



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

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

MATTER OF C-E-, INC.

DATE: MAY 11, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a property management and investment consulting company, seeks to permanently employ the Beneficiary as its chief executive officer (CEO) 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. The Director concluded that the evidence of record did not establish that: (1) the Beneficiary will be employed in the United States in a managerial or executive capacity, and (2) the Beneficiary has been employed abroad in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by disregarding evidence that showed the Beneficiary was employed abroad and will be employed in the United States in an executive capacity.

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

I. LEGAL FRAMEWORK

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.

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. A labor certification is not required for this classification.

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

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

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), 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. *See* section 101(a)(44)(C) of the Act.

A. U.S. Employment in an Executive 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.

(b)(6)

Matter of C-E-, Inc.

1. Evidence of Record

The Petitioner filed Form I-140 on December 24, 2014. On the Form I-140, the Petitioner indicated that it had two¹ current employees in the United States and a gross annual income of \$412,575.

The Petitioner did not initially submit a statement from an authorized official of the petitioning United States employer, as 8 C.F.R. § 204.5(j)(3)(i) requires. Instead, the Petitioner submitted a statement from counsel, who stated that the Petitioner owns a 60% interest in a restaurant called [REDACTED], “which currently employs a staff of 60.” Counsel stated that the Petitioner is developing plans regarding “opportunities for luxury residential real estate investment,” “a Franchise Agreement with the corporate administration of the [REDACTED]” “which would allow the Petitioner or an affiliate to sell these products in Hungary,” and “the acquisition of a major commercial development in Tahiti.”

Counsel stated that, while the Beneficiary had previously “divided his time overseeing the management of the operations in Hungary and the United States,” and will remain “responsible for running the European parent company” and overseeing its real estate investment fund, he would now “devote most of his time in the United States in order to fully pursue [the Petitioner’s] U.S. Investment Strategy.” Regarding the Beneficiary’s U.S. duties, counsel stated:

[The Beneficiary] has been and will continue to be instrumental in restaurant location search and analysis, lease negotiations, and construction management. In terms of his executive capacity, as the acting CEO, [the Beneficiary] will establish corporate goals and policies, direct the management, and make[] strategic decisions for the company in both Europe and the US. [The Petitioner’s] senior management and staff as well as all of its outside advisors will report to [the Beneficiary].

Most recently [the Beneficiary] has devoted substantial time to developing a strategic financial plan to establish the [REDACTED]. In his capacity as an investor with [REDACTED] he will assist with finding additional investors, overseeing the restaurant company’s budgeting and financial performance, including cash management, expense control, dividend policy, and corporate taxation; and promoting the restaurant by inviting new customers and organizing special events at [REDACTED] with additional corporate partners.

The Petitioner submitted copies of various documents relating to its former, current, and proposed investments in the United States.

The Petitioner states that it conducts investment activities through various subsidiaries. An exhibit list submitted with the petition states that [REDACTED] . . . is an 80% owned subsidiary of the Petitioner which will own the real estate interests acquired.” The Petitioner submitted a “Company Fact Sheet,” indicating that the Petitioner “sources, executes, and manages all of [the organization’s] projects in the US and other countries from its [REDACTED] offices.”

¹ The Petitioner stated that its current number of U.S. employees is “2 with Petitioner (60 additional in [REDACTED]”

(b)(6)

Matter of C-E-, Inc.

The Petitioner's payroll records from 2013 named the Beneficiary as one of two employees, the other employee being [REDACTED] chief financial officer (CFO) and chief operating officer (COO). The Petitioner also submitted evidence related to a former restaurant investment located in Arizona and a [REDACTED] restaurant operated by [REDACTED]. The evidence submitted indicates that [REDACTED] owns a 40 percent interest in [REDACTED].

The Director later issued a request for evidence (RFE). The Director asked the Petitioner to submit a detailed job description, with the percentage of time the Beneficiary will devote to each duty. The Director also requested "[a] list of employees (and individual contractors) in the beneficiary's immediate division, department, or team," with job descriptions and other information.

In response, the Petitioner submitted a letter dated July 10, 2015, from [REDACTED] who stated:

[The Beneficiary] will . . . direct the business strategy to secure and expand our investments in the United States. . . .

