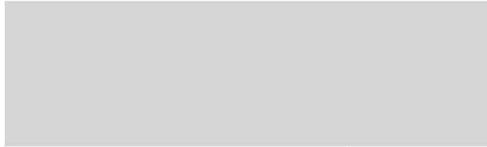


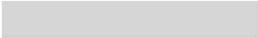


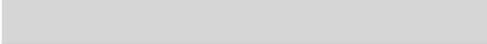
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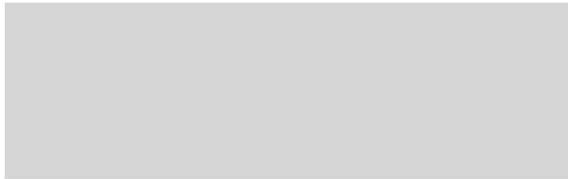
DATE: **JUL 20 2015**

PETITION RECEIPT #: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



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, California Service Center, denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be denied.

The petitioner filed a 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 is a Delaware corporation established in [REDACTED]. The petitioner states that it is a sporting goods company. The petitioner states that it wholly owns the beneficiary's foreign employer, [REDACTED] located in Ireland. The petitioner seeks to employ the beneficiary as its marketing manager in the United States for a period of two years.

The director denied the petition, concluding that the evidence of record has not established: (1) that the beneficiary has been employed abroad in a position that was managerial, executive, or involved specialized knowledge; and (2) that the beneficiary will be employed in a managerial or executive capacity in the United States.

On appeal, the petitioner contends that the record supports its assertion that the beneficiary was employed abroad in a position that was managerial, executive, and involved specialized knowledge. In regards to the beneficiary's position in the United States, the petitioner contends that the director relied too heavily on its size and staffing. Alternatively, the petitioner asserts that the beneficiary will be a function manager with the responsibility of managing its social media. The petitioner submits a brief and additional evidence in support of the appeal.

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(1)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, 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 (1)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides the statutory definition of specialized knowledge:

For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines specialized knowledge as:

[S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

II. EMPLOYMENT ABROAD IN A POSITION THAT WAS MANAGERIAL, EXECUTIVE, OR INVOLVED SPECIALIZED KNOWLEDGE

The first issue is whether the petitioner established that the beneficiary has been employed in a managerial, executive, or specialized knowledge capacity abroad.

A. Facts

The petitioner filed the Form I-129 on April 7, 2014. The petitioner and its subsidiary manufacture and sell technology that incorporates social media, personal GPS, and 3D motion sensor technology. The petitioner stated that the beneficiary worked for its subsidiary in Ireland from December 2011 until February 2013 in a managerial, executive, and specialized knowledge capacity as its marketing and business development coordinator.

In a letter dated March 24, 2014, the petitioner stated that the beneficiary had complete responsibility for market research on golf and surfing which consisted of strategic, digital and communication components. The petitioner provided the following description of the beneficiary's strategic duties:

Ensuring [REDACTED] brand values and identity were protected and communicated effectively internally and externally. And ensuring the effective tracking of all campaigns and other activities, and analyses 'return on investment' to inform future planning. Implementing of the Audience Development Plan, and monitor all delivery against its targets. Managing the creation and development of marketing strategies for print, advertising, CRM applications and Digital/Electronic media, and delegate delivery as required. His digital duties included: Management of Digital Marketing

by, keeping abreast of developments in new media technology and methods of delivery, ensuring vibrant, relevant and timely content on [REDACTED] website and social media platforms, ensuring the [REDACTED] creates, cultivates and maintains online ambassadors, reviewers, media partners and other stakeholders. His communication duties included cultivating and developing relationships with external stakeholders, ensuring the organizational messages are actively communicated internally and externally. Keeping the marketing team up to date with sports and marketing and media developments. He was also a generally responsible for [REDACTED] interactions with gold professionals, general research on geofencing of golf courses around the world.

The director issued a request for evidence (RFE) requesting additional evidence to demonstrate that the beneficiary had been employed abroad in a qualifying capacity. Specifically, the director requested such information as the beneficiary's specific duties and the percentage of time he spent on those duties, pay documentation, work history, an organizational chart demonstrating the beneficiary's position in the company, a list of the beneficiary's subordinates and their duties, positions, pay and qualifications. The director also requested additional evidence to demonstrate that the beneficiary's position abroad required specialized knowledge such as a letter explaining: how the knowledge required for the beneficiary's position is different from similar positions in the industry; the precise product or service that involves specialized knowledge and how it is applied in the international marketplace; the minimum time required to obtain this knowledge in terms of training and education; and how the beneficiary's role has enhanced the foreign entity's productivity, competitiveness, image or financial position.

