



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

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

MATTER OF M-I-, INC.

DATE: JUNE 17, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a U.S. branch office operating as an industrial parts distributor, seeks to employ the Beneficiary as its branch manager 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, Nebraska Service Center, denied the petition, concluding that the Petitioner was ineligible based on the following findings: (1) the Beneficiary would not be employed in the United States in a managerial or executive capacity; and (2) the Beneficiary was employed abroad in a managerial or executive capacity. The Petitioner subsequently filed an appeal, which we summarily dismissed. The matter is now before us on a motion to reopen.

In its motion, the Petitioner asserts that we erred in summarily dismissing the appeal and offers evidence showing that a brief was submitted within the permitted 30-day period.¹

Upon *de novo* review, we will grant the motion for the purpose of considering the merits of the appeal and the evidence submitted in response to our recently issued request for evidence (RFE). However, as the Petitioner has not overcome the original grounds for denial, we will deny the motion.

¹ Upon review of the appeal, which was filed on November 12, 2013, we noted that despite the fact that the Petitioner marked Box 1(b) in Part 3 of the Form I-290B to indicate that a brief and/or additional evidence would be submitted within 30 days of the appeal, the record was devoid of any supporting evidence at the time of our review of the matter. Although the Petitioner filed a motion to reopen, which was accompanied by supporting evidence to show that an appeal brief was sent within the requisite 30-day time period, the Petitioner's evidence shows that the brief was sent to the U.S. Citizenship and Immigration Services office in Phoenix, Arizona. The regulations at 8 C.F.R. § 103.3(a)(2)(viii) and the Form I-290B instructions, which are incorporated into the regulations pursuant to 8 C.F.R. § 103.2(a)(1), expressly require the affected party to submit the brief or evidence directly to our office. As the Petitioner did not comply with these filing instructions when submitting its supporting evidence, we summarily dismissed the appeal based on the lack of supporting evidence discussing the basis for filing the appeal.

I. LAW

A United States employer may file Form I-140 to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager.

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.

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

As previously stated, the Director denied the petition based on a finding that the Petitioner did not establish that: (1) the Beneficiary will be employed in a managerial or executive capacity; and (2) the Beneficiary was employed abroad in a managerial or executive capacity. The Petitioner does not claim that the Beneficiary will be or has been employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary will be and has been employed in a managerial capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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.

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. *See* section 101(a)(44)(C) of the Act.

A. U.S. Employment in a Managerial Capacity

The regulation at 8 C.F.R. § 204.5(j)(5) requires the Petitioner to submit a statement which indicates that the Beneficiary is to be employed in the United States in a managerial or executive capacity. The statement must clearly describe the duties to be performed by the Beneficiary.

1. Evidence of Record

The record shows that the Petitioner filed the Form I-140 on April 10, 2013. The petition was accompanied by a supporting statement along with other supporting documents, including, but not limited to, the Petitioner's and the foreign branch office's respective organizational charts showing that the Beneficiary has and would continue to oversee employees who hold positions in the outside and inside sales groups. The U.S. branch's organizational chart shows an outside sales group comprised of four outside sales representatives and an inside sales group comprised of three customer service representatives and one office manager. The Petitioner also provided the following description of the Beneficiary's proposed position with the U.S. branch office:

[The Beneficiary] will continue to be responsible for managing and overseeing the overall direction of the [Petitioner's] Arizona branch office. He will continue to be responsible for creating and leading a team that continually increases its market share of available business at acceptable net profit returns. His primary roles will continue to include managing the overall success of the branch by maximizing profitability and generating sales individually and collectively through the leadership of others. He will continue to utilize his personal managerial experience and professional training, as well as the tools and policies provided by [the Petitioner], in conjunction with the talents of the branch team to successfully manage the performance of the branch. In this managerial capacity, [the Beneficiary] will continue to implement corporate initiatives and policies and procedures to support the overall direction of [the Petitioner]. He will also continue to execute decision-making that supports both short[-] and long[-]term goals.

(b)(6)

Matter of M-I, Inc.

[The Beneficiary]'s managerial duties will continue to embrace a number of accountabilities, including business planning, people management, financial responsibility, sales, training, and customer service. He will continue to direct staff in refining, developing and implementing branch programs in conjunction with the business plans of the branch [He] will continue to ensure compliance with [redacted] and [the Petitioner's] HR policies . . . for all direct reports and branch employees. He will continue to set an example of proper conduct and professionalism in the branch with employees, customers, and suppliers. . . . [He] will continue to provide direct supervision to the . . . Branch Operations Manager and Account Representatives as well as other direct reports. He will continue to complete and communicate performance evaluations . . . and provide coaching, training[,] and guidance to [the Petitioner's] employees. [The Beneficiary] will continue to assume responsibility for recruiting, hiring, and terminating employees In addition, he will continue to attend job-related training sessions regularly to continue professional growth and development.

