary has been in the United States in valid nonimmigrant status working for the Petitioner since November 2008 (or earlier), the Petitioner may show that the Beneficiary was employed abroad for one year in the three years preceding the Beneficiary's entry into the United States and not, as the Director stated, within the three years preceding the filing of this petition. In analyzing whether or not the Beneficiary was employed for one year abroad by the foreign company between November 2005 and November 2008, we encounter two sets of inconsistencies in the record that prevent us from determining the true facts of the Beneficiary's foreign employment. First, the date of incorporation of the foreign company has been inconsistently portrayed. In the initial petition, the Petitioner submitted the foreign entity's articles of incorporation and a letter from CPA attesting that the foreign entity was incorporated on [REDACTED], in [REDACTED] Mexico. On appeal, the Petitioner asserts that the Director mistook an amendment to the foreign entity's articles of incorporation for the original articles of incorporation. The Petitioner resubmits the articles of incorporation, highlighting text that references the incorporation of the foreign entity in [REDACTED]. Upon review of the documents submitted, we find that the foreign entity was, more likely than not, established in [REDACTED], rather than [REDACTED].

Nonetheless, the Petitioner must also resolve the inconsistencies regarding the Beneficiary's dates of employment abroad. The Beneficiary's resume reports that he has been employed abroad by the foreign entity since 1995; however, the letter from the foreign entity dated October 20, 2014, states that the Beneficiary has been employed by the foreign entity since 2008. If the Beneficiary did in fact commence employment with the foreign entity at some date in 2008 and he entered the United States in E-2 nonimmigrant status in November 2008, then we cannot find that the Beneficiary has the required one year of employment abroad prior to his entry into the United States in nonimmigrant status. The Petitioner has not explained the discrepancy or resolved the inconsistencies present with independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, the record lacks evidence such as employment records, payroll records, tax documents and/or dated organizational charts and corporate documents necessary to establish that the Beneficiary was in fact employed by the foreign entity for any period of time. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

Based on the foregoing, the Petitioner has not established that the Beneficiary's was employed abroad with the foreign entity for the requisite period of time.

B. Managerial or Executive Capacity Abroad

1. Evidence of Record

The record contains a letter dated October 20, 2014, in which a representative of the foreign entity stating that the Beneficiary has worked at the company [REDACTED].

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█ since 2008 as Managing Director and Legal Representative. The letter describes the Beneficiary's job duties as managing director as follows:

- Managing the matter of administration of the entire company
- Operating the multi-faceted tasks that a company has with great efficiency.
- Setting and meeting of different targets that is highly necessary for the success of the company.
- Ensuring that the routine requirements of the company are adequately fulfilled and on time.
- Supervising of the annual accounts of the company.
- Looking after the health, safety, employment, tax and the business related matters of the company.
- Supervising the accomplish of sales plan
- Keeping the good relation with clients, partners and suppliers, verifying that contracts and agreements be fulfilled
- Representation of the Company
- Guarantee the best customer service.

The Director issued an RFE requesting, in part, evidence documenting the Beneficiary's position in a managerial or executive capacity with the foreign entity. The Director requested a more detailed description of the Beneficiary's duties identifying the amount of time he allocates to specific tasks, as well as evidence of the number of employees supervised by the beneficiary, their position titles, their duties and their salaries. The Director also recommended that the Petitioner submit a detailed organizational chart or diagram clearly identifying the Beneficiary's position.

In response to the RFE, the Petitioner submitted a statement explaining that "it is a commonly accepted business practice to allow for a great latitude in work activity and responsibilities for top level Executives in flat line organizations as is the instant case. In these types of organizational structures the 'Directors' perform a wide variety of executive work that is different from more structured organizations or governmental agencies." The RFE response included an organizational chart for the foreign entity which is not translated along with many position descriptions which appear to relate to subordinates listed on the organizational chart.

The Director denied the Petition, noting, in part, that the Petitioner had not submitted sufficient evidence identifying the Beneficiary's role as a manager or executive with the foreign entity. Specifically, the Director noted that the job description was vague and did not identify specific tasks performed by the Beneficiary on a daily basis and that the Petitioner did not indicate the amount of time spent on each tasks or the educational levels of other employees.

On appeal, the Petitioner contends that the Beneficiary's overseas position meets all four prongs of the regulatory requirements for a manager. The Petitioner disputes the Director's finding that the job description lacked detail.

2. Analysis

Upon review, and for the reasons stated below, we find that the Petitioner has not established that the Beneficiary's position abroad was in a qualifying managerial or executive capacity.

As noted above, the Petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are either in an executive or managerial capacity. *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 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). When examining the job duties, we will 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, and any other facts that may contribute to a comprehensive understanding of the Beneficiary's actual duties and role in a petitioner's organizational hierarchy.