In response, the petitioner provided the foreign entity's January 2012 organizational chart depicting the beneficiary as one of four direct reports to the chief executive officer. The chart indicated that the beneficiary had no subordinates. The chart depicted a total of 13 employees; 8 of whom provided engineering support and reported to the vice president of engineering.

The foreign entity's chief operating officer (CEO) described the beneficiary's position as both executive in nature and involving specialized knowledge. He explained that their product, [REDACTED] required marketing strategies for sports and wearable technology. The company considered the combination of these two areas to be an essential function managed by the beneficiary. The letter included a description of the beneficiary's duties with a percentage of time allocated to areas of responsibility such as: (1) decision-making duties including where, when and how to market the company product along with the responsibility for relationships with social media ambassadors to effectively market the product (20%); (2) managerial duties including securing satisfactory and efficient fulfillment of existing marketing contracts which required the review of contracted work, along with documenting, reporting, and correcting deficiencies of contracted work. (30%); (3) managing the marketing component including decisions on marketing opportunities and managing

existing advertising contracts (30%); (4) managing the marketing function by identifying, evaluating, and developing strategic relationships with golf professionals (20%). The CEO explained that the beneficiary had the specialized knowledge required for the position because “(m)arketing our product requires simultaneous understanding of sports marketing and wearable technology.”

The CEO further claimed that the beneficiary’s position as marketing and business development coordinator overseas involved specialized knowledge because the company product was new and different in the marketplace. The petitioner explained that the combination of its methods and measurements used for skills development in golf along with user friendly internet applications for storage and analysis of a golfer’s statistics packaged in its [REDACTED] product required specialized knowledge. Further, the petitioner asserted that its “market combines the industry and market of products for golf with the industry and market of internet technology” including the emerging wearable technology market. According to the petitioner, “no one else in the field could have performed” the beneficiary’s duties because its market “combines the industry and market of products for golf with the industry and market of internet technology.” The petitioner states that it “cannot estimate with any certainty” how much training is required to obtain this specialized knowledge. However, the petitioner asserts that one would not learn this “without years of experience” as a golfer and “professional experience” with marketing of internet applications or social media and “at least of year of experience with our product.” The CEO concluded, stating that the beneficiary’s “role in establishing strategies for the efficient combination of sports marketing and emerging internet technology and wearable technology marketing” has enhanced the company image, productivity and financial position.

In denying the petition, the director determined that the beneficiary’s position had no supporting departments or staff and the beneficiary’s duties were not consistent with someone holding an executive or managerial position. The director further found that the beneficiary’s duties were more indicative of an employee performing necessary tasks to provide a product or service. The director also found that the petition did not provide sufficient evidence to demonstrate that the beneficiary was employed in a position that required specialized knowledge.

On appeal, the petitioner asserts that the record establishes that the beneficiary was employed in a position that was managerial, executive and involved specialized knowledge.

B. Analysis

Upon review, the petitioner has not established that the beneficiary was employed abroad in a qualifying managerial or executive capacity, or in a specialized knowledge 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). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In this matter, the beneficiary's initial duty description abroad included such duties as "ensuring brand values and identity were protected and communicated effectively internally and externally," "ensuring the effective tracking of all campaigns and other activities, and analysis 'return on investment' to inform future planning," "implementing of the audience development plan, and "managing the creation and development of marketing strategies." These responsibilities suggest that the beneficiary was engaged in oversight or management of personnel who would perform the day-to-day operational duties, such as the actual creation and development of marketing strategies, for example. However, the beneficiary did not have a subordinate staff or any employees assigned to assist him with these non-managerial tasks. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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. Here, the beneficiary is not a personnel manager since the petitioner provided insufficient evidence to establish that the beneficiary managed personnel abroad.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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.