As Branch Manager, [the Beneficiary] assumes overall accountability for all financial results, sales, expenses, and asset control of the [redacted] Branch. He will continue to be responsible for developing an effective relationship with the Operations Manager Further, he is required to understand and monitor Key Performance Indicators. [He] will continue to ensure compliance with [the Petitioner's] Performance Standards, with proper recognition of investment for long[-] growth. In addition, he will continue to adhere to [the Petitioner's] pricing policies for contracts. [He] will continue to be responsible for pricing strategy. [The Beneficiary] will continue to prepare the annual budget and will lead the branch to achieve quota. He will continue to review the financial package monthly with the Operations Manager to ensure that the [redacted] branch meets the established profit goals. [He] will also continue to analyze expenses and determine ways to reduce costs. [He] will continue to ensure reasonableness and accuracy of financial statements. Further, he will continue to assume overall accountability for branch and consignment inventory [The Beneficiary] will also continue to assume responsibility for A/R collections and Asset Management within the branch. . . .

In addition, [the Beneficiary] will continue to lead the sales team to retain current customers and develop new, profitable customers. He will continue to liaise with current accounts to ensure their satisfaction and understand both current and future needs. In addition, [he] will he will continue to create materials for and conduct sales presentations to customers. He will continue to maintain a personal sales territory commensurate with the size of the branch[,] which includes active and potentially active customers. Further, he will continue to be responsible for identifying potential new accounts and appropriate geographic penetration. [H]e will continue to assign new accounts and reassign current accounts He will also be responsible for maintaining key local supplier relationships. Further, he will continue to be responsible for leading the long[-] and short-term planning necessary to implement

branch[-]specific programs that meet the needs of [the Petitioner's] customers. Further, he will continue to escalate decisions to appropriate Division Management and Corporate support . . . as needed.

In his managerial capacity, [the Beneficiary] assumes overall responsibility for ensuring a high-level of customer service, including onsite technical assistance, resolution of problems surrounding delivery of products and troubleshooting for customers. He will continue to ensure adherence to all customer agreements and ensure coverage for other branch positions as needed. [The Beneficiary] will continue to manage and oversee six (6) professionals, including the Branch Operations Manager and Account Representatives. . . .

On August 29, 2013, the Director issued a notice of intent to deny (NOID), informing the Petitioner of certain adverse findings pertaining, in part, to the Beneficiary's proposed employment with the U.S. branch office. First, the Director pointed to a numerical discrepancy between the initial supporting statement, which claimed six employees, and the Petitioner's supporting organizational chart, which identified eight employees. Next, the Director focused on information obtained from the parent company's website, which included job requirements for positions that comprise the petitioning branch office, finding that the Beneficiary's subordinates are not supervisory, professional, or managerial employees and that the Beneficiary would therefore be a first-line supervisor rather than someone who is employed in a managerial or executive capacity. The Director conducted a similar analysis of the Beneficiary's subordinate staff at the Canadian branch where the Beneficiary was formerly employed and reached the same conclusion with regard to the Beneficiary's employment capacity in his former position with the Canadian branch office.

In response, the petitioner provided a statement challenging the finding that the Beneficiary's foreign and proposed positions do not involve the oversight of professional subordinate employees. The Petitioner contended that the Director failed to consider alternative criteria, such as whether the Beneficiary's foreign and proposed positions involved and would involve managing an essential function or overseeing subordinates whose positions are managerial or supervisory. The Petitioner reviewed findings in our previously issued, unpublished decisions to support its assertions for a favorable finding. The Petitioner also objected to the Director's reliance on "job postings of a different company," contending that the job requirements the Director addressed in the NOID did not pertain to any of the positions within the Canadian or U.S. branch offices where the Beneficiary was formerly employed and where he is currently employed. The Petitioner stated that the Beneficiary currently supervises at least one professional and one supervisory employee and pointed out that several other subordinates also have experience in the field. The Petitioner ultimately stated, however, that a discussion of whether the Beneficiary's subordinates are professional is unnecessary in light of an alternative means of meeting the statutory criteria by establishing that the Beneficiary manages "a department or subdivision or a critical function of the organization."

