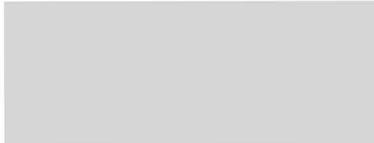




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **AUG 10 2015**

PETITION RECEIPT #: 

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this Form I-129, Petition for a Nonimmigrant Worker, seeking to classify the beneficiary as an L-1A nonimmigrant 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, a Florida corporation, operates a transportation and tourism business. It claims to be a subsidiary of [REDACTED] the beneficiary's employer in Brazil. The petitioner seeks to employ the beneficiary as its CEO for a period of three years.

The director denied the petition, concluding that the evidence did not establish: (1) that the petitioner has a qualifying relationship with the beneficiary's employer abroad; and (2) that the beneficiary will be employed in a managerial or executive capacity in the United States.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to our office for review. On appeal, the petitioner asserts that the evidence is sufficient to establish that the petitioner is a subsidiary of the foreign entity. The petitioner also asserts that the evidence establishes that the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

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.

II. Managerial or Executive Capacity in the United States

The first issue to be addressed is whether the petitioner established that the beneficiary will be employed in the United States in a 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 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, 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. Section 101(a)(44)(C) of the Act.

A. Facts

The petitioner filed the Form I-129 on June 17, 2014. The petitioner stated on the Form I-129 that it has between eight and ten employees and an estimated gross annual income of \$347,345. The petitioner explained that it operates a charter bus company and that it intends to expand its transportation services now that it is under new ownership by the beneficiary's foreign employer, which purchased 50 percent of its shares in 2013.

The petitioner stated that it would employ the beneficiary as its CEO in the United States. In a letter dated April 24, 2014, the petitioner described the beneficiary's proposed duties as follows:

1. Planning

- Overseeing the planning, developing and establishing of policies and objectives of the USA business in accordance with the [the foreign entity's] company mission.
- Directing and creating annual operating plans that support strategic direction set by the Board of Directors and correlate with annual operating budgets; submit annual plans to the Board for approval;
- Collaborating with the Board to define and articulate the organization's vision and develop strategies for achieving that vision;
- Developing and monitoring strategies for ensuring long-term financial viability of the organization;
- Developing future leadership within the organization;
- Selection of various suppliers and groups needing specialized transportation services properties, sites and locations for acquisition.

2. Management

- Overseeing the USA operations of organization for its compliance with legal and regulatory requirements;
- Create and maintain procedures for implementing plans approved by the Board of Directors;
- Evaluate the organization and management of staff performance on a regular basis;
- Liaise with professionals such as lawyers, accountants, appraisers, bankers, developers, and planners.

3. Financial Management

- Overseeing management studies and review and interpret the economic and statistical data in order set the budget for the company;
- Oversee all other officers and executives and managers developing annual budgets that support operating plans and submits budgets for Board approval;
- Providing prompt, thorough, and accurate information to keep the Board appropriately informed of the organization's financial position;
- Coordinate and manage press development. [The beneficiary] will maintain involvement with [the foreign entity] in a variety of capacities. For example, he will continue to report to the Board of Directors and liaise with senior executive members of [the foreign entity] on all decision that have an effect on profits and accountability of [the foreign entity] and the Petitioner.

The petitioner stated that the beneficiary will perform his duties "through subordinate managers and degreed professionals."

The petitioner also provided the following breakdown of how the beneficiary will spend his time:

- Direct, plan, or implement policies, objectives, or activities of organizations or businesses to ensure continuing operations, to maximize returns on investments, or to increase productivity. 25%
- Direct human resources activities, including the approval of human resource plans or activities, the selection of high-level staff. 15%
- Analyze operations to evaluate performance of the company or its staff in meeting objectives or to determine areas of potential cost reduction, program improvement, or policy change. 10%
- Review reports submitted by staff members to recommend approval or to suggest changes. 15%
- Negotiate or approve contracts or agreements with suppliers, distributors, federal or state agencies or other organizational entities. 15%
- Confer with board members, organizational officials, or staff members to discuss issues, coordinate activities, or resolve problems. 10%
- Appoint department heads or managers and assigns responsibilities to them. 10%

The petitioner stated that it employs ten part-time employees and no full-time employees. The petitioner explained that it intended to hire additional employees in the future after the beneficiary's transfer from Brazil. Specifically, the petitioner estimated that it will have nine full-time and 10 to 15 part-time staff within three years, including drivers, marketing, sales and reception staff.