In response to the RFE, the petitioner provided a second duty description assigning an overall percentage of time to each one of the beneficiary’s four general areas of responsibility. Each area included both qualifying and non-qualifying duties such creating marketing strategies, reviewing and monitoring contracted work, and establishing and maintaining relationships. Based on this record, we are unable to determine whether the claimed managerial duties constitute the majority of the beneficiary’s time, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner’s description of the beneficiary’s job duties does not sufficiently establish what proportion of the beneficiary’s duties is qualifying in nature, and what proportion is actually non-qualifying. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Furthermore, even if the petitioner had established that the beneficiary would be primarily engaged in management of the function, it did not explain who would perform the duties of the function. As noted above, the beneficiary has no subordinates.

On appeal, the petitioner asserts that the beneficiary’s non-qualifying duties “represented only a small portion of the beneficiary’s time” and the director failed to consider the “other vast majority” of duties which were “related directly to managing and directing major components of the business.” However, the petitioner provided insufficient evidence to support this assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm’r 1972)).

The statutory definition of the term “executive capacity” focuses on a person’s elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to “direct the management” and “establish the goals and policies” of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they “direct” the enterprise as the owner or sole managerial employee. The beneficiary must also exercise “wide latitude in discretionary decision making” and receive only “general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.” *Id.* Here, the petitioner has not established that it has a subordinate level of employees for the beneficiary to direct.

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. See 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/his duties are "primarily" managerial. As discussed, absent a clear and credible breakdown of the time spent by the beneficiary performing her/his duties, we cannot determine what proportion of those duties would be managerial or executive, nor can we deduce whether the beneficiary is 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).

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 a multinational 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). In this matter, the petitioner provided insufficient evidence to establish that the beneficiary had a staff upon which he could rely. Although the foreign entity's January 2012 organizational chart depicted 12 named employees, it did not demonstrate that the beneficiary had any authority over them. Moreover, the number of employees claimed on the organizational chart conflicts with the six initially claimed on the petition. 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).

In addition, the petitioner has not established that the beneficiary was employed abroad in a position that involved specialized knowledge as defined at 8 C.F.R. § 214.2(l)(1)(ii)(D). In order to establish eligibility, the petitioner must show that the individual has been employed in a specialized knowledge capacity. 8 C.F.R. § 214.2(l)(3)(ii). The statutory definition of specialized knowledge at Section 214(c)(2)(B) of the Act is comprised of two equal but distinct subparts or prongs. First, an individual is considered to be employed in a capacity involving specialized knowledge if that person "has a special knowledge of the company product and its application in international markets." Second, an individual is considered to be serving in a capacity involving specialized knowledge if that person "has an advanced level of knowledge of processes and procedures of the company." See also 8 C.F.R. § 214.2(l)(1)(ii)(D). The petitioner may establish eligibility by submitting evidence that the beneficiary and the position abroad satisfy either prong of the definition.

We cannot make a factual determination regarding the beneficiary's specialized knowledge if the petitioner does not, at a minimum, articulate with specificity the nature of the claimed specialized knowledge, describe how such knowledge is typically gained within the organization, and explain how and when the beneficiary gained such knowledge. Once the petitioner articulates the nature of

the claimed specialized knowledge, it is the weight and type of evidence, which establishes whether or not the beneficiary actually possesses specialized knowledge. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). 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. *Id.*

As both "special" and "advanced" are relative terms, determining whether a given beneficiary's knowledge is "special" or "advanced" inherently requires a comparison of the beneficiary's knowledge against that of others in the organization and/or against others holding comparable positions in the industry. The ultimate question is whether the petitioner has met its burden of demonstrating by a preponderance of the evidence that the beneficiary's knowledge or expertise is special or advanced, and that the beneficiary's position abroad required such knowledge.

Turning to the question of whether the petitioner established that the beneficiary was employed in a capacity requiring specialized knowledge, upon review, the petitioner has not demonstrated that this employee possesses knowledge that may be deemed "special" or "advanced" under the statutory definition at section 214(c)(2)(B) of the Act.

In examining the beneficiary's claimed specialized knowledge, we will look to the petitioner's description of the job duties and the weight of the evidence supporting any asserted specialized knowledge. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner must submit a detailed job description of the services to be performed sufficient to establish specialized knowledge. *Id.*

The petitioner asserts that the beneficiary possesses specialized knowledge of the organization's product, [REDACTED] a product that the petitioner described as "completely new and different from anything else on the market." The petitioner further claims that the [REDACTED] product "involves specialized knowledge not only on the methods and measurements used for skills development in golf and user friendly internet applications for storage and analysis [sic] a golfer's statistics but also the simultaneous combination of golf, our product, and the internet application."