After reviewing the evidence and the Petitioner's response to the previously issued NOID, the Director determined that the Petitioner did not overcome the previously issued adverse findings and denied the petition, on October 7, 2013. The Director noted that the Petitioner did not address the

(b)(6)

Matter of M-I, Inc.

discrepancy between information that was offered in the original supporting statement and information in the Petitioner's organizational chart, pointing out that the two documents are inconsistent as to the number of employees the petitioning branch office had at the time of filing. The Director also clarified the basis for his prior discussion of employee job requirements, pointing out that the information was obtained directly from the Petitioner's parent company's website, which contained job listings and position requirements that are directly related to positions within the Petitioner's organization, not that of its parent entity. Therefore, the Director expressly rejected the Petitioner's assertion that information pertaining to employee job listings and position requirements was obtained from "an unrelated web browsing."

The Director continued with his analysis, finding that the record lacked sufficient evidence to show that the Beneficiary's subordinates are managerial or supervisory employees and that the Petitioner's organizational chart actually contradicts such an assertion, as it does not show that any of the employees who directly report to the Beneficiary have direct subordinates of their own, regardless of position titles they may hold. While the Director acknowledged that the definition of managerial capacity provides an alternative means for meeting the statutory criteria even if the Beneficiary does not oversee the work of a supervisory, professional, or managerial staff, he found that the Petitioner failed to provide evidence sufficient to establish that it meets the alternative criteria for function manager. Lastly, the Director pointed out that the Petitioner's NOID response statement and its organizational chart, both of which indicate that the Beneficiary would report to the Petitioner's vice president/general manager, are inconsistent with the original supporting statement, where the petitioner indicated that the Beneficiary would report directly to the [REDACTED] Division Manager, a position that was not identified in the Petitioner's organizational chart.

The Petitioner appealed the Director's decision and the appeal was dismissed in a decision dated July 24, 2014. In the supporting appeal brief, the Petitioner contended that the Beneficiary meets the statutory criteria as both a personnel and a function manager. The Petitioner resolved various discrepancies pointed out in the Director's decision with regard to position titles and number of employees at the U.S. branch office and objected to the Director's reliance on educational backgrounds as a means for finding that the Beneficiary's subordinates are not professional employees. The Petitioner applied a different definition of the term "professional" than the one used in the Director's decision.

On motion, the Petitioner provides evidence to show that an appellate brief and evidence had been previously submitted and were intended to supplement the Petitioner's appeal. The brief poses arguments that challenge the Director's earlier findings and contends that the Beneficiary's former position with the foreign entity as well as his proposed position with the Petitioner fit the criteria of employment within a managerial capacity.

Upon our initial review of the Petitioner's motion, we determined that further evidence was needed to clarify certain aspects of the claims pertaining to the Beneficiary's employment capacity. Accordingly, on December 7, 2015, we issued an RFE. We notified the Petitioner that the record as presently constituted does not warrant approval of the petition. We asked the Petitioner to provide a list of the Beneficiary's daily tasks with the foreign and U.S. branch offices. We also asked that the

(b)(6)

Matter of M-I, Inc.

Petitioner provide either a percentage or an hourly breakdown indicating the amount of time the Beneficiary allocated to his job duties abroad and the amount of time he would allocate to his job duties with the U.S. branch office. Finally, we asked for evidence pertaining to the Beneficiary's subordinate employees, including their job duties and proof that the employees and/or contractors hired to perform various daily operational tasks were actually paid for their services.

The Petitioner's response includes a statement in which the Petitioner restates assertions that were originally raised in the appeal brief and addresses each of the four prongs that comprise the definition of managerial capacity, offering its own interpretation of the legal definition. The Petitioner also provides an additional organizational chart showing the Beneficiary in a supervisory position over one mining sales representative, two outside sales representatives, one fluid power specialist, and one operations manager, the latter of whom is depicted as overseeing three inside sales representatives and one accounts receivable employee. In addition, the Petitioner provides a company-generated job description for the branch manager position, showing that the branch manager performs job duties in each of six key categories, including sales, customer service, business planning, financial responsibility, people management, and training. In a separate document, the Petitioner provides the following percentage breakdown:

- [The Beneficiary] exercises discretionary authority over day-to[-]day operations. 55%
- He directs, manages and oversees all of the financial and administrative matters of the company. 15%
- He is responsible for establishing the company's policies, procedures and principles by which the company operates in accordance with the [Petitioner's] operating strategies including: key drivers of performance and balancing short, medium, and long term objectives. 5%
- He oversaw employment and compliance to regulatory concerns and reporting. 1%
- [He] manages degreed professionals, including Outside and Inside Sales Representatives and Fluid Power Specialists[.] 10%
- [He] oversees the sales activities of the [redacted] branch.
- [He] reviews operational records and reports to project sales and determine[s] profitability. 1%
- [He] prepares budgets and approves budget expenditures. 1%
- [He] monitors customer preferences to determine focus of sales efforts. 1%
- [He] oversees and enforces the company Loss Prevention Program[.] 1%

Lastly, the Petitioner provides company-generated job descriptions for each of the positions listed as part of the U.S. branch office's organizational hierarchy.

