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

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

DATE: AUG 2 1 2015

PETITION RECEIPT #: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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,

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 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 New York corporation, operates three Indian restaurants in New York. The Petitioner wholly owns the beneficiary's foreign employer, [redacted] located in the United Kingdom. The Petitioner seeks to employ the Beneficiary as its operations manager for three years.

The Director denied the petition concluding that the Petitioner did not establish that the Beneficiary had been employed by the foreign entity in a qualifying managerial or executive capacity.

The Petitioner subsequently filed an appeal. The Director declined to treat the appeal as a motion and forwarded the appeal to our office. On appeal, the Petitioner asserts that the record establishes by a preponderance of the evidence that the Beneficiary had been employed abroad in a qualifying managerial capacity based on her management of an essential function of the organization.

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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

II. THE ISSUE ON APPEAL

The sole issue to be addressed is whether the Petitioner established that the Beneficiary has been employed abroad in a qualifying managerial capacity. The Petitioner does not claim that the Beneficiary was employed in an executive capacity.

A. Facts

The Petitioner filed the Form I-129 on October 14, 2014. In a letter dated September 30, 2014, the Petitioner stated that the Beneficiary held the position of operations manager with overall managerial responsibility for restaurant operations, marketing, and accounting for its foreign subsidiary's restaurant in [redacted] from January 2013 until April 2014. The Petitioner stated that the Beneficiary's responsibilities included supervising business operations, marketing, maintaining client contacts, supervising employees, formulating policy, and reviewing market trends to determine sales practices, market potential, and price schedules. The Petitioner further stated that the Beneficiary's duties included leading and coordinating advertising, design, and marketing campaigns in addition to overseeing all aspects of the restaurant. In addition, the Petitioner stated that she reviewed and approved budgets, controlled all expenses, and directed the management of accounting, marketing, and sales functions. The Petitioner specifically described the Beneficiary's duties abroad as follows:

Operations management: [60%]

- Complete responsibility for the restaurant operations. Liaised with the U.S. parent entity to ensure that all reporting and control, hygiene & cleanliness, maintenance, and general administration are completed and in place according to company policy & chain operation manual.
- Primarily responsible for initiating franchise-level policies and overseeing implementation of same, including service standards, comprehensive quality control, and management standards
- Standardized, controlled, and monitored servings of food at the restaurant for consistency of quality, quantity and hygiene of food, and presentation of food servings. Supervised and coordinated with personnel to process serving food and beverage products to customers and monitor their experience
- Implemented proper guest service procedures, sanitary food & equipment handling.
- Overall responsible for staff training. Directed the training of staff regularly on proper service procedures and sanitary equipment handling
- Beneficiary ensured that the food service personnel followed procedures in accordance with established production criteria, that unique specialty recipes (which distinguish the [foreign entity] from others) were scrupulously followed and food was not over-produced.
- Ensured that the high quality of the restaurant's food offerings was maintained and that there was no scope for deterioration in quality
- Also established policies for handling consumer complaints; monitored productivity of service; reviewed customer feedback/complaints and followed up with customers at the highest level of customer relations. She was familiar and available to customers.
- Implemented standards regarding complaint policies and supervised employees in carrying out appropriate remedial measures in order to ensure maximum customer satisfaction at all times.

Business Development/Sales promotion: [10%]

- The Beneficiary kept up to date regarding new food and beverage trends in the competitive Indian restaurant industry. She reviewed abstracts in regard to sales trends per item, trends of daily specials, and side orders in percent to total orders. She compared production sheets. She also reviewed actual sales against sales goals.

- Responsible for developing and implementing sales promotions and merchandising programs, attendance at special events, and regional networking so that [the foreign entity] remained visible and competitive in the market
- She oversaw and monitored menu expansion and standardization, ensuring portion control by monitoring portion as established in the menu item's recipe.

