



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

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

MATTER OF SKS-C-, LTD.

DATE: MAY 26, 2016

**CERTIFICATION OF TEXAS SERVICE CENTER DECISION**

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

The Petitioner, a branch of a foreign corporation that is authorized to conduct business in the State of Texas as an ocean shipping and transportation business, seeks to permanently employ the Beneficiary as manager of its U.S. branch office under the first preference immigrant classification for multinational executives or managers. See Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director, Texas Service Center, originally denied the preference visa petition. The matter was subsequently brought before us on appeal, where the matter was remanded for further consideration and entry of a new decision. The Director has since denied the visa petition, concluding that the Petitioner did not provide sufficient evidence to establish that the Beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The Director certified his decision to our office for review.

In response to the Director's latest decision, the Petitioner submits additional documentation and asserts that the Petitioner provided sufficient evidence to establish that the Beneficiary's proposed employment is primarily comprised of managerial duties.

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

**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, Immigrant Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager.

The regulation at 8 C.F.R. § 204.5(j)(3) states:

(3) Initial evidence—

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

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

## II. EMPLOYMENT IN A QUALIFYING MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on the finding that the Petitioner did not establish that the Beneficiary will be employed in a qualifying managerial or 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.

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.

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.

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#### A. Evidence of Record

The Petitioner, a foreign entity operating an ocean shipping and transportation branch in the United States, filed Form I-140 on April 8, 2013. The Petitioner claimed "1-2" employees and stated that the Beneficiary would be compensated \$85,000 annually for managing and overseeing "the U.S. branch office in [REDACTED] Texas, encompassing all operations."

In support of the petition, the Petitioner provided a cover letter signed by its deputy senior manager, who stated that the Petitioner was established for the purpose of providing shipping and cargo port services to U.S. clients. The Petitioner provided the following description of the Beneficiary's proposed employment:

The position involves directing the domestic and international shipping services and teams and project execution within the shipping industry for the company at the [REDACTED] including: (1) the supervision of any current employees and/or future employees employed with the company's shipping division; (2) training of employees in the shipping department; (3) managing the negotiations with various parties involved with projects including clientele; and (4) general research and guidance of the team in successfully completing at-hand projects.

In addition, the Petitioner provided a separate percentage breakdown, which states that the Beneficiary's proposed position will include the following duties with time allocations as follows:

- Supervising and managing overall sales [and] marketing, management, and coordination between the petitioning company and the parent company. (30%)
- Directing our company's financial and budget activities to effectively fund business operations[,] maximize investments[,] and increase efficiency. (25%)
- Monitoring and supervising the departments' activities to ensure that they achieve optimal business outcome; [the Beneficiary] will [also be] responsible for managing and controlling the work of subordinate employees and review[ing] weekly sales/progress reports of each department and will set the goals. (25%)
- Supervising customer development and management; [the Beneficiary] will arrange meetings with our clients in contracting new cases and accommodating the needs of existing customers. (10%)
- Reviewing our company's financial statements, activity reports and performance data to measure business achievements and determining areas needing changes and improvements. (10%)

On May 8, 2013, the Director issued the first of two RFEs. The Petitioner was asked to provide an organizational chart of the U.S. branch office, depicting all employees by name and position title, along with brief job descriptions and educational levels for all employees. The Petitioner was further instructed to provide an additional job description for the Beneficiary, listing his specific job duties and the amount of time to be allocated to each task, as well as evidence of the Beneficiary's

remuneration in the form of IRS Form W-2s and/or paychecks, paystubs, and copies of payroll checks.

The Petitioner's response included a statement, dated July 10, 2013, signed by the Beneficiary in his capacity as the branch manager. The Beneficiary stated that the U.S. branch office, at the time, did not have employees for him to oversee, but claimed that he has the authority to oversee, review, and monitor the work of professionals with regard to bulk vessel operations and compliance in stowage procedures, all of which are subject to the Beneficiary's review. The Beneficiary further stated that he manages the company's overall operations, which includes setting goals and policies and training and supervising current and new employees and contractors. The Beneficiary's statement also included an additional percentage breakdown in which he stated that he would allocate his time in the following manner: 40% to supervising vessel operations in the North and South American ports, including overseeing "all personnel involved in each vessel operation" that the Petitioner manages; 25% to controlling and supervising U.S. vendors including the "work flow of subordinate employees/contractors and reviewing weekly activities and progress reports"; 20% to marketing activities, including arranging meetings with current and potential clients; and the remaining 15% to communicating with the headquarters in South Korea to report progress in terms of financial statements, activity reports, and performance data.