The petitioner's description of the beneficiary's duties abroad as a marketing and business development coordinator reflect that he performed duties that are typical of professionals working in the sports marketing and wearable technology industries. The record lacks any detail regarding the specialized nature of the beneficiary's job duties abroad. The petitioner has not clearly described the nature of the beneficiary's knowledge of the [REDACTED] product, nor has it provided an understanding of the beneficiary's role, if any, regarding its development. The petitioner stated that it did not know how much time was necessary for the beneficiary to acquire his knowledge, and the petitioner did not describe any particular training or educational courses necessary to achieve that knowledge. Rather, the petitioner stated that it had no idea how long it would take to train a replacement, but surmised that it would probably take at least a year of experience with its company to acquire the knowledge relating to the [REDACTED] product.

The record, as presently constituted, is not persuasive in demonstrating that the beneficiary has been employed in a specialized knowledge position. Although the petitioner asserts that the beneficiary's position required specialized knowledge, the petitioner has not articulated sufficient basis to the claim that the beneficiary was employed in a capacity requiring specialized knowledge. Other than submitting a general description of the beneficiary's job duties, the beneficiary has not identified any aspect of the beneficiary's position which involves special knowledge of the petitioning organization's product, service, research, equipment, techniques, management, or other interests. The petitioner has not submitted evidence of the knowledge and expertise required for the beneficiary's position in marketing and development that would differentiate the beneficiary's employment from similarly situated employees with other employers within the industry. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998). Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge, 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).

On appeal, the petitioner asserts that the director is "require[d] to find that the position involved specialized knowledge" because her denial states that the beneficiary's duties were "necessary to provide a service or to produce a product." This statement from the denial relates to the fact that the record fails to demonstrate that the beneficiary was primarily employed in a managerial or executive capacity abroad, meaning that the beneficiary's job duties abroad involved operational duties required to support the marketing department. Simply because the petitioner did not demonstrate that the beneficiary was employed in a managerial or executive position abroad does not mean that the beneficiary's position abroad involved specialized knowledge.

The beneficiary is clearly a valued and experienced employee and is well qualified for the position. However, the petitioner has not established that the knowledge he possesses is specialized or advanced, as it has not adequately articulated or documented how knowledge of its business processes or the wearable technology industry, or the combination of these two areas, is truly special or advanced compared to the knowledge generally held by similarly employed workers in the field.

In visa petition proceedings, the burden is on the petitioner to establish eligibility. *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). The evidence submitted fails to establish by a preponderance of the evidence that the beneficiary was employed abroad in a managerial or executive capacity or in a position involving specialized knowledge. For this reason, the petition may not be approved.

III. MANAGERIAL AND EXECUTIVE CAPACITY IN THE U.S.

The second issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a managerial or executive capacity in the United States.

A. Facts

The petitioner claims to have gross income of \$292,000 and employ 31 individuals. The petitioner seeks to employ the beneficiary for a period of two years as marketing manager.

The petitioner states that in the executive position of marketing manager, the beneficiary will report to the director of marketing & sales and “will exercise responsibility for a team charged with the development and management of the company’s growing [REDACTED] marketing strategy, eCommerce, business and sharing.” The petitioner also states that the beneficiary will be responsible for the “development and management of social media strategy across channels,” specifically his duties will include the following:

In the position of Marketing Manager, (the beneficiary) will report to the Director of Marketing and Sales and will be charged with growing the eCommerce business and sharing of [REDACTED], [REDACTED] new product launch in 2014. He will be responsible for the development and management of social media strategy across all channels. Specific duties will include: Management of a content calendar and communicate key themes and messages that align with campaigns, marketing programs, product launches, special events, etc.; Building partnerships that maximize opportunities with like-minded missions; Liaising and managing relationships with existing partners & sponsors; Implementing the Social Media strategy on behalf of the brand, coordinating with multiple stakeholders across the company; Measuring the return on investment of each marketing campaign – including events and social media activities – and using such analysis to make appropriate recommendations; Representing [REDACTED] product, [REDACTED] at PR events, in the Social Media space; Overseeing updates across all [REDACTED] networking sites and social media channels including: facebook, twitter, Instagram, Pinterest, Google+, YouTube, and blogs; Working closely with eCommerce team to ensure programs are driving revenue; working closely with Customer Service teams to monitor chatter (*sic*) across social media outlets; Monitoring trends in the golf industry and the wearable technology industry to recommend new practices and initiatives; Recommending new social media tools, sites, apps as part of the social media mix.