2. Analysis

Upon review, and for the reasons stated below, we find that the Petitioner did not establish that the Beneficiary would be employed in a managerial capacity.

In general, when examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the description of the beneficiary's proposed job duties with the petitioning entity. *See* 8 C.F.R. § 204.5(j)(5). Published case law has determined that 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). We also consider the Beneficiary's job description in the context of the Petitioner's organizational structure, the duties of the Beneficiary's subordinates, and any other relevant factors that may contribute to a comprehensive understanding of the Beneficiary's job duties and role within the petitioning entity.

In addition, while performing non-qualifying tasks that are necessary to produce a product or service will not automatically disqualify the Beneficiary where such tasks do not comprise the majority of the Beneficiary's duties, the Petitioner still has the burden of establishing that the Beneficiary is "primarily" performing managerial or executive duties. *See* Section 101(a)(44) of the Act.

In the present matter, the job description offered in the Petitioner's original supporting statement does not establish that the Beneficiary's proposed employment would be primarily comprised of qualifying tasks within a managerial capacity as claimed. A number of the Beneficiary's job responsibilities are described in terms that are overly vague and thus preclude a meaningful understanding of the actual underlying tasks the Beneficiary would perform. For instance, the original job description stated that the Beneficiary would continue to "implement corporate initiatives and policies and procedures to support the overall direction of [the Petitioner]." However, the Petitioner did not specify any initiatives, policies, or procedures to explain more plainly what daily activities the Beneficiary would carry out. The Petitioner was similarly vague in claiming that the Beneficiary would be held accountable for the branch's finances, sales, training, and customer service. As the Petitioner did not list any specific job duties associated with these broad categories, which lack clarity as to the role the Beneficiary would assume with respect to sales, training, and customer service and do not specify the extent to which that role would require the Beneficiary to perform non-qualifying sales and customer service tasks or state how much time the Beneficiary would allocate to the performance of these operational tasks. In fact, in the supporting brief submitted with the motion, the Petitioner asserts that the Beneficiary provides "the local customer service." Even if customer service is an essential function of the organization, as the Petitioner claims, the Beneficiary must manage, rather than perform, the underlying duties of an essential function if function management is his primary responsibility. Contrary to the Petitioner's assertion, actually performing customer service tasks indicates that the Beneficiary would allocate an undisclosed amount of his time to carrying out non-qualifying operational tasks.

Further, without additional information, we cannot conclude that coaching and training subordinate employees can be deemed as tasks performed within a qualifying managerial capacity under the statutory definition. While the Petitioner indicated that the Beneficiary would "be responsible for developing an effective relationship with the [o]perations [m]anager," the nature of this responsibility is unclear, as the Petitioner did not explain what level of interaction would be required or what daily tasks the Beneficiary would perform in order to cultivate the desired relationship.

Next, while the Petitioner claims that the Beneficiary would be responsible for reviewing financial statements for accuracy and analyzing expenses to reduce costs, the Petitioner did not explain how the Beneficiary would obtain the information necessary to meet these responsibilities. In other words, the Petitioner did not offer any information to establish who within the branch would carry out the underlying operational tasks necessary to provide the Beneficiary with the information he would need to effectively carry out his oversight responsibilities. The Petitioner also did not clarify how the Beneficiary plans “to lead the sales team” in retaining current customers and acquiring new ones; nor did the Petitioner identify the Beneficiary’s specific role with respect to resolving delivery-related problems and “troubleshooting for customers.” Without full disclosure of the actual daily activities the Beneficiary would be expected to carry out with respect to marketing the Petitioner’s products and services, acquiring new customers, and servicing existing customers, we are unable to gauge what portion of the Beneficiary’s time would be allocated to tasks of a qualifying nature. 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.

As previously indicated, the Petitioner’s latest job description, which the Petitioner submitted in response to our RFE, states that 55% of the Beneficiary’s time would be spent exercising discretionary authority over the Petitioner’s daily operations. However, the Petitioner did not specify the actual components that are incorporated into this broad job responsibility, thus precluding us from being able to ascertain what functions comprise 55%, i.e., a majority, of the Beneficiary’s time. There, we find that this information is overly broad and thus lacks the information necessary to impart a meaningful understanding of the Beneficiary’s position and whether it possesses the characteristics of a position that is in a qualifying managerial capacity.

