U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 16 2014 OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center ("the director"), denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker (Form I-129), seeking to classify the beneficiary as an intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, an Ohio limited liability company, states that it operates a "special needs housing and services program for the Cleveland community." It claims to be an affiliate of the beneficiary's foreign employer, located in the United Kingdom. The petitioner seeks to employ the beneficiary as its Director of Operations for a period of three years.

The director denied the petition concluding that the petitioner failed to establish: (1) that the beneficiary would be employed in the United States in a managerial or executive capacity, and (2) that the beneficiary has been employed in a qualifying managerial or executive capacity with the foreign entity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the evidence submitted clearly established that the offered position is at an executive level, and that such evidence was misconstrued, overlooked and ignored. Moreover, counsel asserts that the director improperly reviewed the staffing of the company and contends that the salary of those working beneath an individual is not determinative of whether an individual is employed in a managerial or executive capacity.

I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

> (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

II. THE ISSUES ON APPEAL

A. Employment in a Managerial or Executive Capacity (United States)

The first issue to be addressed is whether the petitioner established that it will employ the beneficiary in a managerial or executive capacity. The petitioner states that the beneficiary will be employed in an executive capacity as its Director of Operations.

1. Facts

The petitioner filed the Form I-129 on September 18, 2013. It stated on the petition that it was established in October 2009 and has 18 employees, with gross annual income of $500,000. In a letter submitted in support of the petition, the petitioner explained that it was established to "develop and run a Special Needs Housing and Services Program for the Cleveland Community in cooperation with Cleveland Council Members and a local non-profit housing provider." The petitioner stated that its goal is to house and provide services to tenants with mental health issues, those recovering from drug and alcohol dependency, and other tenants with special needs. The petitioner indicated that it currently holds non-profit status, has five properties, and continues to expand its social services network. The petitioner explained that it works with mental health services, the Cleveland Metropolitan Housing Authority, the Veterans Association, the Salvation Army, and church groups and accepts all voucher programs.

The petitioner provided a lengthy description of the beneficiary's proposed duties, which relate primarily to operations management, but also include staff management, health and safety, and ancillary duties. The petitioner submitted a "final organizational chart" for North America which shows that the Director of Operations will report to the Chief Executive. The chart depicts a Real Estate Manager subordinate to the beneficiary, and shows that this employee would supervise a part-time lettings officer, a part-time senior building attendant, and three part-time building superintendents. The chart also depicts an administrator and a finance officer, and, according to the accompanying "role profiles" for the positions identified on the chart, these employees would also report to the beneficiary.

In a request for evidence (RFE) issued on September 30, 2013, the director advised that the submitted position description did not establish what the beneficiary would do on a day-to-day basis. Therefore, the director requested a more detailed description of the beneficiary's proposed duties and the percentage of time to be spent on specific tasks. The director also advised the petitioner that it should submit additional evidence of its organizational structure and staffing levels, and noted that such evidence could include, but is not limited to, a more detailed organizational chart and evidence of wages paid to employees, such as state quarterly wage reports, IRS Forms W-2 and 1099, and employment agreements for any newly hired employees.

In response, the petitioner submitted a role profile and position description for the beneficiary. The petitioner indicated that he will be a member of the Executive Team and play a full role in the strategic management of the group, with responsibility for implementation of the Group's general and supported housing, maintenance and asset management policies and the leadership of all designated staff and resources in the function, as well as working to develop and enhance services offered by the group. Specifically, the petitioner stated that the beneficiary would perform the following duties:

Operations Management Duties 65%

1. To lead the Operations function in delivering the Group's objectives derived from the Group's Business Plan ensuring that corporate goals and values are effectively communicated to staff.
2. To have responsibility for the general needs housing and supported housing services to ensure a caring and responsive service delivery and continued viability of schemes and projects.
3. To formulate, implement and review policy and procedure in relation to general needs housing, supported housing and asset management and identify and progress new business opportunities suitable for the expansion of the service.
4. To be responsible for the performance and quality of service delivery in relation to all landlord functions.
5. To have overall responsibility for developing, setting and monitoring performance against targets in all general needs housing, supported housing and maintenance areas of the Association's activities, taking appropriate action to rectify areas of concern and reporting as required.
6. To ensure effective consultation and engagement with tenants and other stakeholders on general needs housing, supported housing and maintenance issues and ensure strategies are derived and implemented to enable tenants play an effective part in the management of their homes.
7. To ensure regular customer surveys to ensure the service meets the customer needs and expectations.
8. To coordinate all aspects of the formal complaints policy, including maintaining organizational records and providing performance reports.
9. To review and recommend expenditure and income levels for general needs housing, supported housing and asset management budgets and to monitor and achieve financial targets.

10. To develop performance targets and monitor key areas of activity including ensuring that risks are identified and minimized.
11. To ensure effective management and review existing and new contracts and leases with external agencies.
12. To keep abreast of changes in legislation and wider political/socio-economic and housing issues. Review, recommend and implement changes in policy, procedures and working practices that will improve service delivery and contribute to achieving strategic objectives and regulators' requirements.
13. To contribute to the Group's plan on Value For Money, developing and maintaining a suitable program of Value For Money reviews and business improvement.
14. To develop effective relationships with users of the services, local community groups, funders, local business, voluntary organizations and other partners and agencies in order to promote the service and maximize opportunities.
15. To contribute to the development and regeneration process in meeting housing need.
16. To oversee the effective asset management of the Group's stock ensuring that there is an effective maintenance service – planned and responsive, ensuring all maintenance activity is delivered on time, within budget and in accordance with agreed technical standards and established timetable.
17. To direct systems for tendering and other procurement of works for maintenance, repair, improvements and related services that meet value for money and probity requirements.
18. To lead on the Group's sustainability plan including maximization of external funding.
19. To liaise with the Chief Executive and other staff in establishing the formulation and review of policy and procedure.
20. To ensure internal control procedures are maintained and upgraded including the provision of adequate internal audit, compliance and risk management processes.

Staff Management Duties 12%

1. To provide leadership and manage staff, assets and resources in order to optimize efficiency, effectiveness and continuous improvement and ensure staff are motivated to achieve agreed performance standards and a customer-orientated service.
2. To ensure the recruitment, training, discipline, allocation of duties, welfare, development and safety of all staff.
3. To ensure that the Group's health and safety, equal opportunities, customer care and other corporate policies are reflected in the team and to monitor the same.

Health and Safety Duties 8%

1. To lead on the technical aspects of the Group's health and safety provision, in liaison with the Chief Executive and ensure that staff have adequate training and supervision to ensure their health and safety at work.

Other Duties 15%

1. In liaison with the Chief Executive and other senior managers ensure that the Group complies with the Data Protection Policy.
2. To Represent the Group at local and national liaison meetings, conferences etc.
3. To prepare and present reports as required to Boards and Committees, ensuring relevant and timely information to enable good quality decision making.
4. To attend board meetings as required.
5. To attend training courses as required.
6. To exercise good practices with relation to Equal Opportunities.

The petitioner provided a revised U.S. organizational chart that identifies the beneficiary as Director of Operations, supervising a senior building superintendent, who in turn supervises a maintenance technician, a senior building superintendent, and three building superintendents. The chart also includes an officer administrator who reports to the beneficiary and supervises an assistant. The chart does not include the positions of finance officer, real estate manager, or lettings officer identified on the original chart. Nevertheless, the petitioner re-submitted the same position descriptions that accompanied the original chart, which indicate that the "real estate manager" directly supervises all building superintendents and the lettings officer.

The petitioner did not submit any of the suggested evidence of wages paid to employees, such as state quarterly wage reports, IRS records of wages paid, payroll records, or any alternative evidence. However, the RFE response did include the petitioner's most recent IRS Form 1120, U.S. Corporation Income Tax Return. The Form 1120 reflects that the petitioner did not pay any compensation to officers or salaries and wages in 2012.