Regulatory compliance: [7%]

- Beneficiary remained up to date on all health and safety regulations and requirements. She directed the Store Manager to train staff of the rules and monitored adherence to them.
- Responsible for ensuring that the restaurant maintained the highest of food safety standards, inspected equipment regularly, and addressed all shortcomings in a timely manner.

Branding & market survey/research: [3%]

- The Beneficiary oversaw the marketing and advertising campaigns, as well as developed marketing plans for potential new location(s) of [the foreign entity].
- Beneficiary used the Internet to track industry news, conduct market research, purchase supplies or equipment, leave the recruitment of new employees, and inform staff training.

Accounting & budget control: [10%]

- Beneficiary determined the budget and estimated the cost of supplies, food, and beverages to determine menu pricing.
- Based on the budget and estimated costs, Beneficiary supervised the ordering of supplies, food, and other necessities for the restaurant.
- Beneficiary executed company policies and procedures to ensure that the food service at the restaurant achieved the established standard of performance within the budgetary controls.
- Her payroll-related duties included overseeing the entire restaurant's payroll; ensuring proper staffing with minimum overtime pay (increasing or decreasing according to volume of business); reviewing weekly forecast volume orders; authorizing overtime; and identifying and implementing better methods of efficiency and reduction of payroll costs.

Human resources: [10%]

- She monitored the interviewing process of candidates for food service operations, and ensured that the credentials of potential employees at restaurant were verified by the interviewing manager.
- She had final approval of new hires, and she ensured that new employees met established high standards criteria so that all workers performed at the same level.
- She was responsible for hiring, training, and firing of employees; evaluating and reviewing their work; and determining a standards were being met.

- Beneficiary recognized merit performances by the employees and kept staff motivated by developing professional development plans for the employees, and she monitored the employee turnover rate.

The Petitioner stated that the Beneficiary had the authority to recommend the hiring and firing of employees and she reported directly to the company's director and owner. The Petitioner claimed that the Beneficiary exercised discretion over to day-to-day operations, marketing, and accounting functions. The Petitioner explained that the Beneficiary delegated duties to her managerial staff who performed the day-to-day non-managerial operational tasks, allowing the Beneficiary to handle marketing and business development for the company.

The foreign entity's organizational chart depicted the store manager reporting to the Beneficiary and showed the kitchen manager, two cashiers and the kitchen staff reporting to the store manager.

The Petitioner described the store manager's duties, stating that he: collaborated with the beneficiary to ensure that the staff accomplished their assigned duties; maintained high standards relating to food products and sanitation; created and monitored schedules for cleaning the premises; monitored staff appearance and hygiene; ensured the smooth operation of the restaurant ensuring timely opening and closing; and monitored aesthetics, ensured proper signage, and monitored efficient food preparation. The Petitioner stated that the store manager trained and supervised all restaurant employees including cashiers, delivery employees, and kitchen helpers. He also provided coverage of the restaurant at peak hours, when necessary, and promoted the restaurant through word of mouth and social media. The Petitioner provided evidence that the store manager had a postgraduate diploma in business management.

The Petitioner explained that the kitchen manager reported directly to the store manager and was responsible for preparing, cooking, and presenting food quickly and efficiently. He ensured the smooth running and operation of the kitchen at all times through supervision, training, and motivating workers. The petitioner stated that the kitchen manager managed and maintained the kitchen staff and carried out instructions from superiors.

On October 28, 2014, the Director issued a request for evidence (RFE) advising the Petitioner that the record did not establish that the foreign entity's employees were engaged in duties related to accounting, marketing, payroll, or human resources, nor did it provide evidence that a third party was contracted to perform those duties. The Director advised the Petitioner to provide additional evidence to demonstrate that the Beneficiary's time was spent primarily engaged in managerial tasks rather than non-qualifying duties such as developing marketing plans, conducting market research, inspecting equipment, and monitoring food portion size. The Director requested clarification of the Beneficiary's duties since several of the store manager's duties appeared to overlap with duties performed by the kitchen manager and the Beneficiary. The Director's RFE advised the Petitioner to provide a letter describing, among other things, the Beneficiary's managerial duties and the percentage of time spent on those specific duties and tasks.