As President and CEO, [the Beneficiary] will be responsible for identifying new investors from Europe who wish to diversify their investment portfolio by investing in the United States as well as overseeing business relations with existing investors who have already committed capital which is directly or indirectly through other [REDACTED] companies invested in the United States.

In the United States, [the Beneficiary] will continue to direct the investment strategy of the Petitioner. . . . [The Beneficiary] has been responsible for identifying suitable investment opportunities for the Petitioner including most recently, restaurants in [REDACTED] Arizona and in [REDACTED] California. [The Beneficiary's] roles as President including overseeing restaurant location search and financial analysis of existing and future investment returns. Once a location is identified, [the Beneficiary] is also primarily responsible for directing the lease negotiations with the landlords, and construction management for the build-out of the specific restaurant location. . . .

. . . [The Beneficiary] will continue to establish corporate goals and policies, direct the management, and make strategic decisions for the company in both Europe and the US. [REDACTED] senior management and staff as well as all of its outside advisors will report to [the Beneficiary].

[The Beneficiary's] daily work duties include the finding and evaluating [of] potential investment opportunities, the sourcing and acquiring of capital funding . . . , the direct reporting by each director of the affiliate companies or project companies, and overseeing divisional performance. Daily tasks . . . include morning meetings and international conference calls, business meetings with existing or potential partners, and afternoon document/contract reviews, staff meetings, business negotiations and internal management discussions. We provide the following breakdown of the duties and percentage of time to be spent on them as follows:

(b)(6)

Matter of C-E-, Inc.

U.S. real estate market research and analysis for potential investments by [REDACTED]	10%
Market consultations as requested by [REDACTED]	5%
Identifying and organizing real estate projects during process or planning phase and presenting them to [REDACTED] for investment	5%
Prepare proposals for the purchase of real estate assets by [REDACTED]	5%
Directing and overseeing the Project Management Team for approved acquisitions and Joint Ventures through direct interface with each director of the affiliate companies or project companies	10%
Directing the business investment strategy for the European parent company in conjunction with the Executive Board in Hungary by advising board members and coordinating between the board and executive staff	10%
Creating and implementing long-term vision of the organization through the review of Market Analysis and Investment Trends	10%
Sourcing and acquiring of capital funding including venture capital and other financial institutional sources	15%
Providing leadership on decision-making issues affecting the organization evaluation of potential alliances acquisitions and/or mergers and other non-real estate investments	10%
Reviewing of budgets, financial reports and financial trends in order to direct senior executives and to ensure that investments are performing as expected	10%
Developing and securing capital funding for Real Balance California's dietary supplement project	10%

[REDACTED] stated that the Beneficiary "directs the following corporate entities as President/CEO"

[REDACTED] (Foreign Parent Organization)

This is the parent company of the [REDACTED] . . . with more than 100 employees in a dozen countries around the world.

. . . U.S. Petitioner

. . . .

[REDACTED]

This company is the wholly owned investment management arm of [the petitioning company] overseeing various strategic and opportunistic investments [the Petitioner] has made and/or has under development in the U.S. and some select other countries.

(b)(6)

Matter of C-E-, Inc.

[redacted]

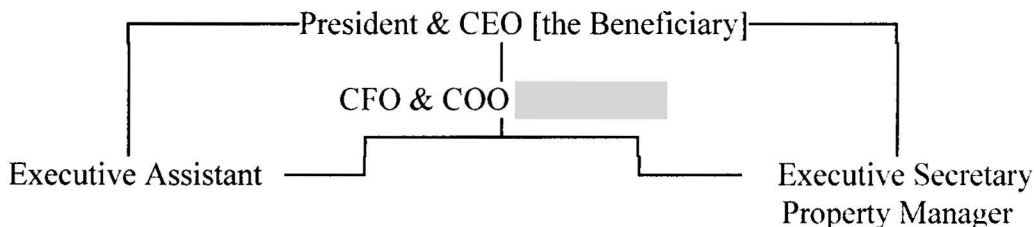
[The Petitioner] has purchased 60% ownership of the company with . . . an experienced restaurant developer. The Petitioner has invested over \$600,000 to date in the venture which currently employs a staff of 60. . . .

