U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-S-P-, LLC

DATE: JUNE 17, 2016

CERTIFICATION OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a New Jersey entity operating as an automotive spare parts distributor, seeks to employ the Beneficiary permanently as its general director. *See* Immigration and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). The employment-based immigrant classification of multinational manager or executive allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work in an executive or managerial capacity.

The Director, Texas Service Center, denied the petition. The petitioner subsequently appealed this decision and, upon review, we remanded it for further consideration and entry of a new decision. The Director again denied the visa petition, concluding that the Beneficiary, as the Petitioner's sole owner, would not receive "only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization" as required by the Act's definition of "executive capacity." *See* Section 101(a)(44)(B)(iv) of the Act, 8 U.S.C. § 1101(a)(44)(B)(iv). The Director certified his decision to our office for review.

The Petitioner provided no further evidence or information pertaining to the issue cited in the Director's certified decision. Accordingly, we will assess the Petitioner's eligibility on the basis of the evidence that is currently on record.

Upon *de novo* review, we will affirm the Director's findings and deny the petition on certification.

I. LEGAL FRAMEWORK

A U.S. employer may file Form I-140, Immigrant Petition for Alien Worker, to classify a beneficiary as a multinational executive or manager under section 203(b)(1)(C) of the Act.

Section 203(b)(1) of the Act states the following with regard to subparagraph C:

> (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.

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The primary issue before us is whether the Petitioner meets all of the requirements of the four-prong statutory definition of executive capacity, despite the Beneficiary's sole ownership of the petitioning entity.[1]

Section 101(a)(44)(B) of the Act defines the term "executive capacity" as "an assignment within an organization in which the employee primarily":

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

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

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.

[1] The petitioner does not claim that the Beneficiary will be employed in a managerial capacity. As such, our analysis will be limited to whether the Beneficiary will be employed in an executive capacity.

A. Evidence of Record

The Petitioner filed the Form I-140 on March 5, 2013. The Petitioner indicated that it had nine employees and claimed a gross annual income of $17,494,994 at the time of filing. The Beneficiary previously worked for the Petitioner's affiliate, in Russia and, as noted above, the Petitioner seeks to permanently transfer him to the United States to work as its general director. The Petitioner provided supporting evidence, including: (1) the Petitioner's business plan stating that the Beneficiary is the sole owner; (2) the Petitioner's organizational chart showing the Beneficiary at the top of an organizational hierarchy consisting of two direct subordinates (i.e., an unnamed warehouse supervisor and an unnamed general operations supervisor) and an undisclosed number of warehouse employees; (3) the Petitioner's federal quarterly tax returns for 2012; (4) purchase and corporate documents showing the Petitioner's operating agreement listing the Beneficiary as its sole member, dated October 8, 2010; (5) a contract, dated January 25, 2010, between the Petitioner as seller and as buyer of auto parts; (6) a share agreement, dated July 27, 2009, showing the Beneficiary holding 50% of that company's shares and two other individuals evenly splitting the remaining 50%; (7) a contract, dated January 11, 2010, between as seller and as buyer of "spare parts" the nature of which was not specifically identified; and (8) 2012 financial statement, lease, and organizational chart, showing the Beneficiary at the top of organization.

On April 5, 2013, the Director issued a request for evidence (RFE), requesting, in part, additional information pertaining to the Beneficiary's proposed position with the Petitioner. Specifically, the Petitioner was instructed to provide a list of the Beneficiary's specific daily job duties and the percentage of time the Beneficiary will spend carrying out each duty. The Director also asked the Petitioner to provide its organizational chart with the names and position titles of its employees, brief job descriptions for all employees, and evidence of wages paid to the employees, such as IRS Form W-2 statements or the Petitioner's recently filed quarterly tax returns.