The Petitioner responded to the RFE with a letter dated November 6, 2014. The Petitioner reiterated that the foreign entity "is in the business primarily of making and selling kati rolls and other Indian specialties" at its [redacted] location and that "the operations, marketing, and accounting functions are the most essential functions" since the foreign entity's "sole income is through sales to customers at its restaurant." The Petitioner asserted that the foreign entity earned the equivalent of $887,704 in gross sales in 2013. The Petitioner stated that "the key component of the Beneficiary's work and the component on which she spends at least 60% of her time day was management of the operations of the restaurant." The Petitioner submitted an updated organizational chart depicting the Beneficiary as operations manager supervising both the store manager and the kitchen manager. The new chart shows that the store manager reported to both the Beneficiary and the foreign entity's director and appeared to show seven kitchen workers reported to the kitchen manager.

Overall, the Petitioner asserted that the Beneficiary's duties were managerial in nature because the Beneficiary had supervisory authority over the restaurant's operations, discretion to make decisions in accordance with the company's policy manual, and the authority to initiate and implement policies and standards. The Petitioner asserted that "[b]y the very nature of a small franchise restaurant, the manager's primary duty is to manage the entire operation of the restaurant, but to also be familiar with and at times engage in some nonmanagerial duties when there may not be an employee at that moment who is able to perform the given task."

The Petitioner provided another lengthy description of the Beneficiary's operational management duties reiterating that the Beneficiary devoted 60% of her time to her overall responsibility for general restaurant operations. The Petitioner did not specifically allocate a percentage of time to any of the duties within the Beneficiary's operations management responsibility.

The Petitioner reiterated that the Beneficiary was also responsible for accounting, marketing, human resources, business development and compliance. The Petitioner allocated a portion of the Beneficiary's remaining 40% of time to each of these areas, and each area included both managerial and non-managerial duties.

The Petitioner explained that the Beneficiary performed administrative duties relating to accounting, marketing, and human resources but that her duties in those areas did not require a significant amount of time. The Petitioner stated that the Beneficiary devoted 10 percent of her time to managing the accounting function by overseeing budgeting, bookkeeping, accounting, and payroll for the foreign entity. The Petitioner provided a letter dated, August 14, 2013, from [redacted] confirming its appointment as the foreign entity's accountant. [redacted] outlined a detailed list of responsibilities required of the foreign entity in support of their contracted services including preparation of financial statements, maintenance of adequate accounting records, maintenance of internal controls, and compliance with laws and regulations. The record indicated that the Beneficiary would perform all of the foreign entity's administrative duties related to this contract. The Petitioner claimed that the contracted accounting firm relieved the Beneficiary from performing the day-to-day tasks related to the accounting function.

The Petitioner provided evidence that the foreign entity contracted with another business, [redacted] in 2009 to perform day-to-day human resources tasks including personnel services documentation, updating personal services documentation, and answering employment questions. The details of this one page contract are not clear. The Petitioner stated that the Beneficiary's human resources oversight and administrative work accounted for 10 percent of her time.

Finally, the Petitioner provided evidence that it entered into a marketing and advertising consultant agreement with [redacted] in 2010, but this agreement does not expressly extend to the Petitioner's subsidiary in [redacted]

The Petitioner concluded that the Beneficiary's managerial duties amounted to more than 51 percent of her time and therefore, the Beneficiary was primarily engaged in managerial duties as required to establish her employment in a qualifying managerial capacity. The Petitioner reiterated that the Beneficiary was relieved from performing non-qualifying duties by the foreign entity's employees and contracted service providers.

The Director denied the petition on November 21, 2014. The Director concluded that the Petitioner did not establish that the Beneficiary had served in a managerial capacity while employed with the foreign entity. The Director noted unresolved inconsistencies and found that the record did not include sufficient documentation to establish that the Beneficiary was primarily managing an essential function.