While no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, each petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. As previously stated, an employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act. In the present matter, as a result of the deficient job descriptions offered in support of this petition, we are precluded from making an informed determination as to the qualifying nature of the Beneficiary’s proposed position.

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. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. 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, that 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).

(b)(6)

Matter of M-I, Inc.

Despite the Petitioner's assertions, the fact that the Beneficiary manages or directs a business does not necessarily establish eligibility for classification as a multinational manager or executive 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 may exercise 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 not sufficient to establish that his actual duties, as of the date of filing, would be primarily managerial or executive in nature.

In the matter at hand, the Petitioner's initial supporting evidence included an organizational chart that did not demonstrate the Beneficiary's position as a manager of subordinates that are supervisory or managerial other than in position title. Based on the information provided in the chart, the outside sales representatives, the customer service representatives, and the office manager were similarly positioned within the Petitioner's organizational hierarchy. The fact that the original chart listed the office manager first among the inside sales staff is not a reliable basis for finding that the Beneficiary would oversee managerial employees, as this would suggest a built-in hierarchy among the customer service representatives with one representative overseeing the one listed below him/her. We would then have to apply the same questionable reasoning in assessing the hierarchy within the outside sales group, where the sales representatives were listed in vertical order, much like the staff in the inside sales group. If it were the case that the employee who is listed first (as the office manager on the inside sales group side) assumes the supervisory position over the employee listed beneath him/her, then we would assume, for instance, that [redacted] position is supervisory with respect to [redacted] who is listed directly beneath [redacted] despite their identical position titles and lack of distinguishing characteristics explaining why one employee would be deemed subordinate to the other. There is no evidence to suggest that the Petitioner vertically listed employees within the inside and outside sales groups for the purpose of depicting a staffing hierarchy.

In support of the instant motion, the Petitioner submitted a new organizational chart depicting a hierarchy where [redacted] who was depicted as the branch office manager in the original organizational chart, assumes the position of the U.S. branch's operations manager, overseeing three inside sales representatives and one accounts receivable clerk. The chart depicts [redacted] as directly subordinate to the Beneficiary, who is shown as overseeing three sales positions, and one fluid power specialist. The Petitioner does not explain why the new chart alters the position titles of the former office manager, who is now depicted as an operations manager, and two outside sales representative positions, who are now depicted as mining sales and fluid power specialist, respectively. In addition, there is no explanation as to why [redacted] whom the original organizational chart depicted as an outside sales representative subordinate to the Beneficiary, is now depicted as an inside sales representative, subordinate to the operations manager. The Petitioner has neither acknowledged nor 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).

The Petitioner also maintains its objection to the Director's reliance on educational backgrounds as a means for finding that the Beneficiary's subordinates are not professional employees, pointing out that one of the Beneficiary's eight subordinates has a baccalaureate degree. However, we find that it is not sufficient to establish that the entire staff is comprised of professional employees based on the educational degree of a single staff member. As previously stated, in order to meet its burden of proof the Petitioner must support its assertions by submitting corroborating documentary evidence. *See id.* Based on the information the Petitioner provided in its NOID response statement, the professional and educational backgrounds of the other seven subordinates range from multiple years of experience to less than two years of experience or no experience at all, as is the case for one of the Petitioner's account representatives, who was identified as a new employee. In other words, while the Petitioner objects to the Director's means for determining when an employee can be deemed a professional, it does not offer supporting evidence or explain what qualifications or abilities the Beneficiary's subordinates possess that would qualify them as professional employees. Rather, on motion the Petitioner asserts that any individual who "is engaged in a specified activity as one's main paid occupation rather than as a pastime" is the opposite of an amateur and thus is sufficient to be deemed a professional employee based on their work in a selected profession, despite their lack of educational credentials. In other words, the Petitioner objects to the Director's reliance on regulatory definitions of the terms "profession" and "professionals," neither of which is included in 8 C.F.R. § 204.5(j), which contains the regulatory requirements for multinational executives and managers. The Petitioner contends that the definitions for these terms, as found in regulatory sections that pertain to two other employment-based visa classifications – aliens who are members of the professions holding advanced degrees or aliens with exceptional ability and skilled workers, professionals, and other workers – should not be applied to the adjudication of this visa petition, which contemplates eligibility for the employment-based visa classification for multinational executives and managers.

We find that the Petitioner's argument is not persuasive. First, we note that according to the Final Rule at 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987), which contemplates congressional intent underlying the definition of managerial capacity, an individual who is said to be employed in a managerial capacity should not allocate a majority of his or her time "to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company, such as doing sales work or operating machines, or supervising those that do." Applying the reasoning in the final rule to the facts in the matter at hand, the Beneficiary's first-line oversight of sales employees does not fit the criteria of managerial capacity as intended, despite the Petitioner's arguments to the contrary.