In response, the Petitioner provided a statement, dated June 24, 2013, which included the Beneficiary's job duties during his tenure as general director of in Russia as well as his proposed job duties with the Petitioner. The Petitioner also listed 15 supporting exhibits that accompanied its statement, including its 2012 W-2 forms, the Beneficiary's 2011 IRS Form 1040, Schedule C, reflecting a net profit of $120,743, and organizational charts for both the U.S. and foreign entities. The U.S. organizational chart depicted the Beneficiary at the top of the hierarchy as the Petitioner's owner, followed by the Beneficiary's two subordinates, as the operations manager and as the warehouse manager. The chart shows the operations and warehouse managers jointly overseeing seven general warehouse employees.

On September 16, 2013, the Director denied the petition, concluding that the Petitioner is a mere agent of its foreign affiliate and therefore not doing business as defined in the regulations. In reaching this conclusion the Director relied heavily on the Petitioner's ownership and its affiliate relationship with the Beneficiary's former employer abroad. The Director's consideration of these factors led him to conclude "that the petitioner is merely an agent of the foreign business because of

common ownership and full power over executive personnel assignment and marketing and operational policies."

The Petitioner appealed the Director's decision, and on December 31, 2013, we issued a decision withdrawing the Director's conclusion, which was based on an improper reading of the regulatory provisions that define the term "doing business." We further found that the record contained unresolved questions pertaining to the Beneficiary's proposed employment with the Petitioner and remanded the matter back to the service center for further consideration after the issuance of a second RFE. We instructed the Director to request clarifying information with regard to the Beneficiary's proposed position. Accordingly, the Director issued an RFE on April 29, 2014. The record shows that the Petitioner submitted a timely response, which included a new percentage breakdown of the Beneficiary's duties and an organizational chart, indicating that the Petitioner's daily operational tasks would be allocated among the organization's work force.

Notwithstanding the evidence submitted, the Director again denied the petition in a decision dated August 4, 2014, concluding that the Beneficiary, as the Petitioner's sole owner, may not be considered an employee of the petitioning organization. Specifically, the Director found that while the Petitioner met the first three prongs of the statutory definition of executive capacity, it did not meet the fourth prong, which requires the Petitioner to demonstrate that the Beneficiary would be subject to supervision from higher level executives, a board of directors, or stockholders of the organization. *See* section 101(a)(44)(B)(iv) of the Act. The Director cited a Supreme Court decision in support of the assertion that a worker may only be defined as an "employee" if he or she is subject to the organization's control. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448-49 (2003) ("Clackamas"). The Director found that the Beneficiary is not controlled by the Petitioner because "there is no proposed individual or board of directors that will supervise the beneficiary's work or that has the authority to hire or fire the beneficiary." In light of this finding, the Director concluded that the Petitioner did not demonstrate that the Beneficiary's job duties meet the definition of executive capacity, and certified his decision to us.

On February 25, 2016, a USCIS officer conducted a site visit of the Petitioner's premises in New Jersey during which the officer interviewed the Petitioner's employee, The officer asked a number of questions in an effort to verify the validity of the Petitioner's claim that the Beneficiary would be employed in the United States in an executive capacity. Among the information the USCIS officer requested was full job title, to which responded that he is "manager – everything right now," thus indicating that he was the Petitioner's only managerial employee. also stated that the company currently has four employees, including himself and three warehouse workers, whose names he listed as and stated that he also performs the Petitioner's administrative and support functions. We note that responses regarding the Petitioner's staffing are inconsistent with the Petitioner's organizational chart, which identified as a warehouse manager and as the Petitioner's operational manager. The organizational chart also indicated that the Petitioner has a total of nine employees, not four.

When asked about role within the petitioning organization, stated that was fired. When asked why the record contains a zoning use permit, dated October 13, 2010, naming as the Petitioner's owner, claimed that he has been attempting "to fix the situation" and claimed that opened the warehouse out of which the Petitioner operates and "put it under his name." When questioned about his knowledge of the Petitioner's ownership, stated that he believed the Beneficiary to be the Petitioner's sole owner. When asked to describe the Beneficiary's proposed position, stated that the Beneficiary "tells people what to do, pays the bills, gets the money, [and] credit cards are in his name."

We will assess the Petitioner's eligibility on the basis of evidence that is currently on record, including any evidence or information provided in relation to the site visit.

B. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal and the site visit, we conclude that the Beneficiary does not qualify for the benefit sought.

1. Employer-Employee Relationship

As a threshold matter, we note that while the Director's four-prong analysis of the definition of executive capacity is highly relevant to the issue of the Petitioner's eligibility, we find that this discussion is secondary to a preliminary determination of whether the Petitioner meets the more basic statutory criteria discussed at section 203(b)(1)(C) of the Act, which states that only aliens who were "employed" abroad and are coming to the United States "to continue to render services to the same employer or to an affiliate or subsidiary thereof" will merit classification as a multinational manager or executive. Also, section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), only permits an "employer desiring and intending to employ within the United States an alien" to file an immigrant petition seeking classification under section 203(b)(1)(C) of the Act. This is in contrast to provisions in the Act, such as section 204(a)(1)(E) and (H), which permit the alien to file an immigrant petition on behalf of himself or herself.[2]

Further, the term "executive capacity," which has been codified and incorporated into the regulations at 8 C.F.R. § 204.5(j)(2), specifically applies solely to "the employee" of the "United States employer" filing the petition on behalf of a beneficiary. *See* section 101(a)(44)(B) of the Act; 8 C.F.R. § 204.5(j)(1), (2). Only upon establishing that the Petitioner and the Beneficiary meet this basic criteria, where the Petitioner is the employer and the Beneficiary is the employee on whose behalf the Petitioner files the Form I-140, would there be a need to conduct a further analysis of the given facts within the framework of the four-prong definition of executive capacity. If it is

[2] Of particular note, Congress enacted sections 203(b)(5) and 204(a)(1)(H) of the Act to permit an alien entrepreneur "engaging in a new commercial enterprise" to immigrate to the United States provided certain requirements were met, including employment creation.

determined that an employer-employee relationship does not exist between the Petitioner and the Beneficiary, this deficiency, by itself, would serve as a sufficient basis for denying the petition.

Therefore, applying the above reasoning to the matter at hand, the first step in our analysis will be to determine whether the Petitioner and the Beneficiary have an employer-employee relationship. As indicated above, section 203(b)(1)(C) requires the Beneficiary to have been "employed" abroad and to be coming to the United States for the purpose of rendering his services to the same or a related "employer" in the United States in a managerial or executive capacity.[3] Section 101(a)(44), 8 U.S.C. § 1101(a)(44), defines both managerial and executive capacity as an assignment within an organization in which an "employee" performs certain enumerated qualifying duties. The Supreme Court has determined that where the applicable federal law does not define "employee," the term should be construed as "intend[ing] to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) ("*Darden*") (quoting *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) ("*C.C.N.V.*")). The Court stated:

> "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

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[3] We note there is existing precedent case law, namely *Matter of Allen Gee, Inc.*, 17 I&N Dec. 296 (Comm'r 1979), and *Matter of Aphrodite*, 17 I&N Dec. 530 (Reg'l Comm'r 1980), that is relevant to the issue discussed here in this matter. In *Matter of Allen Gee, Inc.*, the Regional Commissioner determined that, as the petitioning corporation "is a legal entity distinct from its sole stockholder," it may "petition for the beneficiary's services." Similarly, in *Matter of Aphrodite*, 17 I&N Dec. at 531, the Commissioner focused on the corporation's separate legal existence from that of its shareholder and pointed out that the term "employee" was not used in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L).

However, both decisions were issued prior to the Immigration Act of 1990 ("IMMACT90"), which codified the definitions for managerial and executive capacity. *See* Pub. L. No. 101-649, § 123, 104 Stat. 4978, § 123 (1990). It is critical to note that both definitions in the Act now incorporate the term "employee" in referring to the beneficiary as one who assumes an assignment with an organization in a managerial or executive capacity. *Id.*; section 101(a)(44) of the Act. Therefore, while the holdings in *Matter of Allen Gee, Inc.* and *Matter of Aphrodite* were in line with the statutory provisions that were in effect at the time those decisions were issued, the changes that resulted from the enactment of IMMACT 90 indicate that our current contemplation of the term "employee" within the scope of an employer-employee relationship between the Petitioner and the Beneficiary is inherent to determining whether the Petitioner meets the current eligibility criteria. That said, these prior precedent decisions remain instructive as to whether a petitioner may seek classification for a beneficiary who has a substantial ownership interest in the organization; they were only superseded by statute to the extent they held or implied that such a beneficiary need not be an "employee" of the petitioning organization to qualify as a multinational manager or executive.