As previously indicated, the Director denied the petition on December 27, 2013, concluding that the Petitioner was not doing business in the United States. The Petitioner subsequently appealed that decision, which resulted in our withdrawal of the Director's decision and a remand of the matter back to the Director for further consideration of the Beneficiary's U.S. employment in a managerial or executive capacity.

On March 20, 2015, the Director issued the second RFE, instructing the Petitioner once again to provide a detailed job description delineating the Beneficiary's job duties and their respective time allocations. The Director also asked for an updated organizational chart and job descriptions of any employees or contractors of the Petitioner as well as their respective educational levels.

In response, the Petitioner provided a statement, dated June 3, 2015, signed by the Beneficiary in his capacity as the U.S. branch manager. The Beneficiary provided an identical job description as the one provided in the Beneficiary's July 2013 RFE response statement with entirely different time allocations assigned to the same job duties. Namely, the Beneficiary stated that instead of allocating 40% of his time to supervising vessel operations in the North and South American ports, including overseeing "all personnel involved in each vessel operation" that the Petitioner manages, he would allocate 30% of his time to these job duties; instead of allocating 25% of his time to controlling and supervising U.S. vendors including the "work flow of subordinate employees/contractors and reviewing weekly activities and progress reports," he would allocate 40% of his time to these job duties; instead of allocating 20% of his time to marketing activities by arranging meetings with current and potential clients, he would allocate 25% of his time to these duties; and instead of allocating the remaining 15% of his time to communicating with the headquarters in South Korea to report progress in terms of financial statements, activity reports, and performance data, he would

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allocate only 5% of his time to these job duties. The Beneficiary claimed that he would manage the essential function of vessel operation, but did not explain the reason for the altered time allocations.

In a separate chart, which also depicted a set of time constraints, the Petitioner indicated that 20% of the Beneficiary's time would be allocated to overseeing vessel operations in North America and that 10% of his time would be allocated to the same activity in Central America. The Petitioner explained that such supervision would include "ordering the job on vessel movement and cargo related issue" and indicated that this activity would involve port agency, port "PILOT," a stevedoring company, a trucker, and shore crane. The Petitioner further stated that 20% of the Beneficiary's time would be spent managing contractors through "implementation to conclusion of a contract" and "termination of a contract." Next the Petitioner indicated that 20% of the Beneficiary's time would be allocated to controlling costs and coordinating invoices, which would include the following components: job control function, cost suitability, review and confirm invoices, and overseeing port agency, port "PILOT," a stevedoring company, a trucker, and shore crane. The next 10% of the Beneficiary's time would be allocated to cargo marketing, which includes "FOB cargo marketing," "Conclusion of Cargo Fixture Note," and "Business information gathering." Lastly, the Petitioner stated that 15% of the Beneficiary's time would be allocated to customer service for the Korean shipper and receiver, which would entail "Vessel movement (ETA) notice," addressing customer complaints, and logistics and claim support, and the remaining 5% would be allocated to managing the [redacted] office, which would include administration, controlling the branch expenses, and working with the accountant "regarding required IRS reports."

The Petitioner also provided an organizational chart, which shows that the "Break-Bulk Operation Team" is comprised of four components: (1) vessel operation, which includes two general managers, one deputy general manager, two assistance managers, and one operator; (2) accounting, which lists one operator; (3) port captain (load port), which lists three captains assuming position title of manager; and (4) [redacted] office (unload port), depicting the Beneficiary as branch manager and [redacted] in the position of port captain. The chart further indicates that [redacted] assumes the top position as team leader and general manager overseeing the entire team operation.

In addition, the Petitioner provided a second organizational chart depicting its U.S. shipping hierarchy. This chart indicates that the Break Bulk Operation Team is headquartered in Korea and shows the Beneficiary at the top of the organization with the above-named port captain as his direct subordinate, followed by three types of U.S. contractors, including three agents, approximately 20 stevedores at approximately 18 ports, and "port vendors/personnel," which include survey, towing, ship supply and repair, and trucking companies.

Finally, in another chart, the Petitioner provides a broader overview of the Korean entity's shipping organization, which is shown to be comprised of three components – strategic management, ship management, and marketing. The [redacted] branch office, where the Beneficiary is employed, is depicted as part of the "breakbulk operation team" within the break bulk liner business division, which is one of five divisions that comprise the marketing department. The four remaining divisions

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within the marketing department include the tanker business division, the gas carrier business division, the bulk tramper business division, and the marketing strategy division.

In addition to the organizational charts, the Petitioner provided three letters from various companies that provide the Petitioner with a variety of agency services as well as transportation, warehousing, and stevedoring services. All three statements are accompanied by corresponding service agreements and indicate that the service providers work closely with the Beneficiary.