On appeal, the Petitioner asserts that the record demonstrates by a preponderance of the evidence that the Beneficiary was employed abroad as a functional manager. The Petitioner asserts that the Beneficiary was placed in the most senior role of the organization where she managed the entire operation. The petitioner asserts that, while the operation was small in size, the Beneficiary successfully "managed the essential functions of restaurant operations, marketing, and accounting." The Petitioner asserts that the Director was incorrect in observing that a functional manager is prohibited from directly supervising subordinates. Nevertheless, the Petitioner reiterates that it never asserted that the Beneficiary primarily supervised subordinates. Rather, the Petitioner maintains that the Beneficiary primarily managed the functions of restaurant operations, marketing and accounting. The Petitioner reasserts that the Beneficiary managed the restaurant operations that accounted for sixty percent of her time, thus establishing her role as a functional manager. The Petitioner emphasizes that the foreign entity contracted with an outside company to perform accounting and payroll tasks and the Beneficiary only devoted ten percent of her time to the tasks in support of that contract. Similarly, with regard to the human resources contract, the Petitioner asserts that the Beneficiary's time spent on administrative duties was minimal since "modern technology" allowed her to gather employee information and transmit it quickly to [redacted]

Moreover, the Petitioner asserts that it is reasonable for a senior staff member to perform such tasks, therefore they are not administrative or non-managerial. In regards to marketing, the Petitioner asserts that "the Beneficiary prepared the marketing materials but gave her staff the task of putting up the posters and talk about their new products to customers who entered the restaurant." Finally, the Petitioner asserts that the foreign entity has a "multi-tiered management structure" in which the Beneficiary supervised the store manager and the kitchen manager, who then supervised subordinates.

B. Analysis

As a preliminary matter, and in light of the Petitioner's references to the requirement that we apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, we follow the preponderance of the evidence standard as specified in the controlling precedent decision *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

> Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.
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> The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.
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> * * *
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> Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.
>
> Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe.* Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support the Petitioner's contentions that the Beneficiary was employed by the foreign entity in a qualifying managerial capacity.

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). Here, the Petitioner claims that the Beneficiary's duties establish that she was responsible for managing an essential function of the foreign entity.

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, it must furnish a detailed position description that clearly describes the duties to be performed in managing the essential function, 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). 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. 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 International,* 19 I&N Dec. 593, 604 (Comm'r 1988).

In this matter, the foreign entity operates a small restaurant that employs the Beneficiary, a store manager, a kitchen manager, two cashiers and kitchen staff. Although the Petitioner characterized the Beneficiary as a function manager, we note that the Beneficiary allocated her time to running the overall operations of the restaurant, rather than managing a specific essential function of the company.

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. Whether the Beneficiary is an "activity" or "function" manager turns in part on whether the Petitioner has sustained its burden of proving that her duties are "primarily" managerial.

The Petitioner claimed that the Beneficiary devoted 60 percent of her time to duties characterized as "operations management" activities, but did not document what proportion of those duties were non-managerial. This is important because the Petitioner's description included many tasks that do not fall directly under traditional managerial duties, such as: (1) ensuring operations were in compliance with company policy and chain operation manual; (2) standardizing, controlling, and monitoring food portions; (3) implementing guest procedures and complaint policies; (4) ensuring food service personnel followed procedures; and (5) engaging with customers. Because the Petitioner did not allocate a percentage of time to the Beneficiary's duties, as requested by the Director, we are unable to determine what proportion of time the beneficiary allocated to qualifying duties related to her "operations management" area of responsibility. Absent a clear and credible breakdown of the time spent by the Beneficiary performing her duties, we cannot determine what proportion of her duties was managerial, nor can we deduce whether the Beneficiary was primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

We acknowledge that the Beneficiary relied upon a store manager and a kitchen manager to perform many day-to-day duties of the business; however, we note that each of these managers had different duties and neither has been shown to have a back-up or subordinate who performs their duties in their absence. Further, as noted by the Director, several of the Beneficiary's duties overlap with the duties performed by the store manager and kitchen manager. The petitioner provided evidence that the foreign entity's London restaurant is open for business for 74 hours per week, and acknowledged that a manager for a small restaurant can be expected to engage in non-managerial duties when other employees may be unavailable to perform a given task. Therefore, it is reasonable to conclude that in the absence of either manager, someone would necessarily step in to perform his or her duties and that person would likely be the Beneficiary.