Furthermore, the term "profession" is defined at section 101(a)(32) of the Act and therefore applies broadly to all provisions in the Act, including the employment-based Petitioner in the matter at hand, despite the fact that the definition of this term was not included in the section of the regulations that pertains to multinational executives and managers. Also, while definitions for the terms "profession" and "professionals" were not included in 8 C.F.R. § 204.5(j)(2), which contains definitions for the instant visa classification, USCIS created definitions for both terms and included them in the regulations for other employment-based immigrant petitions. As such, when a relevant

term is not included in the definitions section of a particular visa classification, as is the case regarding the terms “profession” and “professionals,” it is appropriate for the Director to look for guidance beyond the regulations that pertain strictly to the visa classification being adjudicated. Accordingly, in the matter at hand, we find that the Director properly relied on USCIS’s definitions of the terms “profession” and “professionals,” which were defined at 8 C.F.R. § 204.5(k)(2) and 8 C.F.R. § 204.5(l)(3)(ii)(C), respectively, and which have broad application in adjudicating visa petitions where these terms are relevant. The Petitioner has not provided any evidence to justify its attempt to adopt a dictionary definition that is outside of the immigration law context and to apply that definition within the scope of the instant employment-based visa classification.

As an alternative to establishing that the Beneficiary is a personnel manager, the petitioner puts forth the assertion that the Beneficiary manages an essential function. The statutory definition of “managerial capacity” allows for both “personnel managers” and a “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. The term “function manager,” on the other hand, 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).

In the present matter, the Petitioner claims that the Beneficiary meets the criteria for a function manager by virtue of serving as branch manager, which the Petitioner asserts as synonymous with managing a subdivision within the petitioning entity. In other words, rather than establishing that the Beneficiary manages an essential function within the petitioning organization, or within one of the organization’s departments or subdivisions, the Petitioner contends that the statutory requirements may be met simply by establishing that the Beneficiary manages a branch, which the Petitioner claims is reflective of managing an essential function. However, simply claiming that the Beneficiary is a function manager because he manages one of the Petitioner’s numerous branches is not sufficient to meet the requirements of a function manager. As properly conveyed in the Director’s decision, establishing that the Beneficiary would assume the role of a function manager necessarily requires that the Beneficiary would manage a function that is essential to the branch that the Beneficiary would head. The Petitioner does not provide any case law or regulation that would support its own unique interpretation of the statute.

While it is possible, based on the facts presented in support of this petition, that sales is the essential function of the branch, i.e., the subdivision of a broader organization, this information alone is not sufficient to establish that the Beneficiary would assume the role of a function manager. Not only must the Petitioner define the essential function to be managed, but it must also furnish a written job offer that clearly describes the duties to be performed in managing that essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish what proportion of the Beneficiary’s daily duties would be attributed to managing the essential function. See 8 C.F.R. § 204.5(j)(5). As discussed earlier in this decision, the Petitioner offered a deficient job description that is devoid of specific information about the Beneficiary’s actual daily job duties. As previously stated, such information is germane to determining whether the

Beneficiary would be employed in a qualifying capacity and as such, it is expressly required by regulation, regardless of whether the Beneficiary would serve in the role of a personnel or a function manager. *Id.* Here, the Petitioner has not provided this highly critical information, thus precluding us from gaining a meaningful understanding of the Beneficiary's specific tasks, which is necessary in order to assist us in determining whether the Beneficiary would allocate the primary portion his time to performing qualifying, rather than non-qualifying, tasks of the branch he would manage.

Lastly, we note that the Petitioner did not resolve the inconsistent information provided with regard to the Beneficiary's direct superior. As previously discussed, the information provided in the Petitioner's supporting statements differed from the information that was depicted in the organizational chart the Petitioner offered as supporting evidence at the time the petition was filed. The Petitioner has not resolved this inconsistency with independent, objective evidence pointing to where the truth lies. *See, Matter of Ho*, 19 I&N Dec. at 591-92.

In light of the deficiencies discussed above, we find that the Petitioner has provided insufficient evidence to determine that the Beneficiary would assume the role of either a personnel or a function manager pursuant to the statutory requirements of "managerial capacity." Regardless of whether the Beneficiary would manage people or an essential function within the U.S. branch office, the Petitioner must provide a detailed job description of the job duties to be performed, along with supporting evidence, to establish that the Beneficiary would allocate his time primarily to either managing a staff of supervisory, professional, or managerial employees or, alternatively, that he would allocate his time primarily to managing an essential function within the U.S. branch. Given the insufficient evidence submitted to support this petition, we find that the Petitioner has not established that it meets the statutory requirements for either a personnel or a function manager and on the basis of this initial finding, this petition cannot be approved.