On January 8, 2016, the Director issued a decision, which he certified to our office for review. The Director concluded that the Petitioner did not submit sufficient evidence to determine that the Beneficiary would be employed in the United States in a managerial or executive capacity. The Director noted that while the Petitioner claimed that the Beneficiary would oversee [REDACTED] as well as other professional employees, it did not specify any position titles or names of any such employees. Accordingly, the Director found that the Petitioner did not establish that the Beneficiary would be relieved from having to primarily perform non-qualifying operational tasks. The Director further found that the Petitioner provided a deficient job description and did not provide a job description for the individual who was listed as the Beneficiary's only subordinate.

On February 12, 2016, we received the Petitioner's response to the Director's certified decision. The Petitioner reiterates the procedural history in this matter and asserts that the organizational charts and position descriptions that were previously provided are sufficient to warrant approval of the petition. The Petitioner also resubmits an informational packet, which includes, but is not limited to, the Petitioner's organizational charts, meeting agendas, and other general information about the Petitioner's business.

## B. Analysis

Upon review, and for the reasons stated below, we find that the Petitioner did not establish that it will employ the Beneficiary in a qualifying managerial or executive capacity.

When examining the executive or managerial capacity of a given beneficiary, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The Petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial or executive capacity. *Id.*

In addition, while performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not 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 Petitioner provided job descriptions that lack sufficient information about the Beneficiary's specific job duties, such that would convey a meaningful explanation of how the Beneficiary meets the general responsibilities of his position without allocating his time primarily to performing the Petitioner's non-qualifying operational tasks. Looking to the first job description,

which the Petitioner originally provided in support of the petition, we note that the Petitioner allocated 30% of the Beneficiary's time to supervising and managing sales and marketing. While the Petitioner provided a number of follow-up job descriptions in response to the Director's RFEs, the Petitioner did not provide any follow-up information establishing precisely who, if not the Beneficiary, would perform the underlying sales and marketing tasks. The Petitioner's additional job descriptions also do not address the Beneficiary's specific role with regard to sales and marketing. Next, the original job description indicated that the Beneficiary would allocate 10% of his time to supervising customer service development. However, the Petitioner qualified that statement by explaining that the Beneficiary would arrange client meetings and ensure that the clients' needs are met, thus indicating that the Beneficiary himself would carry out the non-qualifying tasks associated with customer service. Further, while the Petitioner indicated that the Beneficiary would allocate 25% of his time to monitoring and supervising the activities in his department and overseeing the work of subordinate employees, the Petitioner has not provided evidence of any subordinate employees prior to the fourth quarter of 2014, as indicated in the Petitioner's Employer's Quarterly Report for the fourth quarter of 2014, despite depicting one subordinate below the Beneficiary's position in the Petitioner's various organizational charts. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Furthermore, while the Petitioner provided additional job descriptions in response to the Director's May 8, 2013, and March 20, 2015, RFEs, the Petitioner did not explain why the two identical job descriptions were accompanied by entirely different percentage breakdowns. Assuming that the content of the job descriptions was sufficiently detailed, the considerable inconsistency created by the different time allocations would preclude us from properly evaluating the Beneficiary's job duties and determining how much of the Beneficiary's time would be allocated to the qualifying versus the non-qualifying job duties. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, in reviewing the content of the job descriptions, we find that the Petitioner provided general information that did not explain what the Beneficiary's specific job duties would be or who would perform the underlying tasks to support the Beneficiary in his claimed managerial role. Namely, the Petitioner claimed that the Beneficiary would allocated either 30% or 40% of his time to "supervis[ing] the overall vessel operations including the overseeing of all personnel involved in each vessel operation managed by [the Petitioner]." However, the Petitioner did not identify specific components of the vessel operation or specify which personnel are involved in such operation and their respective job duties. The Petitioner also stated that the Beneficiary would spend either 40% or 25% of his time to "managing and controlling the work and work-flow of subordinate employees/contractors and reviewing weekly activities and progress reports." However, as with the prior component, the Petitioner did not specify which subordinate employees or contractors would perform the underlying tasks or explain who would create the progress reports for the Beneficiary to review. The Petitioner also neglected to reconcile the reference to "subordinate employees" with the lack of evidence showing the existence of any subordinates at the time the petition was filed. 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 also* sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm’r 1988).

Although the job description that the Petitioner provided in response to the March 20, 2015, RFE was accompanied by a chart with a supplemental percentage breakdown, as described in subsection A above, the chart imparted no additional information as to the Beneficiary’s job duties and actual role within the Petitioner’s branch office. For instance, the Petitioner indicated that 30% of the Beneficiary’s time would be spent on the Central and North America vessel operations, which included supervising vessel movement and “ordering the job on vessel movement and cargo related issue [sic].” However, neither the chart nor the preceding job description explained what tasks are entailed in “supervising vessel movement.” Further, despite indicating which contracted agents participate in the vessel operations process, the Petitioner did not specify what is meant by “ordering the job on vessel movement” or explain the Beneficiary’s role in the vessel moving process. 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).