[redacted]

[redacted] was established in 2013 to oversee [redacted] international real estate investments originating from [redacted] CA. The first of [redacted] proposed projects is a \$100 million shopping center development projects [sic] on the [redacted] . . .

[redacted] stated that two U.S. “executive employees report directly to” the Beneficiary, specifically [redacted] himself (as managing director of the petitioning company), earning an annual salary of \$72,000, and the “Operative Director of [redacted] with an annual salary of \$24,000. The Petitioner submitted no further evidence relating to [redacted]

The Petitioner submitted an organizational chart, dated June 2015, showing that two subordinates report to the Beneficiary and to [redacted]



The Petitioner stated that the executive assistant is “based in the Budapest HQ office of [redacted] she is [the Beneficiary’s] Executive Assistant handling all meeting schedules, travel arrangements, office management duties, etc.” The executive secretary/property manager is “based in [the Petitioner’s] US HQ office . . . ; she is [the Beneficiary’s] Executive Personal Assistant handling all operational, financial, legal and residential aspects of the US businesses.”

The Petitioner submitted an unsigned, two-page document describing the Beneficiary’s “Leadership Roles and Decision Making Between USA & Hungary.” The document stated that the Beneficiary performed the following activities:

- 2011 - [The Beneficiary] negotiated [a] financing agreement for \$500,000 investment in [redacted] restaurant. . . .
- 2012-2014 - [The Petitioner] acquires [redacted] [The Beneficiary] leads negotiations for investment. . . . Multiple complex financing and leasing arrangements are put in place under direction of [the Beneficiary]. . . .

(b)(6)

Matter of C-E-, Inc.

- 2012 – [the Beneficiary] establishes [redacted] with \$250,000 investment from [sic].
- 2014 – [redacted] is liquidated – complex lease negotiations and legal arrangements for orderly liquidation are put in place under direction of [the Beneficiary]. . . . In order to conclude liquidation and reinvestment [the Beneficiary] negotiates loan of \$162,000 from [redacted]
- 2014 and Ongoing – Investment in [redacted] is concluded. Negotiation of complex terms for investment are directed by [the Beneficiary] who remains responsible for financial oversight and reporting to Board of the [parent company] as well as reporting to third party investors who are introduced by [the Beneficiary].
- 2015 – [redacted] is established. [The Beneficiary] is appointed Managing Director and establishes research and development team in Hungary for new line of nutritional supplements, which will be test marketed in Hungary and then will be distributed under [the Beneficiary’s] direction in the US.

The Petitioner submitted copies of various documents relating to the Beneficiary’s work with the Petitioner and its subsidiaries, such as sales agreements and leases.

The Director denied the petition on August 28, 2015, concluding that the Petitioner had not established that the Beneficiary would serve in a managerial or executive capacity. The Director determined that the submitted job description was “vague and non-specific,” and did not “sufficiently describe what the beneficiary did or will do on a day-to-day basis.” The Director also found that the Petitioner did not “sufficiently describe the duties of the subordinate employees.”

On appeal, the Petitioner submits new evidence, including letters and documentation of business transactions. The Petitioner asserts that the Director erred because the Beneficiary meets the requirements for a multinational executive, and because current policy favors favorable treatment of foreign entrepreneurs and job creators.

2. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that the Beneficiary will be employed in an executive capacity in the United States.

The Petitioner has asserted that the Beneficiary has acted, or will act, in an executive capacity relating to several past and future business projects, conducted by several of the Petitioner’s claimed affiliates in the United States and abroad. Some of the Petitioner’s evidence, submitted in response to the RFE and later on appeal, concerns developments that occurred after the petition’s December 24, 2014, filing date. The record indicates that [redacted] was established in 2015. A petitioner must establish eligibility at the time of filing and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971). Therefore, the Beneficiary’s work

(b)(6)

Matter of C-E-, Inc.

with [REDACTED] cannot establish his eligibility for the classification sought as of the petition's filing date. Furthermore, the record provides little information about [REDACTED] except to acknowledge its existence. The minimal information provided about this venture would not have established the Beneficiary's eligibility, even if the company existed at the time of filing. Other ventures, such as [REDACTED], which operated a restaurant in Arizona, ended before the filing date and therefore, likewise, cannot show eligibility at the time of filing.

