U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-T-G-, LLC

DATE: DEC. 23, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a luxury international travel services company, seeks to extend the Beneficiary's temporary employment as its chairman under the nonimmigrant L-1A classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. ISSUES

The issues before us on appeal are whether the evidence of record establishes: (1) that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer; and (2) that the Beneficiary will be employed in a qualifying managerial or executive capacity in accordance with the applicable statutory and regulatory provisions.[1]

II. 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, Petition for a Nonimmigrant Worker, shall be accompanied by:

---

[1] In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). 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.*

(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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the Beneficiary for the previous year and the duties the Beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the Beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

III. QUALIFYING RELATIONSHIP

The first issue before us is whether the evidence of record establishes that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

> (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
>
> (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
>
> (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]
>
> . . . .
>
> (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
>
> . . . .
>
> (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.
>
> (L) *Affiliate* means
>
> *(1)* One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
>
> *(2)* One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

A. Facts

On the Form I-129, the Petitioner stated that it is an affiliate of the Beneficiary's foreign employer located in Egypt. The Petitioner stated that it is wholly owned by the Beneficiary and described the ownership and control of the foreign entity as follows: the Beneficiary (28%); (28%); (20%);

(24%). The Petitioner stated that the Beneficiary, as the foreign entity's managing director, has "managerial control" of the Egyptian company.

The Petitioner submitted a copy of its membership certificate number 1 which indicates that the Beneficiary owns 100 membership units. The Petitioner also provided a copy of the foreign entity's "Licensing Amendment of Articles of Association" dated March 15, 2011 which identifies the four owners as stated on the Form I-129, and indicates that the Beneficiary owns 5,600 of the foreign entity's 20,000 issued shares.

In the RFE issued on March 12, 2015, the Director requested additional evidence of the ownership and control of each company. The Director observed that the initial evidence showed that the Beneficiary owns only 28% of the foreign entity and did not include evidence to establish that he controls the foreign entity based on his minority ownership.

In response the Petitioner stated:

> As you indicate in your correspondence, [the Beneficiary] owns 28% of the shares of our foreign affiliate, . . . However, as a family-owned company, the owners and directors of the company have entrusted sole operational control of the company [to the Beneficiary] in his executive capacity as Managing Director.

The Petitioner emphasized that the Beneficiary is listed as the foreign entity's "Managing Director" with the Egyptian federal taxation administration and as the company's legal representative for required licensures. The Petitioner further stated that the Beneficiary "has also complete authority for all financial transactions" and "retains final authority and executive control over "

The Petitioner also submitted a copy of the foreign entity's "Extract from Commercial Register" which documents the company's formation as an Egyptian joint stock company in 2005. This document identifies the Beneficiary as one of three members of the board of directors and states that "[t]he right of management and signature shall be for the Chairman of the Board of Directors and the Managing Director [the Beneficiary], jointly or severally, before all governmental and nongovernmental authorities . . ." and indicated that certain transactions, such as loans and mortgages, require the signature of both individuals.

The Petitioner's response to the RFE also included a letter dated March 14, 2015, from the foreign entity's Chairman of the Board of Directors, who identified the company's owners. The letter indicates that the Beneficiary is the managing director and "one of the company's three directors." stated that "along with the other director's he is [j]ointly responsible" for governing the organization, "selecting, appointing and reviewing the performance of the[e] managing director," managing finances, approving annual budgets and setting salaries and compensation." further stated that, the Beneficiary, in addition to his role as a

director, held the position of managing director since the inception of the company and that this position "is akin to a chief executive officer for a corporation in the United States." He noted that the Beneficiary "enjoys ultimate discretion and authority and receives no direction or supervision from the Board of Directors as he is only required to produce financial and operational reports for our review."

In denying the petition, the Director determined that, based on the record, the United States company and the foreign employer do not qualify as affiliates as that term is defined in the regulations. The Director noted the Beneficiary is a minority owner of the foreign company and the Petitioner did not establish that the Beneficiary has control of the foreign company. In reaching this conclusion, the Director noted that the letter from [redacted] submitted in response to the RFE stated that the foreign entity's three directors jointly exercise control over the company, and that the Beneficiary cannot be considered to have control of the company by virtue of his appointment as managing director. The Director further observed that [redacted] submitted statements with apparently conflicting information, as one of his letters indicated that the Board of Directors appoints the managing director and reviews his performance, while the other letter stated that the managing director "receives no direction or supervision from the Board of Directors."