The director denied the petition on January 6, 2014, concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity. The director's decision was based primarily on the petitioner's failure to provide any evidence of wages paid to employees, thus precluding a finding that the beneficiary would have staff to relieve him from performing non-executive and non-managerial duties associated with the day-to-day functions of the business.

On appeal, counsel for the petitioner asserts that the director erroneously concluded that the petitioner seeks to place the beneficiary in a managerial position. Counsel asserts that the petitioner consistently stated that the beneficiary would be employed in an executive capacity and provided statements and evidence in support of that claim. Counsel suggests that the director misunderstood the nature of the beneficiary's role "because of the organizational structure and the overly detailed job description."

Further, counsel asserts that the director made erroneous conclusions of law regarding what constitutes executive duties, noting that the beneficiary's duties are comparable to the duties listed for "top executives" in the U.S. Department of Labor's (DOL's) Occupational Outlook Handbook (OOH)

and for "chief executives" in the DOL's O*Net Online occupational information network. As such, counsel asserts that the petitioner clearly met its burden to establish that the beneficiary's proposed duties are executive in nature. Nevertheless, counsel asserts that the beneficiary could also qualify as a manager because he does manage the organization and a key function of the organization, functions at a senior level within the organization, has authority over subordinate employees, and has discretion over the day-to-day operations of the business.

In addition, counsel asserts that the director overlooked the petitioner's organizational chart and voluminous documentation submitted regarding the petitioning company and the beneficiary's role within the organization. Counsel states that the director placed undue emphasis on the size and structure of the organization, and failed to recognize that that the petitioner has only existed since the end of 2009. Counsel indicates that the company currently has 18 employees and 5 properties and is continuing to expand and grow, and that its operation is quite complex due to the need to interact and coordinate with social services organizations, nonprofit groups and local government entities. Counsel states that the director failed to take into account the unique nature of the organization and its reasonable needs.

Finally, counsel questions the relevance of the director's request for evidence of wages paid to the petitioner's employees, noting that the salaries paid to those employees should have no impact on a determination as to whether the beneficiary will be employed in a qualifying managerial or executive capacity.

2. Analysis

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in a qualifying managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Here, the petitioner indicated that the beneficiary would allocate 65% of his time to a set of 20 diverse duties, all of which were characterized as "operations management" functions. While some of these duties fall within the statutory definition of "executive capacity," a number of the duties were inadequately explained. For example, the description as a whole conveys that the beneficiary would exercise the appropriate level of authority over the business and have responsibility for goal-setting, policies, and procedures within the operations area. However, the petitioner did not identify what specific tasks the beneficiary would perform in connection with his "responsibility for the general needs housing and supported housing services to ensure a caring and responsible service delivery," his responsibility "to ensure effective consultation and engagement with tenants," or how he would

coordinate the formal complaints policy. It is unclear from the description to what extent or on what level the beneficiary will maintain relationships with "the users of services, local community groups, funders, local business, voluntary organizations," etc., in order to establish that such duties would be executive in nature. Other duties included under the beneficiary's broad "operations management" responsibility, such as ensuring regular customer surveys, and keeping abreast of legislation and political/socio-economic and housing issues, do not clearly fall under the statutory definition of executive capacity.

Further, the petitioner provided a single percentage for a large group of duties, making it difficult to discern how much time he would allocate to qualifying versus potentially non-qualifying duties listed within the "operations management" function. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the 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).

Therefore, despite any similarities between the beneficiary's listed duties and those attributed to "top executives" in DOL publications, the petitioner's description of the beneficiary's duties alone is insufficient to establish his eligibility for this classification. 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 petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a comprehensive understanding of a beneficiary's actual duties and role in a business.