Darden, 503 U.S. at 323-324 (quoting *C.C.N.V.*, 490 U.S. at 751-752); *see also Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538 U.S. 440, 445, 447 & n.5 (2003). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . *all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.*" *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)) (emphasis added).

In *Clackamas*, the Supreme Court articulated the following factors to be weighed in determining whether an individual with an ownership interest is an employee:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas, 538 U.S. at 449-450 (deferring to the factors enumerated in the Equal Employment Opportunity Commission's *Compliance Manual* § 605:0009 (EEOC 2000) (currently cited as § 2-III(A)(1)(d)) for determining "whether [a partner, officer, member of a board of directors, or major shareholder] acts independently and participates in managing the organization, or whether the individual is subject to the organization's control," and accordingly whether the individual qualifies as an employee).

As with the common-law factors listed in *Darden*, the factors relevant to the inquiry of whether a shareholder-director is an employee are likewise not exhaustive. *Clackamas*, 538 U.S. at 450 n.10 (citing *Darden*, 503 U.S. at 324). Not all of the listed criteria need be met; however, the fact finder must weigh its assessment of the combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee relationship. *See id.* at 448-449.

The fact that a "person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he or she is an employee or a proprietor." *Id.* at 450; *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988) (explaining that a job title alone is not determinative of whether one is employed in an executive or managerial capacity). Likewise, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather,

as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

As indicated above, it is critical to consider not only the factor of ownership, but also the factor of control when making this determination, as neither factor, by itself is sufficient to determine whether an employer-employee relationship exists between any given petitioner and beneficiary. In other words, the fact that a beneficiary owns the majority or all of a petitioning entity's shares does not automatically lead to the conclusion that the Petitioner and the Beneficiary do not have an employer-employee relationship.

After reviewing these factors of control under the common law of agency as articulated in *Darden* and *Clackamas* and applying them to the evidence presented in this matter, we find that the Petitioner has not established that it will be a "United States employer" having an employer-employee relationship with the Beneficiary as an "employee" who would be employed by the Petitioner in a managerial or executive capacity. According to the Petitioner's original supporting statement, dated February 25, 2013, the Beneficiary "owns and controls 100%" of the Petitioning entity and there are "no higher level figures" above the Beneficiary within the organization, as illustrated in the Petitioner's organizational chart. Although the Petitioner indicated at page three, section 2.1 of its business plan that it "contemplates admitting a number of outside private investors who will own a small minority share of the company," there is no indication that the Beneficiary will answer or irrevocably cede control to any other.

Further, in its original RFE response statement, dated June 24, 2013, the Petitioner reiterated that in his role as the general director, the Beneficiary "is the sole executive in charge of running" the U.S. entity. In a supporting organizational chart, the Petitioner once again depicted the Beneficiary at the top of its organizational hierarchy as owner and single member of the organization, neither subordinate to nor controlled by any other individual or board of directors. Lastly, in its most recent RFE response statement, dated July 22, 2014, the Petitioner remained consistent with regard to the Beneficiary's role, referring to the Beneficiary as the Petitioner's sole owner, who "handles management of the company's general operations, financial oversight, and growth."

This information is consistent with the statements provided by [redacted] during the USCIS site visit, as well as other supporting evidence, including a document titled, "Bill of Sale and Assignment of Membership Interest," in which the Beneficiary's sole signature appeared as the buyer of membership interest, and the Petitioner's certificate of amendment, which officially changed the Petitioner's name from [redacted] to '[redacted] and which also contained the Beneficiary's sole signature as the Petitioner's only managing member.