The director issued an RFE informing the petitioner that the record lacked sufficient evidence to establish that the beneficiary will be employed in the United States in a managerial or executive capacity. The director instructed the petitioner to provide a list of the beneficiary's specific daily tasks and to indicate what percentage of time the beneficiary would allocate to each of the specified tasks. The director also asked the petitioner to provide a copy of its organizational chart to show its organizational structure and staffing levels. The director advised that the petitioner should include all employees in the beneficiary’s immediate division, department, or team by name, job title, and summary of duties, education level and pay.

In response to the RFE, the petitioner provided a letter dated July 25, 2014, stating the “Marketing Manager will be expected to make executive decisions marketing opportunities in all marketing channels including print, social media, special events and the investment and fostering of the affiliate programs.” The petitioner stated that “typical Executive duties” include the following:

Defining promotional activities and organization of launches, including the following specific activities [sic]: Development of the strategic sales materials and programs. Oversight of contracts for promotional and advertising materials to assure that the sales and marketing teams and outside contractors efficiently cooperate to successfully promote our products at the best time and place to target our consumers. Review reports from sales and marketing teams of detailed strategic plans and approve them accordingly. (Percentage of time: 25%).

Directing the management of the marketing of [REDACTED] including overseeing annual and quarterly marketing activities and provide results analysis, responsibility for marketing strategy decisions and budgeting. Specifically, this position will be a reasonable [sic] to review and approve overall marketing plans across all channels (social media, print, affiliations and special events etc.) and major activities, including monthly and quarterly budgeting plans with company’s sales and marketing teams and outside contractors. (Percentage of time: 35%).

Defining and directing [REDACTED] social media presence, which is a major component of our company. The Marketing manager will establish the goals and policies our use of social media across all channels. Because [REDACTED] helps golfers to track their performance statistics through an Internet application there is a great potential for cross over with social media. Accordingly, not only must we have established goals and policies for social media marketing opportunities in general, we also require the Marketing Manager to oversee our presence in social media channels in case there are rapid changes that may require strategic changes. (Percentage of time: 40%).

The petitioner provided an organizational chart dated June 2014 depicting the marketing manager position subordinate to a vacant director of marketing & sales position. Five positions and an “inside sales team” were depicted subordinate to the beneficiary, as follows: (1) [REDACTED] sales operations coordinator; (2) [REDACTED] affiliate programs coordinator; (3) [REDACTED] marketing asst.; (4) [REDACTED] marketing consultant; (5) vacant channel sales coordinator; and (6) a vacant “inside sales team” position. Three sales representatives are listed directly subordinate to the vacant inside sales team position, specifically, [REDACTED] and [REDACTED].

The petitioner also provided offer of employment documents agreed to by two employees, [REDACTED] and [REDACTED]. Both agreements were signed on April 17, 2014, with a planned start date of April 28, 2014, and both individuals accepted the inside sales positions reporting directly to [REDACTED].

██████████ director of channel sales. A third employment agreement was signed on April 3, 2014, by ██████████ accepting a position as sales operations administrator reporting directly to ██████████ sales operations manager. The petitioner entered into a consulting agreement on May 28, 2014 with ██████████ an independent contractor, to perform as an inside sales representative. The petitioner also entered into a consulting agreement with ██████████ an independent contractor, to perform as an intern on June 6, 2014. The petitioner provided a state tax summary listing taxes paid on behalf of its employees during the first quarter of 2014, ending March 2014.

The director found that the beneficiary's duty description was too broad and that he could not determine whether the beneficiary would be primarily employed in a qualifying capacity since the petitioner provided no duty descriptions for any of its employees. Overall, the director found that the evidence was insufficient to establish that the beneficiary would be employed in a qualifying executive or managerial capacity.