The only active U.S. venture that the Petitioner documented at the time of filing concerned [REDACTED]. The Petitioner, through [REDACTED], has asserted that the Beneficiary acts as the CEO of [REDACTED]. The record does not support this claim, or [REDACTED] assertion that the Petitioner owns a 60% interest in [REDACTED]. The Petitioner submitted copies of the following documents:

- A copy of a "Subscription Booklet" dated July 14, 2014, stating that [REDACTED] held a 40% interest in [REDACTED]
- A "Membership Interest Purchase Agreement," dated September 30, 2014, which acknowledged that the Petitioner held a "forty percent (40%) . . . beneficial ownership interest in the Company," and agreed to sell half of that interest to another company
- An "Agreement" dated December 5, 2014, stating that [REDACTED] . . . holds a twenty percent (20%) membership interest in [REDACTED]"

The 20% figure also appears on various charts submitted in response to the RFE. The record indicates, therefore, that the Petitioner's subsidiary, [REDACTED] held only a minority interest in [REDACTED] at the time of filing in December 2014. There is no evidence that the Petitioner, directly or indirectly, held a 60% interest in [REDACTED] in July 2015, when [REDACTED] quoted the higher figure in his letter to USCIS. 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).

There is also no evidence that the Petitioner, or the Beneficiary, has any direct control over the operation of the restaurant operated by [REDACTED]. In a letter submitted with the initial filing of the petition, counsel had stated that the Beneficiary would find investors, oversee finances, and promote [REDACTED]. These unsupported assertions of counsel do not constitute evidence. *See, e.g., Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The Petitioner submits a letter from [REDACTED], "founder and managing-member of [REDACTED] who states that the Beneficiary was "part of the executive co-founding team for the restaurant," and "was instrumental in directing his team strategically, providing high-level insights in terms of the build-out and staffing, and raising the necessary funds to construct and open the restaurant." [REDACTED] does not state that the Beneficiary has or had any ongoing role in managing the business or directing its operations. [REDACTED], not the Beneficiary, signed the "Executive Service Agreements" when [REDACTED] hired its chef and its executive general manager.

(b)(6)

Matter of C-E-, Inc.

The Petitioner claims an indirect ownership interest in [REDACTED], through the Petitioner's subsidiary, [REDACTED]. The Petitioner, however, has submitted conflicting documentation regarding [REDACTED] membership:

- [REDACTED] articles of organization, dated April 4, 2011, specify that "the limited liability company will be managed by ... more than one manager." Copies of three membership certificates for [REDACTED], also dated April 4, 2011, identified the three members as the Petitioner (with an 80% membership interest), the Beneficiary (with 10%) and [REDACTED] (with 10%).
- An operating agreement, dated May 1, 2011, identified the Beneficiary as "the single Member and sole Manager of [REDACTED]. Correspondence signed by the Beneficiary, dated December 4, 2014, also refers to the Beneficiary as "the sole managing member of [REDACTED]."
- [REDACTED] California Forms 568, Limited Liability Company Returns of Income, for 2011, 2012, and 2013 identified the Petitioner, not the Beneficiary, as [REDACTED] "sole owner."

There is a significant discrepancy between these portrayals of [REDACTED] ownership structure. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Again, 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. at 591-92.

As noted above, when the Petitioner stated its number of employees on Form I-140, the Petitioner included [REDACTED] 60 employees in that number. Given the above information, the Petitioner has not established that it has a controlling ownership interest, either direct or indirect, in [REDACTED]. As such, the Petitioner has not shown that a qualifying relationship exists between the Petitioner's foreign parent company and [REDACTED]. Absent a showing that [REDACTED] is a qualifying subsidiary or affiliate of the Petitioner and its foreign parent company, we will not consider [REDACTED] employees to be under the Petitioner's authority when discussing the Beneficiary's employment 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 then 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 actual duties and role within the petitioning entity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. §1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct[] the management" and "establish[] the goals and policies" of that organization. Inherent to the definition,

(b)(6)

Matter of C-E-, Inc.

the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they “direct” the enterprise as the owner or sole managerial employee. The beneficiary must also exercise “wide latitude in discretionary decision making” and “receive[] only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.” *Id.*

The Petitioner contends that the tasks in the Beneficiary’s job description are “not vague as the [Director] asserts. . . . [E]ach duty contains the duty itself as well as the means through [which] each duty is executed.”

