



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

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

MATTER OF F-L-F-M-, INC.

DATE: SEPT. 13, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a convenience store and gas station, seeks to permanently employ the Beneficiary as its president and chief executive officer (CEO) 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, denied the petition, concluding that the evidence of record did not establish that the Beneficiary will be employed in the United States in a managerial or executive capacity. The Petitioner then filed three successive motions to reopen and/or reconsider. The Director denied each motion.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred because, in denying each motion, the Director did not explain how the motions were deficient.

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

I. PROCEDURAL HISTORY AND MOTIONS

The Petitioner filed the Form I-140 petition on November 3, 2014. The Director denied the petition on October 15, 2015, advising that the Petitioner could file an appeal; a motion to reopen; a motion to reconsider; or a combined motion.

The regulation at 8 C.F.R. § 103.5(a) sets forth the requirements for motions:

- (2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

....

- (3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The Petitioner filed a motion to reopen and a motion to reconsider. The Petitioner submitted new evidence in the form of daily activity logs. The Petitioner also submitted a legal brief that alleged specific errors of law and policy.

The Director denied the motion on February 1, 2016, stating: “The evidence submitted with the motion to reopen and reconsider does not establish that the requirements for filing a motion to reopen have been met.”

The Petitioner then filed a motion to reconsider, stating: “The director did not bother explaining how and why the petitioner’s motions and evidence failed to meet the applicable requirements.”

The Director denied the second motion on March 1, 2016, stating:

The evidence submitted with the motion to reconsider does not establish that the requirements for filing a motion to reconsider have been met. The evidence contained in the record and the motion does not overcome the basis for the denial. USCIS has determined that the beneficiary will not be performing in a managerial or executive capacity.

The Petitioner filed another motion to reopen, stating “the director’s latest decision still falls far short of the applicable requirements. . . . The petitioner still wants to know how and why its two previous motions have failed to meet the applicable requirements.”

The Director denied the third motion to reopen on March 31, 2016, in a decision that is essentially identical to the March 1 decision.

In all three motion denial decisions, the Director stated “[t]here is no appeal to this decision.” This is not correct, however. The denial of the Form I-140 petition was appealable, and therefore the denial of any subsequent motion would also be subject to appeal.¹

Following the denial of the third motion, the Petitioner has filed a timely appeal with us, stating that the Director “offer[ed] no legal analysis whatsoever” in denying the Petitioner’s motions.

¹ See 8 C.F.R. § 103.5(a)(6).

We agree with the Petitioner that the Director did not explain how the motion filings were deficient. It cannot suffice simply to quote the applicable regulations and state that the filing does not meet the requirements of a motion. The denial of a motion is appealable (notwithstanding the Director's erroneous statements to the contrary), but the Petitioner cannot mount a meaningful appeal unless it knows the specific reasons for the denial.

For the above reasons, the Director should have explained the deficiencies in the Petitioner's first motion. Because the Director did not do so, the appropriate remedy is for us to review the merits of the petition, including the evidence and arguments submitted on motion.

II. 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. A labor certification is not required for this classification.

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.

III. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. The Petitioner initially claimed only that the Beneficiary will serve in an executive capacity, but on motion and appeal the Petitioner has used the broader term “managerial or executive 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

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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.²

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.

A. Threshold Issues

Before we consider the evidence relating to the Beneficiary's claimed managerial or executive role with the Petitioner, two material issues require attention.

1. Multiple Petitioners

One error that the Petitioner alleged in its first motion concerns the Beneficiary's claimed employment arrangement. The Petitioner's initial submission included a letter indicating that the Beneficiary will work "in [an] executive capacity as our President/CEO for three (3) U.S. affiliated commercial entities namely, [REDACTED]

[REDACTED] We note that [REDACTED] is a corporation, not a limited liability company. The Beneficiary's spouse, [REDACTED] signed the letter, identifying herself as the secretary of all three companies, although the letter is on the letterhead of [REDACTED] stated that all three companies are "the U.S. Petitioners in the matter at hand."

² See section 101(a)(44)(C) of the Act.

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The record contains documentation relating to all three companies, but Form I-140 identifies the Petitioner as [REDACTED]. When the Director denied the petition, the Director only considered the information relating to [REDACTED]. On motion, the Petitioner protested that “the director treats the other two entities . . . as if they do not exist and, consequently, ignores the evidence of the beneficiary’s employment with the petitioner for the benefit of those entities.”