Considered cumulatively, these statements and corroborating evidence support the finding that the Beneficiary both owns and controls the petitioning entity wherein he will assume a role as the Petitioner's top-most official and will not be subordinate to or controlled by any other individual(s) or managing board of directors. There is no evidence that anyone other than the Beneficiary himself

is in a position to exercise any control over the work he will perform or that the Beneficiary was hired or is subject to firing by another individual or board. Although it appears that the Petitioner may intend for the Beneficiary to be an employee, the Beneficiary does not report to any higher authority. Further and absent evidence to the contrary, the beneficiary will greatly influence the organization as the final and ultimate decision maker and will be the only person sharing in the profits, losses, and liabilities of the Petitioner. As such and for all practical purposes, the record does not establish that the Beneficiary, who will control the organization, set the rules governing his work, and share in all profits and losses, will be an "employee" of the Petitioner.

For these reasons, we conclude that the Beneficiary is not an employee and does not have an employer-employee relationship with the Petitioner. Therefore, the Petitioner has not established that the Beneficiary meets the basic statutory criteria discussed at sections 101(a)(44) and 203(b)(1)(C) of the Act and is therefore ineligible for the immigrant classification sought herein.

2. Analysis of Executive Capacity Criteria

Notwithstanding the above conclusion, which effectively bars the Beneficiary from further consideration under the immigrant visa classification as a multinational executive given the facts as they existed at the time of filing,[4] we will address the Director's analysis of the four-prong statutory definition of executive capacity. Specifically, we will address the Director's finding that the petition must be denied because the evidence of record did not satisfy the fourth prong of the definition, which requires that the Beneficiary, in his capacity as the Petitioner's employee, receive only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B)(iv) of the Act.

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. 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 a beneficiary to direct and a 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 "executive" or "managerial" employee. A 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.*

[4] The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). This provision does not preclude or prejudice the Petitioner from refiling another petition on behalf of the Beneficiary if the facts change such that eligibility is established by a preponderance of the evidence.

After reviewing the record and the evidence pertaining to the Beneficiary's proposed position, the Director determined that the Beneficiary meets the first three prongs of the statutory definition of executive capacity in that he (1) directs the management of the company, (2) establishes the goals and policies of the company, and (3) exercises wide latitude in discretionary decision-making for the company. In reviewing the Director's underlying analysis, it appears that the primary basis for these findings was the Beneficiary's top-most leadership role as head of the petitioning organization. There is no indication that the Director considered other highly relevant factors, such as the Beneficiary's job duties, the Petitioner's staffing and that staff's job duties, or the complexity of the Petitioner's organizational hierarchy prior to determining that the Beneficiary would allocate his time primarily to executive job duties that involve directing the management of the organization, establishing the organization's goals and policies, or making discretionary business decisions on a daily basis.

While we agree that the Beneficiary's ownership and control of the petitioning entity and his top-most placement within the Petitioner's organizational hierarchy make it likely that he will direct the management of the organization, establish its goals and policies, and have the authority to make discretionary business decisions at all times, the record does not establish that the underlying job duties that the Beneficiary has and would continue to perform on a daily basis will be primarily executive in nature. As stated above, the Beneficiary will not be deemed an executive based solely on his executive title or his authority to "direct" the enterprise as its owner or sole "executive" or "manager." Instead, the Petitioner must establish that the daily duties the Beneficiary will primarily perform will be of an executive capacity as defined by the Act and its implementing regulations.

