



U.S. Citizenship
and Immigration
Services

Non-Precedent Decision of the
Administrative Appeals Office

MATTER OF T-B-USA LLC

DATE: AUG. 22, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a company engaged in the sale of oil steel pipes, seeks to extend the Beneficiary's classification as an L-1A nonimmigrant intracompany transferee. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in an executive or managerial capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the evidence of record did not establish that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director made errors of law and fact.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a 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. Section 101(a)(15)(L) of the Act. 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. *Id.*

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:

- (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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

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

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary will be employed in a 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. Evidence of Record

The Petitioner filed the Form I-129 Petition for Nonimmigrant Worker on October 19, 2015. On the Form I-129, the Petitioner indicated that it engages in “sales of oil steel pipes and construction

materials” with four current employees in the U.S. and an established gross annual income of \$500,000. In its supporting statement, the Petitioner indicated that it is “dedicated to the development of the US market for oil steel pipes for the oil and gas industry and the building materials and decoration stone products.”

The Petitioner described the Beneficiary’s role in the United States as follows (verbatim):

As President, [the Beneficiary] will continue to operate the business enterprise with the assistance of staff. Specifically, [the Beneficiary] will be responsible for managing all the finances, creating the company budget, formulating and implementing company policy, and developing pricing policies. Furthermore, he will be responsible for overseeing negotiations with customers and for supervising and directing the training of U.S. managers, supervisors and employees.

The Beneficiary’s specific duties were described as follows (verbatim):

- Supervising all employees, managers, and contractors or agents employed by the company;
- Making hiring and firing decisions;
- Planning, developing implementing business strategy based on his experience and expertise;
- Developing and implementing policies and procedures for the U.S. operations;
- Determining mark-up percentages necessary to insure profit, based on estimated budget, profit goals and average rate of stock turnover;
- Developing policies and procedures for procurement of markets;
- Authorizing purchase of merchandise based on estimates;
- Formulating pricing policies for sale of products;
- Reviewing all sales strategies and evaluating market developments;
- Coordinating the import of oil pipes and building materials and stone products; supervising the agents for consistent marketing policies and strategies; and ensuring a proper supply of goods;
- Planning business objectives, developing marketing policies and establishing responsibilities and procurements for attaining objectives with the business operations of the company;
- Reviewing activity reports and financial statements to determine progress and status in attaining objectives and revising objectives and plans in accordance with current conditions;
- Planning and developing industrial, labor, and public relations policies designed to improve the business’ image and relations with customers, the community, and the public;
- Planning and implementing new operating procedures to improve efficiency and reduce costs.

Matter of T-B-USA LLC

The Petitioner submitted an organizational chart dated October 1, 2015, depicting the Beneficiary at the top tier of the hierarchy as its President, directly supervising an “Account Manager” [REDACTED] and “Sales and Marketing” [REDACTED]. Under the “Account Manager,” the chart depicted an “Administrator/Logistics” [REDACTED] and a “Warehouse Supervisor and Workers” (Contract Workers) under the Administrator/Logistics position. The “Sales and Marketing” position has two subordinate positions depicted on the organizational chart – “Piple [sic] Products Sales [REDACTED] left; vacant; to be hired”) and “Construction Material Sales ([REDACTED] left; vacant; to be hired).”

The Petitioner submitted its 2014 IRS Form 1120S, U.S. Corporation Income Tax Return for an S Corporation, indicating that it paid \$93,056.00 in salaries and wages during 2014. The Petitioner submitted its IRS Form 941, Employer’s Quarterly Federal Tax Return, for the first, second, and third quarters of 2014, indicating that it had three employees during the first quarter, six employees in the second quarter, and four employees during the third quarter.

The Petitioner also submitted payroll documents for the following individuals: [REDACTED]

and [REDACTED]

The Director issued a request for evidence (RFE), advising the Petitioner that the position description provided was insufficient to demonstrate what duties the Beneficiary and any of the listed subordinates perform on a day-to-day basis. The Director noted that the Petitioner listed employees on the organizational chart that were not on the payroll documentation provided and instructed the Petitioner to submit evidence describing the staffing of the business. The Director also noted that the Beneficiary’s duties were vague and inconsistent with the size, scope, and number of employees in the business. The Director instructed the Petitioner to submit evidence establishing that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition.

In response to the RFE, dated November 7, 2015, the Petitioner stated the following:

After the establishment of the US company, the company’s primary focus had been the oil pipe couplings and other oil and gas equipment. Due to the price change in the energy field, [the Beneficiary] has made strategic decision having the company’s operations from one main function to two to include:

- (1) Oil Pipe Department; and
- (2) Construction Material Department.