It is true that the Director focused only on [REDACTED]. Nevertheless, we do not agree with the Petitioner that the Director erred in this regard.

The Petitioner, on motion, acknowledged that “[n]either the form I-140 nor its underlying regulations . . . provide for multiple petitioners filing the same petition,” but contended:

Neither the regulations nor case law, however, preclude consideration of the beneficiary’s actual employment, even if such employment is at worksites other than the petitioner’s regular place of business or for the benefit of entities other than the petitioner. See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Also see *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); see also 8 C.F.R. § 204.5(j)(5).

The Petitioner did not quote language from any of the cited cases or regulations to explain how they are relevant to the point the Petitioner sought to make. Reviewing the cited cases and regulations, we cannot find any language that relates to alternate work sites or multiple employers. The Petitioner acknowledges that there is no active provision allowing for multiple petitioners, and has cited no verifiable source to support its position that the regulations and case law passively allow for them.

The regulations at 8 C.F.R. § 204.5(j) contain several references to the Petitioner being a single “employer.” The Petitioner has acknowledged that the regulations make no provision for multiple petitioners. If there is no such provision, then the regulations do not permit the situation that the Petitioner desires in this proceeding.³

Also, the Petitioner had claimed that the three U.S. companies are affiliates because they “are 100% owned by the . . . Canadian Corporation” [REDACTED] that previously employed the Beneficiary, “which qualifies the U.S. Petitioners as wholly owned U.S. subsidiaries and the Canadian Corporation as the Canadian Parent company. To confirm this corporate affiliate relationship . . . , please find enclosed copies of U.S. Petitioner’s Membership Interest as stated in the Operating Agreement.”

The record contains no evidence that the Canadian entity owns any of the three U.S. companies, and considerable evidence that it does not. [REDACTED] operating agreement indicates that the

³ Compare 8 C.F.R. § 214.2(h)(2)(i)(F), which permits an agent to file an “H petition involving multiple employers.” The absence of a comparable active provision in 8 C.F.R. § 204.5(j) does not imply its passive, unwritten existence.

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Beneficiary owns a 60% interest in the company, while one [REDACTED] owns the remaining 40%. Both [REDACTED] and [REDACTED] filed IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 2013 and 2014. The returns identified the Beneficiary as the sole owner of both companies.⁴ Schedules K-1 included with both companies' returns identify the Beneficiary as the sole owner of both corporations.

On his 2014 IRS Form 1040, U.S. Individual Income Tax Return, the Beneficiary reported income and losses from several businesses, including all three companies identified as co-petitioners in this proceeding. This is consistent with the ownership interest residing with the Beneficiary personally.

As shown above, the record contains no evidence to support the claim that Furnishings Plus owns the three U.S. companies, and considerable evidence to the contrary. 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.⁵ The record tends to indicate that the Beneficiary owns all or part of each company, but the record does not contain sufficient evidence to settle the issue definitively. Given the conflict between the Petitioner's claims and the incomplete evidence of record, we find that the Petitioner has not established that the three U.S. companies are affiliates of each other or of [REDACTED]. Therefore, the Petitioner has not established the necessary qualifying relationship.⁶

We note that [REDACTED] also asserted that the Beneficiary "owns 60% of the outstanding shares in the foreign Parent," but share certificates in the record and the minutes of a meeting on July 1, 2012, indicate that the Beneficiary owns 51%, not 60%, of the foreign entity. The lower figure would still represent a controlling interest, but the additional discrepancy raises further questions of credibility.

We also note that, of the three named U.S. companies, only [REDACTED] has been paying the Beneficiary a salary. His name does not appear in tax and payroll documents in the record that identify the employees receiving payment from [REDACTED] and [REDACTED]. The companies have separate bank accounts, and there is no indication that the companies have pooled their finances to compensate the Beneficiary.

Finally, we note that the petitioning U.S. employer must have been doing business for at least one year prior to filing the petition.⁷ [REDACTED] does not meet this requirement, as it did not exist until it filed articles of organization on May 1, 2014, just six months before the petition's filing date. A non-qualifying company cannot "piggyback" on the petition through its association with an older company. For all the above reasons, we find that the party named on Form I-140, [REDACTED] is the only petitioning U.S. employer in this proceeding, and that the Director did not err by limiting consideration to the Beneficiary's proposed work for that company. When we use the phrase "the

⁴ [REDACTED] 2013 return acknowledged that the company began the year with two shareholders.