Turning to the Petitioner's RFE response statement, dated July 22, 2014, which contains the Beneficiary's job description, 25% of the Beneficiary's time would be allocated to general operations, including setting company employment guidelines, coordinating preparation of and making revisions to the employee handbook, evaluating and setting benchmarks, reviewing market conditions in the shipping industry to negotiate shipping rates and locating warehouses, and reviewing records for compliance with employment guidelines in the employee handbook. The Petitioner did not explain or provide evidence to support the need for the Beneficiary to continuously allocate his time on a daily, weekly, or even monthly basis to reviewing its employee handbook and looking for warehouse space, nor did the Petitioner establish that negotiating shipping rates and looking for warehouse space are tasks performed within an executive capacity. Moreover, there is no documentary evidence to corroborate the Beneficiary's role in negotiating with shipping companies, nor is there evidence to establish that the Petitioner actually acquired or had the business need to acquire warehouse space in addition to the space that had been acquired prior to the filing of the instant petition. The Petitioner cannot meet its burden of proof simply by claiming a fact to be true, without supporting documentary evidence. *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'l Comm'r 1972)); *see also Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

The Petitioner also stated that the Beneficiary would allocate 45% of his time to financial oversight, stating that this would include analyzing and managing income and spending, monitoring the Petitioner's legal and financial status through domestic and international outside legal counsel and accountants, and establishing financial goals and policies by reviewing the market and supplier and customer projections, reviewing shipping and revenue data, and developing importing and exporting policies. However, the Petitioner has not provided corroborating evidence such as invoices or wage documents to establish that it retains "international and domestic outside legal counsel," nor does the record contain documentation summarizing the specific financial services provided by the firm of CPA PC. In fact, while the record contains the Petitioner's 2012 financial statement and independent accountant's review report, both the report and the financial statement were provided by CPA, not by the accounting firm of Thus it remains unclear what job duties performs or what role he assumes in helping to relieve the Beneficiary from having to allocate a significant portion of his time to performing the Petitioner's non-qualifying operational tasks, such as billing and bookkeeping. In addition, the Petitioner has not established that the Beneficiary's involvement with supplier and customer projections constitutes job duties that are executive in nature.

Lastly, the Petitioner stated that the remaining 30% of the Beneficiary's time would be allocated to growing the Petitioner's business by opening and developing an additional subsidiary in China, growing a client base, negotiating with U.S. suppliers and manufacturers to create an export network, and attending worldwide trade shows. In general, the Petitioner stated that the Beneficiary guides company policies and work standards and creates and maintains relationships with suppliers and customers to ensure the company's profitability. We note, however, that other than the vague references to an additional subsidiary in China in the job description, the Petitioner did not provide corroborating documentary evidence to substantiate that the claimed subsidiary exists and, if so, when the Petitioner and/or Beneficiary acquired the claimed Chinese subsidiary. Further, without sufficient evidence that the Petitioner would be compensated for these services, it is unclear how the Beneficiary's work on behalf of a separate legal entity could be deemed to be work on behalf of the Petitioner.

In addition, we find that several anomalies or inconsistencies, which remain unresolved after the site visit, call into question the Petitioner's credibility, thus casting doubt over the validity of the Beneficiary's job description and the tasks the Beneficiary actually performs within the scope of its automotive parts distribution business.

First, when asked whether the Petitioner has offices in any locations other than New Jersey, responded in the negative, claiming that in New Jersey is the Petitioner's only location. However, this response is inconsistent with sales invoices that were issued by and the parts department, which were among the Petitioner's

most recent submissions and which show a second business addresses for the Petitioner at or NY.[5]

Next, when questioned about the company and the Petitioner's relationship with this company, was unable to respond, stating that he had never heard of the company, despite the Petitioner's prior submission of a contract, dated January 25, 2010, naming the Petitioner as the seller and as the buyer of auto parts. We further note that the contract between the Petitioner and refers to the Petitioner by the name However, the record shows that the certificate of amendment, which officially changed the Petitioner's name from to its current name – – was not filed until September 10, 2010. Moreover, a purchase agreement between the Beneficiary and owner of was not fully executed until it was signed by the Beneficiary on September 9, 2010. Thus, prior to such date, i.e., the Petitioner, did not exist.

The fact that the Petitioner provided a contract between itself and which predates the legal existence of an entity known as significantly undermines the validity of the contract. Further, as stated above, this inconsistency gives rise to doubt as to the validity of the Petitioner's claims and other supporting documents on record. 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).