On appeal, the Petitioner asserts that the Director erred in considering only the percentage owned by the Beneficiary in the two companies and not the control of the companies or the fact that the Beneficiary remains the managing director of the foreign entity. The Petitioner claims that the Beneficiary owns the U.S. company and is a part owner and the managing director of the foreign entity. The Petitioner asserts that the Beneficiary makes all decisions pertaining to both companies unanimously and has always done so.

The Petitioner states in its brief that it "acknowledges that both the Petitioner and the foreign company's Vice Chairman and Acting Managing Director in [the Beneficiary's] absence, failed to adequately detail the managerial control of the foreign company in their respective statements and which understandably appeared to contradict . . . the Petitioner's claim of the continuing qualifying relationship."

In support of the appeal, the Petitioner submits the minutes of an "ordinary general meeting" held by the foreign entity on January 3, 2013, which lists the attendees as the Beneficiary, the Board Chairman and two board members. According to the meeting minutes, the board members appointed the Beneficiary as Board Chairman of the company, and as such he would have "all powers and is entitled solely to manage the Company and all its branches inside and outside Egypt."

In a separate letter, the Petitioner once again states that the previously submitted documentation "contained errors regarding the management control of the foreign company." The Petitioner asserts that it has maintained a qualifying relationship with the foreign entity since January 3, 2013. The Petitioner explains that the Beneficiary, despite holding only 28% of the foreign entity's shares has been entrusted with sole management control "in his executive capacity as Board Chairman and Managing Director."

Finally, the Petitioner submits a letter dated May 12, 2015 from who states that he is the vice chairman of the Board of Directors and acting managing director for the foreign entity while the Board Chairman and Managing Director is not in Egypt. states that the Beneficiary is solely responsible for governing the foreign company, acting as managing director, selecting and reviewing the performance of the acting managing director, approving budgets, ensuring the availability of financial resources, reporting the company's performance to shareholders, and setting the salaries of company management.

B. Analysis

Upon review, the evidence of record does not establish that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a Petitioner's claimed qualifying relationship, in addition to stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a Petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.,* 19 I&N Dec. 362.

To establish eligibility in this case, it must be shown that the foreign employer and the Petitioner share common ownership and control. Control may be *de jure* by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be *de facto* by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

If one individual owns a majority interest in a Petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. Here, the Beneficiary is the sole owner of the Petitioner and exercises *de jure* control by virtue of his ownership interest. However, the Beneficiary is a minority shareholder of the foreign entity. The Petitioner has not provided sufficient evidence that the other shareholders of

the foreign entity have relinquished control to him such that he exercises *de facto* control based on his minority ownership of the company.

The Petitioner's and foreign entity's statements pertaining to the ownership and control of the foreign entity are inconsistent. The Petitioner initially stated that the Beneficiary, despite being a minority shareholder of the foreign entity, exercises "managerial control" by virtue of his position as its managing director.

In response to the RFE, the Petitioner submitted the foreign entity's formation document from 2005, which states that the Beneficiary was the managing director and a member of a three-member board of directors, and that the right of management was vested with the Chairman of the Board and the Managing Director, with certain transactions requiring the signature of both individuals.

A letter dated March 14, 2015 from in his capacity as Chairman of the Board of Directors, stated that the Beneficiary remains the foreign entity's managing director, and that he along with two other directors, is jointly responsible "for governing the organization, "selecting, appointing and reviewing the performance of the[e] managing director," managing finances, approving annual budgets and setting salaries and compensation." further stated that, the Beneficiary, in addition to his role as a director, held the position of managing director since the inception of the company and that this position "is akin to a chief executive officer for a corporation in the United States." However, the fact that the Beneficiary is considered the company's CEO would not grant him the type of control over the company that he would derive from being a majority shareholder, or from possession of proxy votes that would give him a majority vote on shareholder matters. stated that the company's directors and shareholders jointly govern the organization.

Further, although the Petitioner initially emphasized that the foreign entity is family owned, this familial relationship does not constitute a qualifying relationship under the regulations. *See Ore v. Clinton*, 675 F.Supp.2d 217, 226 (D.C. Mass. 2009) (finding that the petitioner and the foreign company did not qualify as "affiliates" within the precise definition set out in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L)(1), despite petitioner's claims that the two companies "are owned and controlled by the same individuals, specifically the Ore family").

The new evidence submitted on appeal does not clarify the issue of the Beneficiary's control over the foreign entity. The Petitioner now submits meeting minutes indicating that the Beneficiary, who has been consistently identified as the foreign entity's managing director and holding the same position since 2005, was also appointed Board Chairman of the foreign entity on January 3, 2013. The Petitioner states that since this date, the Beneficiary has enjoyed "all powers and is entitled solely to manage the Company and all its branches." The Petitioner now states that its qualifying relationship with the foreign entity has existed only since January 2013, when the Beneficiary is claimed to have assumed control of the foreign entity, but does not explain why it previously claimed that the Beneficiary served only as managing director, or why it previously claimed that the managing director position, rather than the Board Chairman, exercises control over the company.