⁵ *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

⁶ See generally section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(3)(i)(C).

⁷ See 8 C.F.R. § 204.5(j)(3)(i)(D).

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Petitioner” in this decision, we refer only to [REDACTED] and not to [REDACTED] or [REDACTED]

2. The Beneficiary’s Status as an Employee

As noted above, the evidence of the Petitioner’s ownership is incomplete. The Petitioner claims to be a wholly owned subsidiary of [REDACTED] but other evidence, including tax filings, is consistent with the finding that the Beneficiary, as an individual, is the Petitioner’s sole owner.

While the Director’s analysis of the four-prong definitions of managerial and executive capacity is highly relevant to the issue of the Petitioner’s eligibility, we find that this discussion is secondary to a preliminary determination of whether the Petitioner meets the more basic statutory criteria discussed at section 203(b)(1)(C) of the Act, which states that only aliens who were “employed” abroad and are coming to the United States “to continue to render services to the same employer or to an affiliate or subsidiary thereof” will merit classification as a multinational manager or executive. Also, only an “employer desiring and intending to employ within the United States an alien” may file an immigrant petition seeking classification under section 203(b)(1)(C) of the Act.⁸ This is in contrast to other provisions in the Act which permit an intending immigrant to file an immigrant petition on behalf of himself or herself.⁹

Further, the term “executive capacity,” which has been codified and incorporated into the regulations at 8 C.F.R. § 204.5(j)(2), specifically applies solely to “the employee” of the “United States employer” filing the petition on behalf of a beneficiary.¹⁰ Only upon establishing that the Petitioner and the Beneficiary meet this basic criteria, where the Petitioner is the employer and the Beneficiary is the employee on whose behalf the Petitioner files the Form I-140, would there be a need to conduct a further analysis of the given facts within the framework of the four-prong definition of executive capacity. If USCIS determines that an employer-employee relationship does not exist between the Petitioner and the Beneficiary, this deficiency, by itself, would serve as a sufficient basis for denying the petition.

Therefore, applying the above reasoning to the matter at hand, the first step in our analysis will be to determine whether the Petitioner and the Beneficiary have an employer-employee relationship. As indicated above, the statute requires the Beneficiary to have been “employed” abroad and to be coming to the United States for the purpose of rendering his services to the same or a related “employer” in the United States in a managerial or executive capacity.¹¹ The statutory and

⁸ Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F)

⁹ See, e.g., sections 204(a)(1)(E) and (H) of the Act. Of particular note, Congress enacted sections 203(b)(5) and 204(a)(1)(H) of the Act to permit an alien entrepreneur “engaging in a new commercial enterprise” to immigrate to the United States provided certain requirements were met, including employment creation.

¹⁰ See section 101(a)(44)(B) of the Act; 8 C.F.R. § 204.5(j)(1), (2).

¹¹ See section 203(b)(1)(C). We note there is existing precedent case law, namely *Matter of Allen Gee, Inc.*, 17 I&N Dec. 296 (Comm’r 1979), and *Matter of Aphrodite*, 17 I&N Dec. 530 (Reg’l Comm’r 1980), that is relevant to the issue discussed here in this matter. In *Matter of Allen Gee, Inc.*, the Regional Commissioner determined that, as the

regulatory definitions of managerial and executive capacity refer to an assignment within an organization in which an “employee” performs certain enumerated qualifying duties.¹² The Supreme Court has determined that where the applicable federal law does not define “employee,” the term should be construed as “intend[ing] to describe the conventional master-servant relationship as understood by common-law agency doctrine.”¹³ The Court stated:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.¹⁴

As the common-law test contains “no shorthand formula or magic phrase that can be applied to find the answer, . . . *all of the incidents of the relationship must be assessed and weighed with no one factor being decisive*”¹⁵ (emphasis added).

petitioning corporation “is a legal entity distinct from its sole stockholder,” it may “petition for the beneficiary’s services.” Similarly, in *Matter of Aphrodite*, 17 I&N Dec. at 531, the Commissioner focused on the corporation’s separate legal existence from that of its shareholder and pointed out that the term “employee” was not used in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L).

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

¹² See Section 101(a)(44)(A) and (B) of the Act; 8 C.F.R. § 204.5(j)(2).

¹³ *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (“*Darden*”) (quoting *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) (“*C.C.N.V.*”).

¹⁴ *Darden*, 503 U.S. at 323-324 (quoting *C.C.N.V.*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538 U.S. 440, 445, 447 & n.5 (2003).