Here, the petitioner failed to submit a consistent description of the petitioner's organizational structure and staffing levels. The petitioner states that it has 18 employees but provided two organizational charts that included only 11 or 12 staff. Further, there were clear discrepancies between the two different charts that have not been explained, as the initial chart included a "real estate manager" position that was attributed with daily oversight of the business and extensive involvement in its day-to-day operations, and the other chart did not include this position, the leasing officer, or a finance officer. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Although the director requested corroborating evidence of wages paid to employees that may have served to corroborate one or the other of the two different organizational charts and the petitioner's statements that it has 18 employees, the petitioner opted not to provide this information, and questions why such information would be requested. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose

of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Therefore, the petitioner's claims regarding its staffing levels and organizational structure remain inconsistent and uncorroborated. 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)).

The petitioner has consistently stated that the beneficiary will be employed in an executive capacity. 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 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.*

Here, the petitioner established that the beneficiary would exercise executive-level authority over operational matters, but did not establish that he would more likely than not primarily perform executive-level duties, rather than being involved in the many non-executive functions associated with his area of responsibility. The petitioner initially indicated that administration, finance, leasing, property management and maintenance, tenant engagement, and supported housing services would all fall within the purview of the "operations" area assigned to the beneficiary. Due to the inconsistencies and uncorroborated information submitted regarding the company's actual staffing levels and structure of the company, the petitioner has not established who will be performing the non-qualifying duties associated with these functions, such that the beneficiary could reasonably devote the primary part of his time to executive duties.

For these same reasons, the petitioner has not established that the beneficiary is, in the alternative, managing an essential function. 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 furnish a written job offer that clearly describes 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. § 214.2(l)(3)(ii). 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 noted above, the petitioner must establish that someone other than the beneficiary will perform the non-qualifying duties associated with the function, such that the beneficiary is free to perform primarily qualifying duties. Due to the petitioner's failure to establish the number and types of employees working for the organization, it cannot be determined to what extent other staff will perform the non-managerial duties that fall within the function managed by the beneficiary. Therefore, the petitioner has not established that the beneficiary's duties would be primarily managerial in nature and he cannot qualify as a function manager based on the submitted evidence.

Section 101(a)(44)(C) of the Act requires the AAO to "take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function." The petitioner states that its business is still quite new and that it has grown from two employees in 2009 to 18 employees at the time of filing. However, the only supporting evidence submitted that contains information regarding the actual number of employees is the petitioner's corporate tax return from 2012 which indicates that the company paid no salaries or wages at all. While a staff of 18 employees may very well be sufficient for the operation of the business and to relieve the beneficiary from non-qualifying duties associated with the "operations management" area, the petitioner has not corroborated its claim that it has 18 employees, nor has it consistently identified the positions that were staffed at the time the petition was filed.

Therefore, this decision does not rest on the petitioner's relatively small size but rather on its failure to corroborate its claimed size or to submit consistent evidence regarding the number and types of employees available to perform the day-to-day functions of the various areas that are under the "operations" responsibility assigned to the beneficiary. Based on this evidentiary deficiency, the petitioner has not established that it currently has a reasonable need for a director of operations who primarily performs executive or managerial duties. Accordingly, the appeal will be dismissed.

B. Foreign Employment in a Managerial or Executive Capacity

The remaining issue to be addressed is whether the foreign entity employed the beneficiary in a qualifying managerial or executive capacity.

1. Facts

The petitioner indicated at the time of filing that the beneficiary has been employed as director of operations for the foreign entity since September 2012, but did not provide a detailed description of his duties or an organizational chart for the foreign entity. In the RFE, the director advised the petitioner that the initial evidence did not include information regarding what the beneficiary has been doing on a day-to-day basis. The director instructed the petitioner to provide additional evidence that would support its claim that the beneficiary has been employed in a managerial or executive capacity, including, but not limited to: (1) an organizational chart showing the foreign

entity's staffing levels and the names, job titles, job duties, educational level and salary of the beneficiary's subordinates; and (2) a letter from the foreign entity describing the beneficiary's typical managerial or executive duties and the percentage of time he spends on each duty.