Further, despite the Petitioner's claim that the Beneficiary has served as the foreign entity's Board Chairman since January 3, 2013, it has not explained why [redacted] previously submitted two letters dated in 2015 which he signed in his capacity as "Chairman of the Board of Directors [redacted]." The fact that he changed his title in his latest letter to "Vice Chairman of Board," does not resolve the inconsistencies in the record. 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).

Overall, the Petitioner has not established by a preponderance of the evidence that it maintains a qualifying relationship with the Beneficiary's foreign employer. The two companies have only one common shareholder and no common majority shareholder. Accordingly, the two entities are not "owned and controlled by the *same group of individuals*, each individual owning controlling approximately the same share or proportion of each entity. . . ." 8 C.F.R. § 214.2(l)(i)(ii)(L)(*2*). In addition, there is no parent entity or individual with ownership and control of both companies that would qualify the two entities as affiliates. The Petitioner's claim that the Beneficiary controls the foreign entity despite having only a minority interest in the company are not supported by consistent, probative evidence sufficient to meet its burden of proof. Accordingly, the appeal will be dismissed.

IV. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The remaining issue to be addressed is whether the Petitioner established that it will employ the Beneficiary in a qualifying managerial or executive capacity under the extended petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the

supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

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

A. Facts

The Petitioner filed the Form I-129 on February 27, 2015. The Petitioner stated that it operates a luxury travel services business with three employees and gross annual income of approximately $326,000 in 2014.

In a letter dated February 26, 2015, the Petitioner explained that the Beneficiary arrived in the United States on August 13, 2014, and has been performing the following duties in his role as Chairman:

- Established initial goals and objectives;
- Formulated financial and operational policies and procedures;
- Staffed the vacant Manager and one (1) Clerk position and delegated responsibilities;
- Conducted operational and financial review for proper budgeting and allocation of investment capital;
- Directed company marketing efforts.

The Petitioner stated that, under the extended petition, the Beneficiary will "focus 100% of his time on the direction and development of the company" and listed his duties as follows:

- Delegates the generation of sales, revenue, expense, operational reports;
- Reviews revenue and expense reports and budgeting activities and modif[i]es company financial and operational goals and objectives;
- Reviews operational reports and modifies operational and personnel policies and procedures;
- Reviews existing sales and marketing strategy and modifies sales and marketing strategy and direct its implementation;
- Supervises the activities of the subordinate manager and company personnel to ensure compliance with established policies and procedures;
- Conducts periodic performance reviews of the manager and subordinate personnel.

In this capacity, the Chairman will direct the management of the company and establish its goals and policies and will be solely responsible for all executive decisions. Therefore, his employment is executive in nature. Additionally, he has ultimate authority and discretion over the direction of company operations, supervises and controls the work of the company's supervisory or managerial department head, and has sole authority for their hire, fire, and/or promotion as well as final authority over all human resources activities. Therefore, his employment with our company is also managerial in nature.

The Petitioner stated that it employs a manager who is "responsible for direct management of the company's operations and supervision of clerical staff and reports directly to the Chairman," and a clerk who is "responsible for customer service, sales calls, and service processing and reports directly to the Manager." The Petitioner explained that it intends to hire two additional clerks in 2015.

The Director issued a request for additional evidence (RFE) on March 12, 2015, advising the Petitioner that the initial evidence was insufficient to establish that the Beneficiary will be employed in a managerial or executive capacity under the extended petition. The Director requested, among other items, more detailed descriptions of the Beneficiary's duties and the Petitioner's staffing, along with a detailed organizational chart and evidence of wages paid to employees.

In response to the RFE, the Petitioner provided an expanded job description of the duties the Beneficiary performed during the previous year and the following description of duties he would perform under the extended petition:

- **Delegates the generation of sales, revenue, expense, operational reports (5%)**
  [The Beneficiary] will continue delegation to the Manager for generation of general and specific sales, revenue, expense, and operational reports for proper review.

- **Reviews revenue and expense reports and budgeting activities and modifies company financial and operational goals and objectives (35%);**
  Chairman [the Beneficiary] will spend approximately 35% of time conducting review of sales, revenue, and expense reports generated by the Manager to ensure the company is reaching its short-term financial and operational goals and objectives. He will also review company budgets and financial standing to ensure capitalization for monthly salaries, monthly rent and utility expenses, equipment and/or supplies, payments for services, etc... [sic] Additionally, he will modify the company's short term financial operational and goals and objectives as necessary to ensure the company is still on track to meet its long term goals.