¹⁵ *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).

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

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.¹⁶

As with the common-law factors listed in *Darden*, the factors relevant to the inquiry of whether a shareholder-director is an employee are likewise not exhaustive.¹⁷ Not all of the listed criteria need be met; however, the fact finder must weigh its assessment of the combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee relationship.¹⁸

The fact that a “person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he or she is an employee or a proprietor.”¹⁹ Likewise, the “mere existence of a document styled ‘employment agreement’” shall not lead inexorably to the conclusion that the worker is an employee.²⁰ “Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on ‘all of the incidents of the relationship . . . with no one factor being decisive.’”²¹

As indicated above, it is critical to consider not only the factor of ownership, but also the factor of control when making this determination, as neither factor, by itself is sufficient to determine whether

¹⁶ *Clackamas*, 538 U.S. at 449-450 (deferring to the factors enumerated in the Equal Employment Opportunity Commission's *Compliance Manual* § 605:0009 (EEOC 2000) (currently cited as § 2-III(A)(1)(d)) for determining “whether [a partner, officer, member of a board of directors, or major shareholder] acts independently and participates in managing the organization, or whether the individual is subject to the organization's control,” and accordingly whether the individual qualifies as an employee).

¹⁷ *Clackamas*, 538 U.S. at 450 n.10 (citing *Darden*, 503 U.S. at 324).

¹⁸ See *id.* at 448-449.

¹⁹ *Id.* at 450; *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988) (explaining that a job title alone is not determinative of whether one is employed in an executive or managerial capacity).

²⁰ *Clackamas*, 538 U.S. at 450.

²¹ *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

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an employer-employee relationship exists between any given petitioner and beneficiary. In other words, the fact that a beneficiary owns the majority or all of a petitioning entity's shares does not automatically lead to the conclusion that the Petitioner and the Beneficiary do not have an employer-employee relationship.

██████████ in her introductory letter, claimed that the Beneficiary "will be required to report all his findings and justify all his of [*sic*] corporate decisions to the Canadian Parent's Board." As explained above, the record contains no evidence to support the claim that ██████████ is the Petitioner's parent company. There is no basis for us to conclude that, in running a company that he appears to personally own, the Beneficiary would need to report to the board of any foreign company.

After reviewing these factors of control under the common law of agency as articulated in *Darden* and *Clackamas* and applying them to the evidence presented in this matter, we find that the Petitioner has not established that it will be a "United States employer" having an employer-employee relationship with the Beneficiary as an "employee" who would be employed by the Petitioner in a managerial or executive capacity. The Petitioner has not supported its claims of foreign ownership, and tax documents filed by the Beneficiary and by the Petitioner refer to the Beneficiary's total ownership of the petitioning company and his receipt of company profits above and beyond his salary. The Beneficiary sits alone at the highest level of the company's organizational chart, and there is no indication that the Beneficiary will answer or irrevocably cede control to any other.

B. Evidence of Record

Having addressed the above issues, we turn now to the grounds for denial that the Director set forth in the original denial notice, specifically, that the evidence of record did not establish that the Petitioner would employ the Beneficiary in a managerial or executive capacity.

On its Form I-140, the Petitioner indicated that it had eight current employees in the United States and a gross annual income of \$2,237,878.39. ██████████ listed the following duties that the Beneficiary would perform, with the approximate percentage of time to be devoted to each:

- Formulating and implementing assigned customer service and human resource policies and business administration methods to be executed and followed by all subordinate and professional personnel employed [by] the U.S. Petitioners' offices; **20% of his time**
- Negotiation of long-term contracts with suppliers, as well as providing necessary financial controls over expenditures to allow for decreased operational costs without loss of value to customers and patrons (financial reporting to be performed by the Beneficiary on a monthly basis); **10% of his time.**
- Plan, develop, establish and direct all company policies and objectives *and* implement same into realistic and competitive objectives; **10% of his time.**

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- Develop organizational policies and be responsible for all financial aspects including accounting, budgeting, insurance, credit, tax, worker's compensation and other financial procedures that must be analyzed in order to alter policies to increase efficiency, accuracy, and revenue and will utilize his General Managers and Auditors, feedback to attain positive results; **20% of his time.**
- Establish responsibilities and procedures for attaining deadline and project objectives and review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current market and economic conditions pursuant to feedback reports from his upper management; **10% of his time.**
- Direct and coordinate formulation of financial programs and provide funding for new operations to maximize return on investment and to develop and increase productivity, by reviewing feedback and data provided to him from the department managers, General Managers, Financial Reports and Market Trends; **20% of his time.**
- Evaluate performance of both upper and lower management to determine compliance with established company, franchise policies and objectives for the U.S. Petitioners and prepare written contributions in attaining these objectives; **10% of his time.**

The Director issued a request for evidence (RFE), instructing the Petitioner to submit evidence that the Beneficiary will be employed in a managerial or executive capacity in the United States.