B. Foreign Employment in a Managerial Capacity

Next, we turn to the issue of the beneficiary's former employment with the foreign branch office.

If the beneficiary is already in the United States working for the foreign employer or its subsidiary or affiliate, then the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) requires the petitioner to submit a statement from an authorized official of the petitioning United States employer which demonstrates that, in the three years preceding entry as a nonimmigrant, the beneficiary was employed by the entity abroad for at least one year in a managerial or executive capacity.

1. Evidence of Record

As previously noted, the Petitioner's initial supporting evidence included the foreign branch's organizational chart. The chart shows a single outside sales representative comprising the outside sales group, and two customer service representatives, one office manager, and one shipper/receiver comprising the inside sales group. The Petitioner's supporting statement, dated January 22, 2013, also contained the following job description for the Beneficiary's position abroad:

(b)(6)

Matter of M-I, Inc.

From September 1, 2005 to April 2012, [the Beneficiary] continuously held the managerial position of Branch Manager with [redacted] Canada in [redacted] Alberta, Canada. As Branch Manager, [the Beneficiary] was responsible for managing and overseeing a high performing 3-5 person branch. He developed, met and maintained sales objectives He was responsible for monitoring the branch operating expenses and adjusting inventory, vendors, corporate contract customers and purchasing. As Branch Manager, [the Beneficiary] was responsible for mentoring and training staff. He coordinated activity between business units within the [redacted] to ensure timelines were met on special projects. In addition, he was responsible for implementing cost savings and presenting presentations on company products and services. In this managerial position, [the Beneficiary] regularly reported to [redacted] Regional Managers, Directors and Executive Board members. In performing his managerial duties, [the Beneficiary] established goals and policies for his area of responsibility, exercised a wide latitude of discretionary decision-making, and made decisions that required a high level of judgement and analysis to determine the appropriate course of action.

The Petitioner also pointed out the Beneficiary's success in managing the foreign branch, discussing various awards won during the course of the Beneficiary's employment abroad.

As previously noted, the Director's review of the evidence resulted in the issuance of a NOID, on August 29, 2013. As in his analysis of the Beneficiary's proposed employment, the Director found similar deficiencies regarding the Beneficiary's foreign employment, noting that the record does not show that the Beneficiary's subordinates were supervisory, professional, or managerial employees. The Director observed that the relevant information, including job duties, job title, scope of the foreign operation, and job titles of the Beneficiary's subordinates were substantially similar to the information pertaining to the Beneficiary's proposed employment abroad. The Director therefore reached a similar conclusion regarding the issue of the Beneficiary's qualifying employment abroad.

The Petitioner's response statement, dated September 26, 2013, challenged the Director's finding that the Beneficiary's foreign position did not involve the oversight of professional subordinate employees. The Petitioner stated that the Director should have considered whether the Beneficiary's foreign employment involved managing an essential function or overseeing subordinates whose positions were managerial or supervisory.

After reviewing the evidence and the Petitioner's response to the previously issued NOID, the Director determined that the Petitioner did not overcome the previously issued adverse findings and, on October 7, 2013, denied the petition. In general, the Director found that the Beneficiary's position abroad was similar to the proposed position in terms of his job duties, job title, scope of operation, and job titles of the Beneficiary's subordinates. Therefore, the Director applied similar reasoning in concluding that the record does not contain sufficient evidence to establish that the Beneficiary was employed abroad in a qualifying managerial or executive capacity.

The Petitioner has since provided supporting briefs in support of the Petitioner's appeal, motion, and in response to our RFE, dated December 7, 2015. In the latter document, the Petitioner asserts that the Beneficiary performed job duties that met the four statutory criteria comprising the definition of managerial capacity.

Regarding the first criterion – managing the organization, or a department, subdivision, function or component of the organization – the Petitioner states that the Beneficiary was responsible for the following: Directing, managing, and overseeing his branch's financial and administrative matters; implementing policies and procedures ensuring that they are in line with the organization's operating strategies; developing, meeting, and maintaining sales objectives and monitoring operating expenses; overseeing and directing regional and local sales activities; directing and coordinating financial and budget activities to ensure proper funding and efficiency; increasing productivity; preparing and approving organizational budgets and negotiating contracts with distributors, suppliers, and other entities; directing and coordinating activities of departments concerned with sales and product distribution to identify cost-cutting measures and improve performance; and reviewing staff reports and other performance indicators.