Because of [the Beneficiary’s] planning and leadership, [the Petitioner] is able to survive the oil crisis and has been maintaining stable business income and staffing level.

[The Beneficiary] will oversee and direct these two departments via department heads, and he is the corporate executive for the company.

The Petitioner also provided a description of the Beneficiary's duties along with the percentages of time the Beneficiary will devote to each as follows (verbatim):

- Develop internal control procedures, operational efficiencies, and risk based plans. [The Beneficiary] formulates policies and designs the systems and strategies for the company to implement policies, work plans, and to make sure that the company operates at its optimal level with proper controls. During the previous year, [the Beneficiary] has made decisions and directed the company to operate two functions. He laid out the plans for the company to develop and operate, and decided how to use the investment in both the oil pipe section and construction material section and to oversee the operations of the two functions (30% - approximately 12 hours/week)
- Execute and implement a defined operations process compliant with industry standards and with appropriate controlling programs and metrics. [The Beneficiary] oversees the operations of two departments of the company, approves work plans for departments such as marketing & sales, funding, and pricing policies. Especially during the energy crisis, [the Beneficiary] has made decisive plans for the company to adjust, adapt and develop. He holds meetings with staff members and managers, announces procedures, plans, outlines, etc. He reviews periodic reports regarding the implementation of the work plans and makes suggestions for changes and improvements. (30% - approximately 12 hours/week)
- Present to the Board and the foreign parent company the annual risk assessment and investment plan in the US company, including periodic updates of status and changes required in the plan. He also makes suggestions on annual work targets for the corporate purchasing, internal auditing, and marketing/sales to guide the managers. (10% - 4 hours/week)
- Set annual and quarterly plans and conduct audits to assess internal controls, operational efficiencies and compliance. [The Beneficiary], with the assistance of the sub-managers and other outside professionals, conduct audits to ensure the compliance with the annual or quarterly plans, objectives, policies, procedures and local laws and regulations. (5% - approximately 2 hours/week)
- Review company assets and ensure safeguards are maintained to protect them from losses. [The Beneficiary] reviews the reliability and integrity of financial information and the means used to identify, measure, classify and report such information. He also reviews and records actions and plans taken by management to correct conditions reported by audit findings. (10% - approximately 4 hours/week)
- Review fieldwork work papers, findings and recommendations, and make sure that the operations comply with standards, laws, and regulations. (10% - approximately 4 hours/week)

(b)(6)

Matter of T-B-USA LLC

- Review personnel records and makes decisions for hiring or firing, promoting, demoting, transferring, or suspending of employees. (5% - approximately 2 hours/week)

The Petitioner submitted a second organizational chart that depicted the Beneficiary as President, with an Office Manager/Administrator, [REDACTED] and two subordinate managers: Oil Pipe Department Manager, [REDACTED] and Construction Materials Department Manager, [REDACTED]. Warehouse Assistants (Contract Workers) reported to each of the department managers. The Petitioner also submitted job descriptions for the office manager, oil pipe department manager, construction materials department manager, and contract workers.

The Petitioner also explained that four employees [REDACTED] and [REDACTED] were hired in the company's first year of operation but resigned prior to the filing of the extension petition. At the time of the extension petition's filing, [REDACTED] and the Beneficiary were employed by the Petitioner.

The Director denied the petition, concluding that the Petitioner did not establish that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition. In denying the petition, the Director noted that a majority of the Beneficiary's duties refer to managing or directing department managers, but the company appears to only employ three other individuals besides the Beneficiary and, as such, the Director found that without more specific information regarding the duties of the Beneficiary's position, including how and at what frequency the stated duties are performed, the Petitioner's job description was insufficient to show that the position is primarily managerial or executive. The Director further found that the Petitioner did not establish that the U.S. business has an organizational structure sufficient to elevate the Beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees.

On appeal, the Petitioner submits a brief that includes the same set of job duties and percentages of time spent on each duty, and asserts that the Beneficiary manages an essential function of the business. The Petitioner further disputes the Director's findings by stating the following:

[P]revious evidences have shown that [the Beneficiary] will supervise directly the Account Manager, Sales and Marketing Manager, and through them supervise indirectly other submanagers and/or employees. The managers may not have direct employees to supervise at this time, but they are obviously managing the essential functions of the company so as to relieve [the Beneficiary] of supervising the operations on a daily basis.

....

. . . The essential function for the business concern of this nature rests on the company's marketing and sales strategy, ensurity [sic] of supplying sources and maintaining and exploring markets and supplying channels, which are crucial to the

Matter of T-B-USA LLC

success of a business like [the Petitioner]. Clearly, as evidences and documents submitted previously have demonstrated, [the Beneficiary] has been overseeing and managing these two essential functions from the establishment of the company.