- **Reviews operational reports and modifies operational and personnel policies and procedures (25%);**
  [The Beneficiary] will also spend approximately 25% of time reviewing operational report delegated to the Manager including breakdown of sales by method of acquisition and/or referral type, breakdown of sale by type of travel package, summary of customer service questionnaire responses and personnel reviews. Utilizing this information, the Chairman will engage in any required modification of operation and personnel policies and procedures to maximize revenue and increase customer satisfaction.

- **Review existing sales and marketing strategy and modifies sales and marketing strategy and direct its implementation (15%);**
  [The Beneficiary] will also spend approximately 15% of time reviewing the company's sales and marketing campaign effectiveness. He will delegate the Manger to produce breakdown of sales by method of acquisition and/or referral type and breakdown of sale by type of incentivized travel package and summary of customer service questionnaire responses to determine effectiveness of marketing campaign. He will also modify the sales and marketing strategy and will relay the modifications in marketing strategy and/or specific tasks to the Manager for immediate execution.

- **Supervises the activities of the subordinate manager and company personnel to ensure compliance with established policies and procedures (10%);**
  [The Beneficiary] will also spend approximately 10% of time directing and overseeing the activities of the Manager, a managerial and supervisory position within the company with responsibility for management of company operations and supervision of subordinate staff. The Chairman will also monitor daily operations including sales of travel packages, sales calls and presentations, and other daily activities performed by the Manager and his subordinate Clerks. He will make note of operational compliance or non-compliance and will determine if any established policies and procedures require modification to achieve the company's sales and financial goals.

- **Conducts periodic performance reviews of the manager and subordinate personnel (10%);**
  [The Beneficiary] will also spend approximately 10% of time conducting period performance reviews of company personnel. He will directly review the Manger's tasks, duties, and responsibilities and will address any deficiencies immediately. For all other personnel, he will delegate the Manager to produce subordinate personnel performance reports and will review the Manager's recommendations. He will conduct weekly, monthly, quarterly, and yearly personnel performance reviews and will authorize the Manager to perform salary increases or decreases, and promotion or termination, as may be applicable.

The Director denied the petition, finding that the evidence of record did not establish that the Beneficiary will be employed in a managerial or executive capacity under the extended petition. The Director determined that based on the organizational structure described, the Beneficiary would be assisting in the day-to-day non-supervisory duties of the business. The Director further found that the Petitioner did not establish that a bachelor's degree is actually necessary to perform the functions of any of the beneficiary's subordinates.

On appeal, the Petitioner claims that the Beneficiary will be employed in both an executive and a managerial capacity under the extended petition. The Petitioner states that it "disagrees with the USCIS's demand for such a high level of specificity" or "any level of 'organization and business complexity,'" noting that the regulation at 8 C.F.R. § 214.2(l)(14)(ii) "appears to require a cursory level of supporting documentation."

The Petitioner also states for the first time on appeal that the Beneficiary continues his "executive leadership and direction of the foreign company." The Petitioner concedes that it "failed to adequately describe the continued interaction and close coordination of the luxury travel services offered by both companies and how the Beneficiary's executive responsibilities over the foreign company . . . continue without change." The Petitioner submits the foreign entity's organizational chart and a "Services Diagram" intended to show how business activities are coordinated between the U.S. and foreign companies. The Petitioner also submits a letter dated May 12, 2015 in which it further explains the Beneficiary's continuing responsibilities to oversee the foreign entity.

B. Analysis

Upon review, the Petitioner has not established by a preponderance of the evidence that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition.

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 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 time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the Beneficiary manages a business or a component of a business does not establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 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").

On review, the Petitioner provided a general description of the Beneficiary's duties that provides little insight into what he will do on a day-to-day basis. For example, the Petitioner states that the Beneficiary will be responsible for "conducting review of sales, revenue, and expense reports generated by the Manager to ensure the company is reaching its short-term financial and operational goals and objectives"; "review company budgets and financial standing to ensure capitalization for monthly salaries, monthly rent and utility expenses, equipment and/or supplies, payments for services, etc."; and, "engage in any required modification of operation and personnel policies and procedures to maximize revenue and increase customer satisfaction." While such duties describe his areas of responsibility, they offer little insight into the specific tasks he performs. Reciting a 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 did not provide sufficient detail or explanation of the Beneficiary's proposed 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The Petitioner claims that the Beneficiary is employed in a qualifying 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.*