Next, the Petitioner claims that the Beneficiary supervised and controlled the work of other supervisory and professional employees, thus meeting the second statutory criterion. The Petitioner states that the Beneficiary supervised the foreign branch's office manager, whom the Petitioner described as a supervisory employee overseeing inside sales staff. The Petitioner further stated that the Beneficiary supervised and controlled the work of professional employees in the outside sales group and liaised with upper-level executives, including regional managers, directors, and members of the board of directors.

The Petitioner goes on to restate the third statutory criterion, claiming that the Beneficiary had "held full discretionary authority over the management of professionals at his branch." The Petitioner also claimed that the Beneficiary discussed issues and resolved problems with staff, appointed other managers and supervisors and delegated duties to these individuals as necessary.

Finally, the Petitioner stated that the Beneficiary had discretionary authority over the daily activities of his branch, thus meeting the fourth statutory criterion of managerial capacity. In this regard, the Petitioner states that the Beneficiary established goals and policies and made decisions using "a high level of judgement and analysis"; reviewed operating records and reports to project sales; prepared and approved budgets and expenses; monitored customers' preferences to determine where to focus sales efforts; managed inventory, vendors, corporate customers, and purchasing; coordinated activities between units within the organization to ensure that timelines were met; and made presentations on company products.

2. Analysis

As a threshold matter, we note that the analysis for determining whether the Beneficiary was employed abroad in a qualifying managerial or executive capacity is similar to the analysis we conduct with regard to the Beneficiary's proposed employment. Accordingly, we look to the

Beneficiary's job duties, followed by a review of the totality of the record, including the job duties of the support staff and any other relevant factors that may contribute to a comprehensive understanding of the Beneficiary's daily tasks and his role within the foreign branch office.

A review of the job description included in the Petitioner's initial supporting statement indicates that the information offered was overly broad and thus has minimal probative value. The Petitioner provided general statements claiming that the Beneficiary created sales objectives, monitored branch operating expenses, and managed inventory, vendors, corporate contract customers, and purchasing with a staff of 3-5 employees, which included one outside sales representative, one office manager, two customer service representatives, and one shipper/receiver. Although the Petitioner provided another job description in response to our RFE, the updated information does not include a list of the Beneficiary's actual daily tasks and their specific time allocations such that would convey precisely how much of the Beneficiary's time would be allocated to tasks associated with the management of an essential function. The most current job description is plagued with similar deficiencies as prior descriptions in their lack of detailed information pertaining to actual tasks. It remains unclear what policies and procedures the Beneficiary implemented, what specific tasks the Beneficiary carried out as a means of overseeing the outside sales group, and who, other than the Beneficiary, took part in providing sales and financial reports that the Beneficiary reviewed and used as a basis for formulating sales and spending strategies or for determining the foreign branch's profitability. Although the Petitioner claims that the Beneficiary appointed managers and supervisors to whom he delegated tasks, the Petitioner did not specifically identify any such employees or state what actual tasks he delegated. Given that the Petitioner identified only one supervisory employee who was subordinate to the Beneficiary, this reference to other managers and supervisors remains unsupported by the evidence of record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (quoting *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Further, the Petitioner claims that the Beneficiary made presentations, engaged in contract negotiations with distributors and suppliers, and managed inventory. However, without further explanation as to the specific circumstances and the Beneficiary's level of involvement in each of these actions, it is unclear that any of these responsibilities, to which no time constraints have been assigned, fit the definition of managerial capacity as claimed. Reciting a beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. As stated earlier in this discussion, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Therefore, applying the analysis of the Beneficiary's U.S. employment to the Beneficiary's former position, we cannot conclude that the Beneficiary allocated his time to primarily managing a staff of supervisory, professional, or managerial employees or that he primarily managed an essential function. Neither the broadly stated job duties, nor the foreign branch's staffing composition establishes that the Beneficiary was relieved from having to spend his time primarily performing the operational tasks of the Canadian office. While the Petitioner asserts that staffing size is not dispositive in determining whether the Beneficiary meets the statutory criteria, the issue of a support staff is highly relevant and often critical, as it helps to determine who performs the underlying

Matter of M-I, Inc.

operational tasks of an entity or subdivision and what role a beneficiary assumes with respect to those employees or with respect to an essential function.

Given the lack of adequate supporting evidence provided with regard to the issue of the Beneficiary's foreign position, we cannot conclude that the Beneficiary was employed abroad in a qualifying managerial or executive capacity.

III. CONCLUSION

The motion to reopen will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reopen is denied.

Cite as *Matter of M-I, Inc.*, ID# 10490 (AAO June 17, 2016)