The petitioner submitted a business plan, which included a proposed organizational chart for the business. The chart indicates that the beneficiary will oversee the administrative staff, sales and reservations staff, lawyers and consultants, banks and investors, suppliers, and accountant and CPA positions. The chart also includes a Chief Operating Officer, the petitioner's co-owner, who will oversee drivers and mechanics. The petitioner also provided a "Structure Chart" depicting its proposed staffing levels through 2016. This chart

shows that the initial full-time jobs created would include one sales person, two drivers and one office worker, while additional full-time staff to be hired in 2015 and 2016 would include three drivers, one mechanic and one general laborer. The chart reflects that the petitioner would maintain a staff of ten part-time employees over time as it grows from its current fleet of four charter buses to a total of nine buses by 2016.

The petitioner submitted its IRS Form 1120, U.S. Corporation Income Tax Return, for calendar year 2013. The tax return shows that the petitioner did not pay direct wages to any employees in 2013. The petitioner provided IRS Forms 1099-MISC for 2011 and 2012 demonstrating the use of contract employees, but did not provide documentation for 2013.

The director issued a request for evidence (“RFE”) informing the petitioner that the evidence was insufficient to establish that the beneficiary will be employed in a managerial or executive capacity. The director instructed the petitioner to provide additional evidence, including the following: an organizational chart or diagram to include the name, job title, salary, education level, and a summary of duties for each employee in the beneficiary’s department; copies of IRS Forms W-2, W-3, and 1099-MISC showing wages paid to all employees under the beneficiary’s direction; copies of state quarterly wage reports for the first and second quarters of 2014; and copies of employment agreements for newly hired employees who will be managed by the beneficiary.

In response to the RFE, the petitioner provided an employee list for the period January 1 to August 31, 2014. The list named 15 part-time drivers and one full-time sales representative. The petitioner also provided a new organizational chart which depicts the foreign entity and [REDACTED] as co-owners in parallel positions at the apex of the company’s organization. [REDACTED] the COO, oversees 15 drivers and 12 contracted mechanic shops. The beneficiary is placed under the foreign entity and holds the title of CEO/CFO. The chart shows that the beneficiary will supervise the sales representative, the petitioner’s attorney, an accountant/CPA, two [REDACTED] managers, and suppliers such as [REDACTED] and [REDACTED]. Of these subordinates, only the sales representative is claimed to be an employee of the petitioning company.

The petitioner also provided a list of 13 independent contractors whose services it used between January and August 2014. The petitioner submitted 24 Forms 1099-MISC, showing that the petitioner paid a total of \$84,073 to four companies and approximately 20 individuals in 2013. There were no Form 1099s included for the individual identified as the beneficiary’s subordinate sales representative or for the third-party attorney, accountant/CPA, bank managers, or suppliers. Further, the petitioner did not submit evidence of wages paid to the 16 individuals identified as employees, such as IRS Forms W-2 or quarterly wage reports.

The director denied the petition concluding that the beneficiary would not be employed in a managerial or executive capacity in the United States. The director found that the beneficiary’s described duties were inconsistent with the current scope and structure of the petitioning company. The director acknowledged the petitioner’s claims that the beneficiary was expected to further grow the U.S. business; however, the director noted that the petitioner must establish eligibility at the time of filing the petition. The director found that the petitioner did not establish that the claimed employee, contractors and other third parties placed subordinate to the beneficiary on the organizational chart would be under his supervision or control. The director

concluded that the evidence was insufficient to show that the petitioner could support the beneficiary in a primarily managerial or executive capacity at the time of filing.