While the Petitioner provided a fairly lengthy list of duties with a breakdown of the percentage of time the Beneficiary would allocate to different areas of responsibility, this breakdown did not establish that the Beneficiary's duties are primarily managerial or executive in nature. The Petitioner states that the Beneficiary spends a total of 65% of his time delegating the preparation of and reviewing revenue and expense reports, "budgeting activities," and "operational reports," in order to make decisions regarding policies, procedures and goals. While we do not doubt the Beneficiary's

ultimate decision-making authority for the Petitioner's operations, the submitted position description does not establish that he is primarily engaged in duties that are executive in nature or explained why reviewing reports requires 24 hours of his time each week. The Petitioner has not provided information regarding how frequently the reports are generated, how much of the manager's time is allocated to generating reports, or how frequently such reports are submitted for his review. Given the nature of the Petitioner's business and its employment of a single clerk to sell the Petitioner's travel products and services, the record does not support a finding that the manager generates reports so frequently that the Beneficiary would spend close to five hours per day on their review.

The Petitioner further claims that the Beneficiary's position satisfies the requirements for qualifying employment in a managerial capacity. 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*).

The Petitioner states that the Beneficiary supervises a manager and a clerk. In evaluating whether a beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988.

Therefore, we must focus on the level of education required by the position, rather than the degree that will be held by the subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, upon review of the job descriptions for the manager and the clerk, the record does not establish that either position performs duties that would require a bachelor's degree. For example, the Petitioner states that the manager authorizes travel sales package orders, supervises the clerk, maintains sales and service records and addresses customer complaints, while the clerk makes sales calls, takes sales orders, and arranges travel and lodging accommodations.

The Petitioner has consistently stated that the manager supervises one employee and has the authority to recommend hiring for clerks. However, the Petitioner has not established how a single

clerk performs all sales activities for the company or that this clerk relieves the manager and the Beneficiary from involvement in sales and marketing activities. The Petitioner states on appeal that the manager "is akin to a General and Operations Manager with direct management of the company's day to day operations" while the Beneficiary is "responsible for the overall management of the company." While we recognize that some aspects of the overseas travel arrangements may be handled by the foreign entities, the record does not establish how the Petitioner supports two levels of management over a single clerk. The evidence must substantiate that the duties of the Beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy. Further, the Petitioner indicates that the Beneficiary allocates only 20% of his time to supervising the activities and reviewing the performance of the subordinate personnel. As such, even if we conclude that the Beneficiary oversees one supervisory employee, we cannot conclude that his duties are primarily those of a personnel manager.

On appeal, the Petitioner explains that the Beneficiary continues to oversee the foreign operations of the company. However, the Petitioner's breakdown of the Beneficiary's duties states that he allocates 100% of his time to performing tasks specific to the U.S. office and overseeing its two employees. It includes no references to the foreign entity. While it appears that the Petitioner's staff are required to coordinate with foreign staff at times in order to put together complete travel packages to Africa and the Middle East for its customers, the Petitioner provided evidence that it also deals with other, unrelated foreign vendors of travel services. Further, the record does not show how the foreign staff would relieve the Beneficiary from involvement in the Petitioner's own operational, administrative and other day-to-day tasks.

The Petitioner correctly observes that 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 petition for classification as an L-1A manager or executive. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for us to consider the size of the petitioning company in conjunction with other relevant factors, such as 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. 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).

Further, in the present matter, the regulations require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).[2] The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the

[2] Following the enactment of section 101(a)(44)(C) of the Act in 1990, the former Immigration and Naturalization Service (INS) recognized that that managerial capacity could not be determined based on staffing size alone and deleted reference to "size and staffing levels" at 8 C.F.R. § 214.2(l)(3)(v)(C)(*3*) (1990), setting out the evidentiary requirements for initial new office petitions. *See* 56 Fed. Reg. 61111, 61114 (Dec. 2, 1991). However, the INS chose to maintain the review of the new office's staffing, among other criteria, at the time that the new office seeks an extension of the visa petition. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).

petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the Beneficiary from primarily performing operational and administrative tasks, the Petitioner is ineligible by regulation for an extension. Here, there is a noted absence of employees to perform several of the non-managerial and non-executive functions of the company and the Petitioner conveyed only a vague understanding of the duties to be performed by the Beneficiary.

For the foregoing reasons, the evidence of record does not establish that the Beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

V. 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.

Cite as *Matter of H-T-G-, LLC*, ID# 14898 (AAO Dec. 23, 2015)