Next, while the chart indicates that the Beneficiary supervises contractors, no specifics were provided to explain what actual tasks are entailed in such supervision or what tasks the Beneficiary carries out during the contract implementation phase versus the contract termination phase. Similarly, while the Petitioner indicated that the Beneficiary would be responsible for cost control and invoice coordination, no explanation was provided to clarify what is meant by “job control function” or “cost suitability supervision” or how they relate to the Beneficiary’s responsibility to control costs. The chart was equally vague in delineating job duties associated with the Beneficiary’s cargo marketing responsibility, as the Petitioner did not clarify what is meant by “FOB cargo marketing” or “conclusion of cargo fixture note,” both of which were listed as components of cargo marketing. In other words, while the Petitioner seemingly lists the various components that comprise the management of the Petitioner’s U.S. branch office, none of the job descriptions provide a telling account of the specific job duties the Beneficiary would perform or the job duties to be performed by other participants who play a role in the Petitioner’s operation; nor do these job descriptions explain how the Beneficiary would be relieved from having to allocate his time to primarily performing the Petitioner’s operational and administrative tasks, which are inherent to the Petitioner’s daily function. Again, 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. *Id.* at 1108.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company’s organizational structure, the duties of a beneficiary’s subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business,

and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 204.5(j)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 204.5(j)(2).

To determine whether the Beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Cf. 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

In the present matter, while the Petitioner made references to the Beneficiary's supervisory and training role over subordinate personnel, the record contains no supporting evidence to establish that the Beneficiary's role would indeed be that of a personnel supervisor. As discussed above, despite the inclusion of one subordinate below the Beneficiary's position, the record does not indicate that the subordinate employee had been hired by the time this petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). While the record indicates that the Petitioner deals with contractors who carry out various services as part of the Petitioner's operations in the United States, the record does not contain information explaining how the Beneficiary executed supervisory authority over the agents with whom the Petitioner has agency agreements. Rather, the evidence indicates that the Beneficiary is the point of contact for the companies that are hired to provide the Petitioner with various ship agency services. In light of the evidentiary deficiencies described herein, it does not appear that the Beneficiary has or will assume the role of a personnel manager, where his primary focus will be to oversee and control the work of supervisory, professional, or managerial personnel whom the Beneficiary would have the authority to hire and fire. See sections 101(a)(44)(A)(ii) and (iii) of the Act.

We also find that the record lacks sufficient evidence to establish that the Beneficiary would assume the role of a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8

U.S.C. § 1101(a)(44)(A)(ii). The term “essential function” is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must clearly describe the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary’s daily duties attributed to managing the essential function. *See* 8 C.F.R. § 204.5(j)(5). In addition, the petitioner’s description of the beneficiary’s daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. As stated above, an employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int’l*, 19 I&N Dec. at 604.

In the present matter, while the Petitioner claims that the Beneficiary will manage the operations of the break bulk team, which may be a key component of the Petitioner’s U.S. port activities, the Petitioner has not delineated the Beneficiary’s specific tasks or consistently stated how much time the Beneficiary would allocate to each of the job duties he performs. The record also does not identify the underlying tasks of the essential function or explain who performs those functions and who performs the administrative and operational tasks associated with daily operations. In other words, the Petitioner did not provide evidence to establish who performs the daily non-qualifying tasks, such as processing invoices, answering phones, paying for services provided by outside contractors, etc. While the Petitioner’s latest statement indicates that the previously submitted evidence was sufficient to meet its burden of proof, the numerous deficiencies described above indicate that the Petitioner’s assessment of the submitted evidence is incorrect, as the record contains a number of evidentiary deficiencies that preclude us from withdrawing the Director’s decision.

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

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, merely satisfying these requirements is insufficient for the purpose of establishing 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 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 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).

As previously indicated, the evidence of record does not establish that the Petitioner's U.S. branch office has reached a level of complexity where it has the personnel to relieve the Beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks.

The record in the present matter lacks sufficient evidence of subordinates who would perform non-qualifying functions. Therefore, we find that the Petitioner has not established that the Beneficiary's proposed position in the United States would consist primarily of tasks within a qualifying managerial or executive capacity and on the basis of this finding, we will affirm the Director's decision.

### III. CONCLUSION

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 initial decision of the Director, Texas Service Center, dated January 8, 2016, is affirmed, and the petition is denied.

Cite as *Matter of SKS-C-, Ltd.*, ID# 16992 (AAO May 26, 2016)