On appeal, the petitioner asserts that the evidence is sufficient to support its forecasted growth and expansion and claims that the beneficiary's time will be almost exclusively devoted to managerial and executive duties. The petitioner states that the beneficiary's duties will include responsibility for setting goals and all marketing and expansion plans; establishing corporate purchase and acquisition criteria; and having overall direction and authority for the control of the company. The petitioner states that the evidence is sufficient to demonstrate that the beneficiary will not be making reservations, doing maintenance on the buses, or performing other non-qualifying duties and that [REDACTED] identified as the COO, will be in charge of the day-to-day operations including maintenance, equipment, and mechanical tasks.

The petitioner reasserts the beneficiary's duties in the areas of planning, management, financial management, human resource management, and marketing and public relations. In addition to the previously described duties, the petitioner states that the beneficiary will oversee organizational resources, oversee management studies, review and interpret economic and statistical data in order to set the budget for the company, ensure that all staff practice appropriate accounting procedures, oversee and direct policy development and documentation, control customer service issues and quality control, forecast future employment and marketing needs, prospect new acquisitions, and direct and manage diverse marketing strategies and promotion opportunities through subordinate managers.

B. Analysis

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States.

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). 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 either an executive or a managerial capacity. *Id.* The definitions of executive and managerial capacity each 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 show 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).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining a beneficiary's claimed employment in a managerial or executive capacity, 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 understanding a beneficiary's actual duties and role in a business.

The petitioner described the beneficiary's duties in broad terms and did not provide any insight into his day-to-day activities. For example, the petitioner stated that the beneficiary will spend 25 to 30 percent of his time directing, planning, or implementing policies, objectives, or activities. The petitioner described the beneficiary's described planning and management duties as: developing and monitoring strategies; overseeing the U.S. operations to ensure compliance with legal and regulatory requirements; directing and creating annual operating plans; and creating and maintaining procedures. These broadly described responsibilities potentially require the beneficiary to perform both qualifying and non-qualifying duties. Without additional details describing the routine actions the beneficiary will take to accomplish the broadly described responsibilities, the petitioner has not established the proportion of time the beneficiary spends performing managerial or executive duties. 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner stated that the beneficiary will spend 15 percent of his time negotiating and approving contracts and agreements and an unspecified additional portion of his time selecting various suppliers and groups; coordinating and managing press development; managing client development and the procurement/distribution of supplies, controlling customer service issues and quality control, directing all operations including sales and marketing, and directing human resource activities. These duties suggest the beneficiary's involvement in non-qualifying administrative, procurement, sales, customer service, marketing, and/or human resources duties. 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. Section 101(a)(44) of the Act. Based on the current record, we are unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs administrative or operational duties. Despite the petitioner's attempts to provide percentages to broad areas of responsibility, the description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties will be executive or managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 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. § 214.2(l)(1)(ii)(B)(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. § 214.2(l)(1)(ii)(B)(3). Here, the petitioner claims that the beneficiary will spend 10-15% of his time directing human resource activities and 5-10% of his time appointing department heads or managers and assigning responsibilities.

At the time of filing in April 2014, the petitioner stated that it maintained a staff of ten part-time employees. The petitioner has consistently identified the part-time staff as drivers who report to the company's chief operating officer. Therefore, at the time the petition was filed, the record reflected that the beneficiary would have no direct subordinate staff to assist him with the financial, administrative, sales, marketing, customer service and quality control activities mentioned in his position description. In response to the RFE, the petitioner claimed to have 15 part-time drivers and one full-time sales representative. Although the petitioner provided Form 1099s from 2013 to demonstrate that it paid wages to 13 individuals identified on the organizational chart as drivers subordinate to the COO, there is no evidence to demonstrate that any wages were paid to any of the beneficiary's claimed subordinates. 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)). Further, since the petitioner did not claim to employ a full-time sales representative at the time of filing, it is reasonable to conclude that she was hired after the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Furthermore, the organizational chart indicates that the beneficiary's subordinate attorney, accountant, bank managers, and suppliers are employees of third-party companies. While we do not doubt that the beneficiary's role will involve interaction with these individuals and that they will assist with legal, accounting and banking matters, the petitioner has not established that the beneficiary will actually act as a supervisor or manager of these individuals and entities. An employee will not be considered to be a supervisor simply because of a job title, because he or she is placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. See generally *Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). 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. § 214.2(l)(1)(ii)(B)(3). The petitioner has not provided contracts or other evidence that the beneficiary possesses the requisite control and authority over the third-party companies' employees.