In response to the RFE, the Petitioner submitted an organizational chart showing the Beneficiary at the top, as president. The second tier on the chart consisted of a general manager, with the initials J.W. Finally, the chart listed six cashiers, including [REDACTED]. The chart also indicated that the Petitioner's hours of operation are from "5:30 a.m. – 10:00 p.m. / 7 days a Week / 365 Days a Year." The Petitioner also submitted copies of 2014 IRS Forms W-2, Wage and Tax Statements, corresponding to all but one of the names on the organizational chart. The exception is that the Petitioner did not issue a 2014 IRS Form W-2 to [REDACTED]²²

The Director denied the petition, concluding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity in the United States. In denying the petition, the Director found that "the petitioner lacks the organizational complexity to warrant the employment of the Beneficiary in a primarily executive or managerial capacity." The Director found that the Beneficiary's job description consisted of "broad job responsibilities" that lacked detail. The Director concluded that the Beneficiary would likely devote much of his time to non-qualifying operational or administrative tasks.

²² [REDACTED] did issue an IRS Form W-2 to [REDACTED] showing payment of \$39,000.00 in 2014. That company's organizational chart referred to [REDACTED] as a cashier.

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On motion from the Director's initial decision, the Petitioner submitted a brief and activity logs, intended to provide further information about the Beneficiary's day-to-day tasks. Because the Petitioner's first motion was the only one to address substantive, non-procedural issues, we will discuss that motion below in lieu of the Petitioner's eventual appeal.

C. 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 a managerial or executive capacity in the United States.

When examining the executive or managerial capacity of a given beneficiary, we will look first to the petitioner's description of the job duties.²³ 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.²⁴

There is considerable overlap among the duties. The Petitioner stated that the Beneficiary will "[p]lan, develop, establish and direct all company policies and objectives *and* implement" them for 10% of his time, but four other listed duties entail developing and/or implementing company policies.

The list of duties referred to department managers, general managers, and auditors, and stated that the Beneficiary would "[e]valuate performance of both upper and lower management." The Petitioner's organizational chart shows no department managers or auditors, and only one general manager. The list of duties also referred to "professional personnel," but the organizational chart does not identify any positions that qualify as professional (i.e., that require a baccalaureate degree as a minimum for entry into the field of endeavor).²⁵ The list of duties, therefore, refers to personnel that do not appear to exist within the petitioning company.

On motion, in response to the Director's finding that the list of duties lacked detail, the Petitioner submitted logs showing the Beneficiary's "Daily Schedule" from October 29 to November 10, 2015 (a period shortly before the filing of the motion on November 16, 2015). The Beneficiary signed an affidavit attesting to the accuracy of the logs.

The logs describe the Beneficiary's visits to [REDACTED] and the other two U.S. companies whom the Petitioner claimed as co-petitioners. With respect to [REDACTED] the listed

²³ See 8 C.F.R. § 204.5(j)(5).

²⁴ *Id.*

²⁵ *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."

(b)(6)

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activities included visits to the store, meetings with vendors, reviewing bank documents, and checking security cameras. The activities described bear little resemblance to the duties described in [REDACTED] initial letter, and do not show that the Petitioner requires significant managerial or executive oversight.

The logs show gaps for significant spans of time. For example, the log for November 5, 2014, shows nothing between a 12:00 meeting with a supplier and 4:00, when the Beneficiary “[c]hecked online cameras of all businesses. The log for November 8, 2014, shows nothing between 10:00 a.m. and 4:00 p.m.

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.”²⁶ 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.”²⁷ 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.²⁸

Managing or directing a business does not necessarily establish the Beneficiary’s 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.²⁹ 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

²⁶ See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii).

²⁷ Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 204.5(j)(4)(i).

²⁸ 8 C.F.R. § 204.5(j)(2).