In response, the petitioner submitted a letter from the foreign entity listing the same duty description provided for the beneficiary's proposed U.S. position and confirming that the positions are identical. The petitioner also provided an organizational chart for the foreign entity which depicts the beneficiary as director of operations. The chart identifies a subordinate company accountant, office administrator and tenant liaison officer reporting to the beneficiary, and indicates that the tenant liaison officer supervises a maintenance technician. The chart also appears to show the tenant liaison officer's oversight of four properties, but does not identify any additional employees. In total, the chart identifies seven employees by name, including the beneficiary and the CEO.

The petitioner also resubmitted a letter from which was provided to verify the beneficiary's salary and employment dates. The letter mentions that the beneficiary's duties include "day to day management of the property portfolio of the business," overseeing its financial transactions, researching future opportunities, and formalizing company strategies.

The director denied the petition, determining that the petitioner failed to establish that the beneficiary's position with the foreign entity is in a qualifying managerial or executive capacity. In denying the petition, the director emphasized the brief description provided in the letter from the accounting firm, noting that such duties did not appear to be in a managerial or executive nature. The director further found that the petitioner did not provide the requested percentages of time the beneficiary allocates to specific duties. The director also stated that the petitioner did not provide an organizational chart for the foreign entity; however, as noted above, the petitioner did include the chart in its response to the RFE.

On appeal, counsel asserts that the director overlooked the submitted organizational chart and detailed description of the beneficiary's duties and instead relied on the brief description of duties provided by the foreign entity's accountant, which was intended only to verify the beneficiary's dates of employment and salary, and not to explain his actual day-to-day duties.

2. Analysis

Upon review, the petitioner has not established that the beneficiary's position with the foreign entity was in a managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Here, the petitioner submitted the same position description for both the beneficiary's current foreign and proposed U.S. positions. The deficiencies of this description have been addressed above and are applicable here. The description included both qualifying executive and non-qualifying duties and did not clearly

establish how the beneficiary primarily spends his time. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

Further, when examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts that contribute to understanding a beneficiary's actual role in a business.

While the petitioner submitted an organizational chart in response to the director's RFE, it did not clearly identify the foreign entity's staffing levels and structure, and did not provide the requested information regarding the duties performed by the beneficiary's subordinate employees, information that would contribute to establishing whether the beneficiary is relieved from performing the non-executive and non-managerial duties associated with the "operations" area under his responsibility. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Therefore, as with the beneficiary's position with the U.S. entity, the record establishes that the beneficiary exercises the appropriate level of authority over the company's operations and performs some qualifying duties, but does not establish that the beneficiary's actual primary duties would be executive, or managerial, in nature.

The petitioner indicated that the foreign and U.S. entities provide the same type of supported housing services in their respective communities and manage a similar number of properties. The petitioner claims to employ 18 employees, yet the foreign entity submitted an organizational chart with only seven employees, including the beneficiary and the CEO to whom he reports. The petitioner did not submit an explanation as to how work is distributed among the foreign entity's staff. 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)). Absent evidence of who is performing the day-to-day, non-executive duties associated with tenant relations, leasing, service provision, maintenance and other operational functions, the petitioner has not met its burden to establish that the beneficiary's duties have been primarily executive in nature.

Section 101(a)(44)(C) of the Act requires USCIS to "take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function." USCIS interprets the statute to prohibit discrimination against small or medium-size businesses. However, no matter the size of the company, the petitioner has the burden to establish that the beneficiary's position consists "primarily" of managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir., 2008).

Here, the petitioner has not submitted sufficient evidence to establish that the foreign entity employs the beneficiary in a qualifying managerial or executive capacity. For this additional reason, the appeal will be dismissed.

The dismissal of this appeal has no bearing on future adjudications involving the same petitioner and beneficiary. The petitioner may submit a new petition accompanied by relevant evidence without prejudice.

III. CONCLUSION

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

ORDER: The appeal is dismissed.