While the petitioner states on appeal that it intends to hire additional employees in the future, the director correctly noted that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. Again, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). The petitioner stated on appeal that the beneficiary will delegate all his administrative tasks at the beginning of the second year; however, the petitioner has not demonstrated who performed the administrative tasks at the time of filing. Even if we considered the petitioner's future hiring plans through 2016, the evidence would not be sufficient to establish that he would supervise subordinate managers, supervisors or professionals. The petitioner's proposed structure chart states that it intends to hire a total of nine full-time employees over a period of three years. Of

these anticipated hires, only two employees, a sales representative and an office worker, were expected to report to the beneficiary.

Given the lack of evidence that the beneficiary would have any subordinate employees under his control and authority as of the date of filing, and in light of the submitted hiring plan, the evidence does not support a finding that the beneficiary would be employed as a personnel manager. Further, the lack of subordinate staff also calls into question the petitioner's assertion that the beneficiary would be required to spend 15 to 25 percent of his time on human resources activities or directing or assigning duties to subordinate managers or department heads.

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 job description that clearly explains the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). 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. 593, 604 (Comm'r 1988). Although the petitioner states on appeal that the business plan demonstrates the beneficiary's role as a function manager, the petitioner has not identified with specificity the function to be managed by the beneficiary. The beneficiary's described duties include sales, marketing, customer service, quality control, and financial duties. A petitioner cannot satisfy the regulatory requirements by making a blanket claim that the beneficiary is responsible for the management of all functions of the business and therefore qualifies as a function manager.

Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. As discussed above, the petitioner did not provide evidence to demonstrate that the beneficiary will have subordinate employees to perform non-qualifying duties related to the broad functions assigned to him as CEO/CFO. The petitioner states that the beneficiary will spend 15 percent of his time reviewing reports submitted by staff members and that he will oversee management studies, coordinate and manage press development, review and interpret economic and statistical data to set the budget, control customer service issues, and manage diverse marketing strategies and promotion opportunities. However, the petitioner has not provided evidence of any staff to create the necessary reports and management studies or to perform the non-qualifying duties associated with the beneficiary's described duties. While the petitioner asserts that the beneficiary's transfer to the United States will precipitate a period of growth and increased hiring of full- and part-time staff, most of the planned future hires will report to the chief operating officer, not to the beneficiary. The record does not establish that the beneficiary's future direct reports or third-party staff would relieve him from performing non-qualifying duties associated with the several functions assigned to him.

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

The petitioner has not demonstrated that the beneficiary would spend the majority of his time focused on the broad goals of the organization. Although the petitioner stated that the beneficiary is responsible for sales and marketing, office administration, human resources, finance, supply, and legal functions, the petitioner has not established that that it employs a subordinate staff to relieve him from performing the many non-qualifying tasks associated with these functions. The fact that the beneficiary owns or manages 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)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of “manager” or “executive”).

As correctly noted by the petitioner, a company’s size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, however, federal courts have generally agreed that 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. at 178); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). 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).

At the time of filing, the petitioner was operating a transportation company which was staffed by its co-owner/chief operating officer and ten part-time drivers. The petitioner did not establish that it can currently support a managerial or executive to oversee all other functions of the company, particularly in light of the lack of staff to perform duties such as purchasing, sales, marketing, customer service, and routine financial and administrative functions. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily

managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

For the foregoing reasons, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

III. Qualifying Relationship

The next issue to be addressed is whether the petitioner has established that it has a qualifying relationship with the beneficiary's last foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

Upon review of the record and the evidence provided on appeal, we find that the evidence is sufficient to establish that the petitioner is a subsidiary of the beneficiary's foreign employer. The director's finding in regard to this issue only will be withdrawn.

IV. Conclusion

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

ORDER: The appeal is dismissed.