The Beneficiary’s stated duties with respect to [REDACTED] are relevant to the extent that they relate to the Petitioner’s minority ownership interest in the restaurant. [REDACTED] letter indicated that the Beneficiary’s activities relating to [REDACTED] were short-term, largely involved in helping to set up the company, which afterward appears to have run with little or no involvement by the Petitioner and its subsidiaries. Further, as stated above, the Petitioner has not shown that [REDACTED] is a qualifying subsidiary of the petitioning company.

The Petitioner’s commercial projects in Hungary and Tahiti appear to have advanced no further than the proposal stage at the time of filing. Also, the Petitioner has indicated that these businesses would operate outside the United States, and they would be overseen not by the petitioning U.S. employer, but by its foreign parent company. Therefore, the Petitioner has not established that the Beneficiary’s work on these projects would involve executive authority over the U.S. petitioner.

The remaining duties described appear to overlap. The Petitioner does not explain, for example, how “presenting [real estate projects] to [REDACTED] for investment” is different from “[p]repar[ing] proposals for the purchase of real estate assets by [REDACTED]”. Similarly, “real estate market research and analysis” appears to be integral to “review of Market Analysis and Investment Trends.” “Market consultations,” “[p]roviding leadership on decision-making issues,” and “advising board members” concerning “business investment strategy” also appear to be different ways of describing essentially the same activity. Furthermore, two separate items both refer to securing capital funding for investments. One of those items was limited to obtaining funds for [REDACTED], which did not exist at the time of filing and, therefore, cannot have occupied any of the Beneficiary’s time when the Petitioner filed the petition.

The Petitioner asserts that several of the Beneficiary’s duties involve providing information to the parent company so that the parent company’s “executive staff” can make decisions regarding investments, but the Petitioner also asserts that the Beneficiary himself is the president and CEO of the foreign parent company, in which capacity he “[p]rovides leadership on decision-making issues” while “[d]irecting [its] business investment strategy.” As such, any activity that the Beneficiary performs in this regard is best seen as part of his work as an executive of the foreign parent entity, rather than of the petitioning U.S. employer.

(b)(6)

Matter of C-E-, Inc.

In a new letter dated September 27, 2015, [REDACTED] states:

In terms of his day-to-day work activity . . . , [the Beneficiary] spends most of his mornings on important conference calls . . . with his European parent company management staff and/or overseas senior business partners. This is followed by local lunch meetings discussing U.S. ongoing businesses and future investment opportunities. The rest of the afternoon is spent with me and our local staff and outside advisors following up on weekly to-do lists and important tactical business decisions related to the U.S. growth plans of the company. . . . [The Beneficiary] has a busy travel schedule frequently traveling between the [REDACTED] and the [REDACTED] offices.

[REDACTED] in his new letter, discusses various projects, but with respect to the Beneficiary's specific duties, he does not provide significantly greater detail than the Petitioner has provided before. Instead, he used phrases such as "[the Beneficiary] has been instrumental in providing vision, strategy and direction." [REDACTED] indicates that the Beneficiary spends much of his time on "business decisions," but, as discussed, the Petitioner has identified only one investment project [REDACTED] that was active at the time the Petitioner filed the petition.

The above discussion supports the Director's finding that the Petitioner has not adequately shown "what the beneficiary did, or will do, on a day-to-day basis." Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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 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 insufficient to establish that his actual duties, as of the date of filing, would be primarily managerial or executive in nature.

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. Federal courts have generally 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 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

(b)(6)

Matter of C-E-, Inc.

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 his new letter, [REDACTED] refers to the Petitioner's "local staff," but at the time of filing, the Petitioner claimed no "local staff" apart from the Beneficiary and [REDACTED]. A subsequent organizational chart submitted in response to the RFE named an executive secretary/project manager/executive personal assistant not mentioned in the initial submission. If the Petitioner hired this individual after the filing date, then at the time of filing she was not available to perform lower-level tasks on the Beneficiary's behalf. The Petitioner did not submit any evidence of wages paid to this employee and we cannot determine when she was hired.