Here, the Petitioner has stated that the Beneficiary was the managing director of the foreign entity with responsibility for the overall operation of the company. The Beneficiary's duties, however, are vague and do not include percentages of time devoted to each duty. The broad duties listed include duties such as "[m]anaging the administration of the entire company," "[o]perating the multi-faceted tasks that the company has with great efficiency," "[g]uarantee the best customer service," "[r]epresentation of the company," and "ensuring that the routine requirements of the company are adequately fulfilled." These are general statements that shed little light on the actual tasks that the Beneficiary performed in his role or how they related to the foreign entity's specific business. Furthermore, the Petitioner did not provide the required information concerning the organizational structure of the foreign entity and did not identify any subordinate staff that performed the non-qualifying functions to support the Beneficiary's claimed managerial or executive position. Without this information, we are unable to determine that the Beneficiary was performing in a qualifying managerial or executive role. Moreover, the Beneficiary's specific duties included activities such as "accomplishing a sales plan" and "managing the administration of the entire company." Without a full-time staff to execute the sales function or conduct company operations, it is unclear how the Beneficiary would have primarily devoted his time to managerial or executive duties. It is reasonable to conclude that the foreign entity would require employees, in addition to the Beneficiary, to perform the functions of sales, administrative, and operational staff.

Based on the statements provided in the record, we are unable to determine whether the claimed managerial and executive duties constituted the Beneficiary's primary duties, or whether the Beneficiary primarily performed non-managerial administrative or operational duties as described above. Although specifically requested by the Director, the Petitioner's descriptions of the Beneficiary's job duties does not sufficiently establish what proportion of the Beneficiary's duties was managerial or executive in nature, and what proportion was actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The statutory definition of “managerial capacity” allows for both “personnel managers” and “function managers.” *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word “manager,” the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 204.5(j)(4)(i). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 204.5(j)(2). Here, the Petitioner did not state that the Beneficiary would supervise subordinate employees. While the Petitioner did submit an organizational chart that seems to indicate that the Beneficiary would oversee other employees, it is not translated and the organizational structure is not explained. The Petitioner did not provide evidence indicating that the Beneficiary had the authority to control the work of subordinate employees including the authority to hire, fire and make personnel decisions, nor did the Petitioner indicate that he controlled the work of other supervisory, professional, or managerial employees. For these reasons, the Petitioner has not established the Beneficiary was employed as a personnel manager.

The term “function manager” applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an “essential function” within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term “essential function” is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary’s daily duties attributed to managing the essential function. *See* 8 C.F.R. § 204.5(j)(5). In addition, the petitioner’s description of the beneficiary’s daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial 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).

In this matter, the Petitioner has not provided evidence that the Beneficiary will manage an essential function. The Petitioner generally asserts the Beneficiary will manage the functions of the foreign company and operate at a senior level in the organization’s hierarchy, but it has not defined a specific function to be managed or established that the Beneficiary primarily performs managerial duties in general, or with respect to a specific, defined function. The Petitioner has also not established that the subordinate staff of the company performed the day-to-day tasks of the function managed, thereby allowing the Beneficiary to manage the function and not perform the function. Accordingly, we find that the Petitioner has not provided reliable, probative evidence sufficient to establish that the Beneficiary was employed abroad as a function manager.

Finally, the Petitioner also indicates that the Beneficiary worked abroad as an executive. As noted, the term “executive capacity” focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B).

Here, the Petitioner emphasizes that Beneficiary’s title as Managing Director as evidence of his performance of qualifying executive duties. As discussed, incorporating our discussion regarding the deficiencies of the position description and absence of documentation concerning other employees, we find that the totality of the evidence does not support a finding that the Beneficiary was employed as an executive who primarily focused on the broad goals and policies of the organization rather than on its day-to-day operations.

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).

Here, given the overly broad breakdown of the Beneficiary’s duties, the lack of percentages of time devoted to those duties, the prevalence of non-qualifying duties in his position description, and the lack of subordinate staff to perform many essential day-to-day functions of the company, the Petitioner has not established by a preponderance of the evidence that the Beneficiary was employed in a qualifying managerial or executive capacity.

IV. QUALIFYING RELATIONSHIP

Beyond the Director’s decision, we also find that the Petitioner has not established that it 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. The Petitioner must show that the Beneficiary’s foreign employer and the proposed U.S. employer are the same employer (i.e. related as a “parent and subsidiary” or as “affiliates.”) See generally section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(3)(i)(B).

The pertinent regulations at 8 C.F.R. § 204.5(2) define the terms “affiliate” and “subsidiary” as follows:

Affiliate means:

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

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- (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;

....

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.

A. Evidence of Record

The Petitioner asserts that is related to [REDACTED] located in Mexico.

The record contains a Certificate of Filing from the Office of the Secretary of State of Texas indicating that the Petitioner was formed as an entity on [REDACTED]. The Petitioner's Articles of Incorporation dated [REDACTED] authorize the issuance of 5000 shares with a par value of \$1.00 each and identify the Beneficiary as one of two Directors of the corporation.³ In a document titled [REDACTED] also dated [REDACTED] the Petitioner's ownership is described as the Beneficiary owning 600 of the available 5000 shares and [REDACTED] owning 400 of the available shares. The "Stock Ledger and Capitalization Summary" submitted shows that the Beneficiary purchased 600 shares on [REDACTED] and that [REDACTED] purchased 400 shares on the same day. The stock ledger does not indicate that any additional shares have been purchased to date. The Petitioner also submitted stock certificates that corroborate this information.