²⁹ Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B).

in assessing whether its operations are substantial enough to support a manager.”³⁰ 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.³¹

The Petitioner contends that the Beneficiary oversees a general manager who, in turn, supervises the cashiers at the Petitioner’s store. The record does not show that the Beneficiary has enough subordinate employees to relieve him from performing non-qualifying operational and administrative tasks.

The Petitioner claimed eight employees on Form I-140, but the record does not support this claim. The Petitioner’s IRS Form 941, Employer’s Quarterly Federal Tax Return, for the third quarter of 2014 (the last full quarter before the filing date) showed two employees as of September 12, 2014. Quarterly returns from 2013 each showed either two or three employees, indicating that the low employee count in September 2014 was not an anomaly.

The Petitioner’s 2014 IRS Forms W-2 show the following sums:

Initials	Total Paid
[The Beneficiary]	\$52,000.00
J.M.W. (general manager)	7697.69
B.B. (cashier)	454.94
A.B. (cashier)	325.50
D.S.M. (cashier)	7167.09
M.D.S. (cashier)	1052.00
L.E.T. (cashier)	491.19

The above forms indicate that the Petitioner paid seven employees in 2014, but there is no evidence that it employed all of them at once. None of the above amounts are consistent with full-time employment, even at minimum wage. The Petitioner submitted a daily log for its general manager, purporting to show a full-time work schedule on weekdays, with additional weekend hours, but the IRS Forms W-2 do not show that the general manager worked full-time at the time of filing in 2014.

Even if we assume that the Petitioner hired the general manager late in the year, the amounts on the IRS Forms W-2 do not show that the Petitioner had sufficient employees subordinate to the Beneficiary to staff its store during its stated operating hours. The Petitioner’s organizational chart shows that the company is open “5:30 a.m. – 10:00 p.m. / 7 days a Week / 365 Days a Year,” which

³⁰ *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).

³¹ *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

adds up to 6022.5 hours per year. Assuming that there was only one worker on duty at any given time, earning the \$7.25 minimum wage, the store's daily 16 1/2 hour schedule should have generated at least \$43,633 in wages to subordinate staff in 2014. But, excluding payments made to the Beneficiary, the company paid less than 40% of that amount to its workers.

If the Petitioner's tax records are accurate, then we must conclude that the Beneficiary himself was the only worker on site for much of 2014 and the only worker available to work in the Petitioner's store during many of its operating hours as of the date of filing. The Petitioner has not shown that, as of the petition's filing date of November 3, 2014, the company had sufficient staff to relieve the Beneficiary from having to primarily perform non-qualifying operational and administrative tasks.

The Petitioner has not established, in the alternative, that the Beneficiary will be employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary's managerial role arises not from supervising or controlling the work of a subordinate staff but instead from responsibility for managing an "essential function" within the organization.³² The statute and regulations do not define the term "essential function." If a petitioner claims that a beneficiary will manage an essential function, that 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 dedicated to managing the essential function.³³ In addition, a petitioner's description of a beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform the duties related to the function.

The Petitioner has not actively claimed that the Beneficiary will serve as a function manager. Any such claim is subject to the objections described above. The Petitioner simply does not have adequate staff to relieve the Beneficiary, its only full-time worker, from having to perform non-qualifying operational and administrative functions.

The Petitioner initially emphasized that the Beneficiary will be employed as an executive. 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.³⁴ 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

³² See section 101(a)(44)(A)(ii) of the Act.

³³ See 8 C.F.R. § 204.5(j)(5).

³⁴ Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B).

“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.”³⁵

The Beneficiary does appear to have the discretionary authority of an executive. As we have noted, the Petitioner has submitted evidence identifying him as the company’s sole owner, even as the Petitioner has claimed otherwise. But the definitions of executive and managerial capacity have two parts. First, the Petitioner must show that the beneficiary will perform certain high-level responsibilities.³⁶ Second, the Petitioner must prove that the beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the Petitioner’s other employees.³⁷

By definition, an executive directs the management of the organization or a major component or function of the organization. With one part-time employee identified as “general manager,” the Petitioner has not shown that the organization has a management structure that requires significant executive direction, nor has it shown that the Beneficiary would primarily focus on the broad goals of the organization rather than being involved in its day-to-day operations.

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

IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above reason. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner.³⁸ Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of F-L-F-M, Inc.*, ID# 10404 (AAO Sept. 13, 2016)

³⁵ *Id.*

³⁶ *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

³⁷ *See, e.g., Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World, Inc. v. INS*, 940 F.2d 1533.

³⁸ Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013).