The Petitioner initially submitted a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, for 2013 (the most recent year for which a return was available on the date of filing). It did not show payment of any salaries (separate from compensation of officers), nor did it show costs (such as cost of labor) that could be attributed to payments to contract workers. Therefore, the Petitioner has not established that anyone other than the Beneficiary and [REDACTED] performed, or was available to perform, non-executive operational tasks.

[REDACTED] was the Petitioner's only employee (other than the Beneficiary) at the time of filing. The Petitioner submits a copy of [REDACTED] résumé, which lists tasks he undertook while working for the Petitioner:

- Built, structured and co-managed a \$250mn+ multi-family office with three principals from the commercial real estate and filmed entertainment industries. Employ a cost-effective 'core & satellite' approach to managing the family office whereby the core internal team (COS, CFO, controller, in-house counsel, assistants) is complemented by the trusted outside advisory team (attorneys, CPAs, PMs, brokers, marketers). Research, source and execute private investment transactions in the real estate and hospitality sectors.
- Sourced and led [the Petitioner's] \$10mn [REDACTED] portfolio investment through a joint-venture with the founding family. . . . Oversee all operational, legal, financial and tax aspects of this location. Achieved 25% cost savings through labor rationalization and food cost management during first operating season.
- Manage all personal, legal, estate and tax planning for entrepreneur principals and their family members. Oversee household staff management, and lifestyle necessities such as private air travel options, yacht charters, vacation homes and luxury automobiles.
- Negotiated multi-year lease agreement for \$15mn luxury home in [REDACTED] CA. . . . Arranged \$2mn first mortgage loan for foreign buyer's primary residence in [REDACTED] CA.

Of the four items listed above, only the second (concerning [REDACTED] the restaurant associated with the now-liquidated [REDACTED] appears to relate directly to the activities that the Beneficiary is said to oversee. The first item might relate to the petitioning entity, with its references to

“investment transactions in . . . real estate,” but other elements of the first item are of uncertain relevance to the Petitioner’s stated business activities. The reference to a \$250 million office does not appear to refer to the Petitioner; that figure substantially exceeds the Petitioner’s assets and its annual income. The third and fourth items appear to relate to accommodating the housing and “lifestyle necessities” of individual principals rather than conducting the Petitioner’s business activities.

Without sufficient evidence of the employment of subordinates to perform non-executive functions, we find that the Petitioner has not provided sufficient evidence to support the claim that the Beneficiary’s proposed position in the United States would consist primarily of tasks within a qualifying executive capacity.

On appeal, the Petitioner states that the Director’s “decision is contrary to current stated policy of the USCIS and the Administration to support entrepreneurs and immigrant founded businesses.” The Petitioner submits various documents relating to this point. General policy goals, such as encouraging foreign investment and entrepreneurship, cannot exempt the Petitioner from statutory and regulatory requirements. We must judge the petition on its own merits. Section 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5), established a separate immigrant classification for job-creating entrepreneurs. The Beneficiary does not seek that classification in this proceeding.

Finally, the Petitioner states that the prior approvals of nonimmigrant petitions, granting the Beneficiary L-1A nonimmigrant status, shows that the Petitioner has demonstrated, to USCIS’ satisfaction, that the Beneficiary qualifies as a multinational executive. These approvals, however, do not create a binding precedent that would require approval of the immigrant petition now on appeal.

Each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. Such proceedings are not part of the record in the instant immigrant petition proceeding. In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. 8 C.F.R. § 103.2(b)(16)(ii). In the present matter, the Director reviewed the record of proceeding and concluded that the petitioner was ineligible for the requested immigrant classification. In both the RFE and the final denial, the Director clearly articulated the objective statutory and regulatory requirements and applied them to the case at hand. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm’r 1988).

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States.

B. Foreign Employment in a Qualifying Managerial or Executive Capacity

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

Matter of C-E-, Inc.

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.

Upon *de novo* review of the entire record of proceeding, we conclude that the record contains sufficient evidence to overcome this ground for denial. Specifically, the totality of the evidence establishes that the Beneficiary's employer abroad had the staffing and organizational structure in place to support the Beneficiary in an executive capacity. The record also establishes the Beneficiary's executive-level control of the foreign entity.

Therefore, we will withdraw this ground for denial, although the other stated ground remains.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reason. In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of C-E-, Inc.*, ID# 16742 (AAO May 11, 2016)