The record also contains IRS Form 1120 U.S. Corporation Income Tax Return for the Petitioner for the years 2008-2011 and 2013. According to the 2008 IRS Form 1120, Schedule K, the Beneficiary reportedly owned 100 percent of the voting stock of the Petitioner. For for 2009, 2010 and 2013, IRS Form 1120 Schedule G, Information of Certain Persons Owning the Corporation's Voting Stock, the Beneficiary is listed as the 100% owner of the Petitioner's voting stock. Furthermore, for the years 2009, 2010, and 2013, the Form 1120 Schedule E, Part 1, indicates that the Beneficiary was the owner of 100% of the common stock of the organization. and IRS Form 1125-E, Compensation of Officers for 2011 lists the Beneficiary as the 100% owner of the common stock, devoting 50% of time to the corporation.

³ A nearly identical document entitled, "Articles of Incorporation," is contained in the record; however, this document pertains to a corporation called [REDACTED]. The Beneficiary is listed as a Director of this corporation also and both corporations have the same registered office address of [REDACTED] Texas.

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The Petitioner also submitted a "verification" from [REDACTED] Certified Public Accountant, dated July 1, 2010, attesting to the relationship between the Petitioner and the foreign entity, [REDACTED]. This document indicates that the Beneficiary owns a 60% interest in the Petitioner and that the Petitioner was incorporated on February 15, 2006. This document also states that the foreign entity was incorporated [REDACTED] in [REDACTED] Mexico, and that the Beneficiary is one of two shareholders with a 50% interest in the foreign entity.

Regarding the ownership of the foreign entity, the Petitioner submitted copies of the foreign entity's amended Articles of Incorporation of the foreign entity dated December 12, 2008. The amendment indicates that as of that date, the foreign entity had the following ownership structure:

SHAREHOLDER	"A" STOCK	"B" STOCK	TOTAL STOCK	AMOUNT
[REDACTED]	25	2,755	2,780	\$ 2,780,000.00
[REDACTED]	25	2,756	2,781	\$ 2,781,000.00
[REDACTED]	0	439	439	\$439,000.00
TOTALS	50	5,950	6,000	\$ 6,000,000.00

B. Analysis

Upon review of the record, including materials submitted in support of the appeal, we conclude that the Petitioner did not establish that it 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").

In this case, the Petitioner does not state the basis of the qualifying relationship. However, being a separate legal entity, the Petitioner does not qualify as a branch of the foreign entity, and absent any indication in the evidence of record that the foreign entity owns the Petitioner, or vice versa, the two entities do not appear to be related as parent and subsidiary. Rather, based on the evidence submitted, the Petitioner appears to assert that the Petitioner and foreign entity have an affiliate relationship. However, the record contains inconsistent and incomplete evidence regarding the Petitioner and foreign entity's ownership, such that we are precluded from determining that the two entities qualify as affiliates as that term is defined at 8 C.F.R. § 204.5(j)(2).

First, the information submitted in regards to the Petitioner's ownership is inconsistent. Specifically, the Articles of Incorporation, stock ledger and capitalization summary, and stock certificates all state that the Beneficiary owned 60 percent of the 1000 issued shares as of February 2006. However, all of the tax documents noted above, filed from 2008 to 2013, state that the Beneficiary owns 100 percent of the Petitioner's stock. The stock ledger and stock certificates do not indicate that any stock has been transferred, sold, or issued since February 15, 2006; therefore, it is unclear how the Beneficiary's ownership grew from 60 to 100 percent. Moreover, in a letter dated July 1, 2010, the Petitioner's CPA attests that the Beneficiary again owns 60 percent of the Petitioner's issued stock. Here, the Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The absence of any explanation as to the ownership changes raises doubt about the veracity of the information provided. *Id.* Therefore, based on the evidence available in the record, we cannot determine the facts of ownership and/or control of the Petitioner.

Similarly, we are unable to determine the ownership structure of the foreign entity. While the Petitioner asserts that the Beneficiary owns 50 percent of the foreign entity, the December 2008 amended Articles of Incorporation indicate that the Beneficiary owns less than 50 percent of the outstanding interest in the foreign entity. Thus, absent additional evidence, we cannot conclude that the Beneficiary has a majority ownership interest or control over the foreign entity, as asserted by the Petitioner.

Absent sufficient information to determine the true ownership structures of the Petitioner and foreign entity, we cannot find that the Petitioner has a qualifying relationship with the Beneficiary's claimed foreign employer. For this additional reason, the petition cannot be approved.

V. CONCLUSION

We will dismiss the appeal 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, the Petitioner has not met that burden.

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ORDER: The appeal is dismissed.

Cite as *Matter of F-T- Inc.*, ID# 14540 (AAO Apr. 25, 2016)