We acknowledge that the foreign entity contracted with third parties to perform some non-managerial duties related to accounting, human resources, and possibly marketing. We also acknowledge that the Petitioner allocated a percentage of time that the Beneficiary devoted to duties in the areas of business development, regulatory compliance, branding and market research, and accounting and budget control, and indicated that these areas required a combined total of 40 percent of her time. Once again, however, the Petitioner included both managerial and non-managerial tasks within each of these five areas leaving us unable to determine what proportion of the beneficiary's time was allocated to qualifying managerial tasks. For example, the Petitioner asserted that the Beneficiary devoted 10 percent of her time to the accounting function but did not indicate how much of this time was dedicated to the administrative tasks attributed to the foreign entity in its contract with its accountant. These duties included keeping records of receipts and payments, reconciling the company's records with bank statements, and maintaining records of debtors and creditors. Similarly, the petitioner stated that the Beneficiary's regulatory compliance duties including inspecting equipment, and that she was responsible for conducting market research, purchasing supplies and equipment, monitoring portion size and menu standardization, among other non-managerial duties. Again, we are unable to determine how much of the remaining 40 percent of her time, outside of the "operations management" area, was spent engaged in qualifying managerial duties.

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

The Petitioner provided evidence that the foreign entity's store manager has a post-baccalaureate degree; however, it did not establish that the employee required at least a bachelor's degree to perform his duties, such that he could be classified as a professional. The Petitioner did indicate that the foreign entity's employees supervised subordinate staff members but based, in part on minimal staffing, the Petitioner has not sufficiently established that the employees would relieve the Beneficiary from primarily performing in a non-qualifying capacity, or that the managers themselves were relieved from performing the lower-level functions of their subordinates, as necessary. Nevertheless, the petitioner has consistently claimed that the beneficiary primarily managed an essential function of the foreign entity; the petitioner has not claimed that the beneficiary was primarily a personnel manager.

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 an intracompany transferee. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the foreign entity in conjunction with other relevant factors, such as the company's small personnel size, or the absence of employees who would perform the non-managerial or non-executive operations of the company. *See, e.g. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). We interpret the statute to prohibit discrimination against small or medium-size businesses, but we also require each petitioner to establish that a beneficiary's position consists of "primarily" managerial or executive duties and that the company has sufficient personnel to relieve a beneficiary from performing operational and administrative tasks.

Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of a petitioner may justify a beneficiary who allocates 51 percent of his or her duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a Beneficiary who spends the majority of her time on non-qualifying duties. 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 foreign entity operates a restaurant that is open for business for 74 hours per week. It employed the beneficiary as operations manager, a store manager, a kitchen manager, two cashiers and, apparently, a total of seven line cooks and kitchen helpers, with no additional subordinate staff. The petitioner has neither clearly identified nor provided evidence of the total number of full- and part-time workers employed by the foreign entity. Nor has it provided evidence that the subordinate managers work more than a standard 40-hour workweek, or explained who performs the non-qualifying operational and first-line supervisory tasks associated with their respective positions when they are not on duty. Moreover, the petitioner has provided evidence of only limited contracted support for the beneficiary related to her responsibilities for accounting, human resources, marketing and other functions outside of day-to-day restaurant and kitchen operations. While we do not doubt the Beneficiary's decision-making authority as the senior employee reporting to the foreign entity's owner, the evidence of record does not establish that her day-to-day duties were primarily managerial in nature. The actual duties themselves 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).

For the foregoing reasons, the petitioner has not established that the beneficiary was employed by the foreign entity in a qualifying capacity. Accordingly, the appeal will be dismissed.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.