On appeal, the petitioner asserts that the evidence it provided sufficiently establishes that the beneficiary will be employed in a managerial and executive position. The petitioner further asserts that the director erred in failing to sufficiently consider the beneficiary's duties and the reasonable needs of the company but instead relied upon the company size and its staffing. The petitioner also asserts the beneficiary's management of social media "is an inherent and indispensable function" to the company's product ██████████ therefore, the beneficiary "can easily be deemed" a functional manager.

B. Analysis

Upon review, the petitioner has not established that the beneficiary will be employed in the United States in a qualifying managerial or executive 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). 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.* Beyond the required description of the job duties, we review the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

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 operational functions.

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

In this matter, the beneficiary's initial duty description was vague and listed both qualifying and non-qualifying duties such as implementing social media strategy, measuring the return on investment, representing the company's product at events, and monitoring chatter across social media. The petitioner responded to the director's request for more detail with a new description dividing the beneficiary's duties into one of three categories. Specifically, the beneficiary was to spend 40% of his time defining and directing [REDACTED] social media presence, 35% of his time directing the management of the marketing of [REDACTED] and the remaining 25% defining promotion activities and organizational launches. Despite the percentages of time allocated, the descriptions are still too broad and offer little insight into how the beneficiary will spend his time on a day-to-day basis. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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. *Id.*

The beneficiary is not required to supervise personnel, but if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. In this matter, the petitioner's organizational chart indicating that the beneficiary supervises [REDACTED] and three sales representatives is inconsistent with other documentation in the record. For example, employment agreements indicate that [REDACTED] does not report directly to the beneficiary, the sales representatives report to the channel sales coordinator, [REDACTED] (vacant on the org chart) and not to the vacant inside sales team position, and two "employees" are actually independent contractors (including one intern). 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).

Moreover, the petitioner did not submit evidence to document the number of employees or the names and positions of the beneficiary's subordinates at the time of filing. The petitioner did not provide payroll, tax, or banking documentation to support its claim that it employed 31 individuals in the initial petition. 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)). In response to the director's RFE regarding employees, the petitioner submitted its

organizational chart dated June 2014, representing its organizational structure two months after filing the petition. The petitioner provided employment agreements for five of the beneficiary's claimed subordinates listed on the petitioner's organization chart. The employment agreements for the three sales representatives and the marketing assistant were signed and dated after the date of filing. 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).

Further, the record reflects that the petitioner employed an affiliate programs coordinator and sales operations coordinator at the time of filing. However, the record fails to demonstrate whether these positions are supervisory, professional, or managerial in nature. Therefore, we cannot conclude that the beneficiary qualifies as a personnel manager.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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 *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. On appeal, the petitioner asserts that "social media is an inherent and indispensable function" to the petitioner's [REDACTED] product therefore, the beneficiary easily qualifies as a functional manager. We find that the petitioner has provided insufficient evidence to demonstrate that the beneficiary will primarily manage the function rather than perform the tasks necessary to the function itself.

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.*

The petitioner asserted that the beneficiary's duties included defining promotional activities, directing management of [REDACTED] marketing, and defining and directing [REDACTED] social media presence. Included under these general headings were tasks such as reviewing sales and marketing team reports, and review of marketing plans and budgeting plans with the teams and outside contractors; however, the petitioner has not provided sufficient evidence to demonstrate who the beneficiary can rely on to support his management, direction and oversight. The petitioner has not provided sufficient evidence that the petitioner had a staff subordinate to the beneficiary at the time this petition was filed, leaving us with the reasonable conclusion that the beneficiary will primarily perform these non-qualifying duties and functions until the petitioning entity is sufficiently staffed to assist him.

For the reasons discussed above, the petitioner has not established that the beneficiary will be employed in an executive capacity.

Finally, on appeal, 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 a multinational 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). The size of a company may be especially relevant when we note discrepancies in the record and we fail to believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15. Here, the petitioner asserts that the beneficiary will primarily perform in an executive capacity but, as discussed, it has not demonstrated that the petitioner had the staffing at the time the petition was filed to allow the beneficiary to perform at the high executive level claimed. Overall the petitioner has not established that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity. Accordingly, for this additional reason, the appeal will be dismissed.

IV. 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, 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, that burden has not been met.

(b)(6)



NON-PRECEDENT DECISION

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ORDER: The appeal is dismissed.