Further, the fact that the Beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of 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). While the Beneficiary in this case likely exercises discretion over the Petitioner's day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, the position description alone is insufficient to establish that his actual duties, as of the date of filing, would be primarily managerial or executive in nature.

That is, we also consider the proposed position in light of the nature of the Petitioner's business, its organizational structure, and the availability of staff to carry out the Petitioner's daily operational tasks such that the Beneficiary could primarily perform managerial or executive duties as defined in the Act. Federal courts have agreed that in reviewing the relevance of the number of employees a Petitioner has, USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d at 42; *Q*

[5] According to publicly available information, either address appears to be a residential address for a single detached home.

Data Consulting, Inc. v. INS, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). Furthermore, 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.*, *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In the present matter, the information gathered during the USCIS site visit indicates that the Petitioner has significantly diminished in size such that it would not be able to support the Beneficiary in an executive capacity. Specifically, when questioned about the role of identified as the Petitioner's operations manager in its most recent organizational chart, stated that while employed by the Petitioner, performed administrative and human resource duties, paid bills and was tasked with "pick up." However, stated that was fired and, during later questioning, clarified the Petitioner's current organizational hierarchy consisted of himself and three warehouse workers, for a total of four employees, not including the Beneficiary.

This existing hierarchy of four subordinates includes less than half of the employees that the Petitioner originally claimed in the petition and depicted in a corresponding organizational chart. Based on the volume of business the Petitioner claims to be doing, which, according to the Petitioner, resulted in over $17 million in gross earnings, it is unclear how the Petitioner can sustain that level of business and continue to function with no operations manager and three fewer warehouse employees, while still supporting the Beneficiary in a primarily executive capacity. In other words, the record does not establish that the Petitioner is able to relieve the Beneficiary from having to allocate a considerable portion of his time to the performance of non-qualifying tasks given its significantly diminished support staff.

In light of the numerous documentary deficiencies discussed above, we disagree with the Director's finding that the Petitioner meets the first three prongs of the statutory definition of executive capacity, as we find that the record does not support the conclusion that the Beneficiary would allocate his time primarily to (1) directing the management of the company, (2) establishing the goals and policies of the company, and (3) exercising wide latitude in discretionary decision-making for the company.

Despite finding that the Director erred in his conclusion with regard to the first three prongs of the definition of executive capacity, we agree with the Director's finding and analysis with regard to the fourth prong of the definition, which requires that the Beneficiary receive only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization. Specifically, the Director pointed out that based on the evidence of record, there is no one within the Petitioner's organization who will supervise the Beneficiary; the Petitioner has no board of directors or other higher level figures to whom the Beneficiary would report; and the Petitioner's operating agreement names the Beneficiary as the sole managing member. In other words, the Beneficiary will not receive supervision or direction from anyone.

Taken out of context, a finding that the Beneficiary will receive no supervision or direction may appear on its face to satisfy this statutory requirement at section 101(a)(44)(B)(iv) of the Act. But while the fourth prong indicates that supervision over the Beneficiary should be limited, such that the Beneficiary can maintain the requisite level of authority to meet the criteria of the first three prongs, inherent to this fourth criterion is also a requirement that the Beneficiary, as an "employee," will receive some degree of supervision or direction from higher level executives, a board of directors, or stockholders of the organization. Therefore, as the Beneficiary does not report to any higher authority and is not subject to supervision from another individual or board of directors, the Petitioner has not established that it has satisfied section 101(a)(44)(B)(iv) of the Act.[6]

III. CONCLUSION

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 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The initial decision of the Director, Texas Service Center, dated August 4, 2014, is affirmed, and the petition is denied.

Cite as *Matter of C-S-P-, LLC*, ID# 10486 (AAO June 17, 2016)

[6] This conclusion is further supported by our primary finding above that the Petitioner does not have an employer-employee relationship with the Beneficiary and therefore does not meet the basic statutory criterion that the Beneficiary be an "employee" of the petitioning entity. *See* section 101(a)(44)(A) and (B); 8 C.F.R. § 204.5(j)(2) (defining executive capacity as an assignment in which an "employee" primarily performs certain duties).