The Petitioner explained that, “[the Beneficiary] has made strategic planning and decisions for the US company to not only sell and explore market for the oil pipe products, but also direct subordinate manager to explore the market for the construction materials . . . [The Beneficiary] will supervise directly the Account Manager, Sales and Marketing Manager, and through them supervise indirectly other submanagers and/or employees. The managers may not have direct employees to supervise at this time, but they are obviously managing the essential functions of the company so as to relieve [the Beneficiary’s] burden of supervising operations on a daily basis.”

The Petitioner also submitted a third organizational chart. This chart depicts the Beneficiary as President with Account Manager [REDACTED] and Operations Manager [REDACTED] reporting to him directly. Below the Account Manager is “Logistics (to be hired).” Reporting to the Operations Manager, are “Oil Pipe Product Manager, [REDACTED] and “Construction Material Sales Manager, [REDACTED]

Finally, the Petitioner asserts on appeal that the Director erred in concluding that the Beneficiary would not be managing professional employees, that the Director did not discuss what constitutes a professional, and that the Beneficiary will continue to manage an essential function of the business.

B. Analysis

Upon review, and for the reasons stated herein, the Petitioner has not established 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 Petitioner’s description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.*

The definitions of executive and managerial capacity each have two parts. First, the Petitioner must show that the Beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the Petitioner must show that the Beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his 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 a 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 the instant matter, the Petitioner characterized the Beneficiary's role as President and initially provided a vague list of general job duties that did not adequately explain what the Beneficiary would do on a daily basis. Many of the tasks did not specifically relate to the company's stated business of selling oil pipes and building materials. General tasks such as "developing policies and procedures," "formulating pricing policies," "reviewing sales strategies," and "planning, developing, implementing business strategy," do not sufficiently describe the Beneficiary's role with respect to the Petitioner's operations. For example, the Petitioner claimed that the Beneficiary would develop the organization's policies and procedures. However, the Petitioner did not state actual policies or goals that the Beneficiary plans to set that would lead to a greater understanding of what the Beneficiary would do on a daily basis to ensure that the Petitioner is able to meet organizational goals and policies within the context of its oil pipe and construction materials sales operation. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Similarly, we find that the job description offered in the Petitioner's RFE response statement is not sufficient to establish that the Beneficiary would be employed in a managerial or executive capacity. While this description does contain additional detail and includes percentages of time devoted to each cluster of tasks, the description contains several ambiguities. Many of the tasks describe the Beneficiary working with a staff of managers and departments, yet the Petitioner has not established that these departments are fully staffed and functioning. For example, the Petitioner indicated that the Beneficiary "oversees the operations of two departments of the company, approves work plans for departments such as marketing & sales, funding, and pricing policies," and "he holds meetings with staff members and managers, announces procedures, plans, outlines etc." The Petitioner also stated that the Beneficiary "reviews periodic reports regarding implementation of the work plans and makes suggestions for changes and improvements." The Petitioner stated that the Beneficiary "makes suggestions on annual work targets for the corporate purchasing, internal auditing, and marketing/sales to guide the managers." Thus, the Beneficiary's claimed managerial tasks assume that the Petitioner has an adequate organizational structure that includes "departments," "managers," and "staff members."

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including a petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

Matter of T-B-USA LLC

Here, the Petitioner has submitted inconsistent evidence regarding its organizational structure.¹ In the first organizational chart dated October 1, 2015, the Petitioner describes the Beneficiary overseeing an “Account Manager [REDACTED]” and “Sales and Marketing [REDACTED]”. An “Administrator/Logistics [REDACTED]” reports to the Account Manager, and there are two vacant sales positions reporting to “Sales and Marketing [REDACTED]”. One of the sales positions indicates “[REDACTED] left; vacant to be hired,” and one indicates “[REDACTED] left; vacant; to be hired.” The Petitioner submitted payroll receipts for several employees including [REDACTED] for August 2015 and for [REDACTED] for June, July, and August 2015. The Petitioner did not submit payroll receipts for either [REDACTED] or [REDACTED].

In response to the RFE, the Petitioner submitted a second organizational chart. This chart depicted the Beneficiary as President, with an “Office Manager/Administrator, [REDACTED]” and two subordinate managers: “Oil Pipe Dept Manager, [REDACTED]” and “Construction Material Dept Manager, [REDACTED]”. Warehouse Assistants (Contract Workers) reported to each of the department managers. The Petitioner also submitted job descriptions for the office manager, oil pipe department manager, construction materials department manager and contract workers. The Petitioner also explained that four employees [REDACTED] and [REDACTED] were hired in the company’s first year of operation but resigned prior to the filing of the extension petition. The Petitioner stated that, at the time of the extension filing, [REDACTED] and the Beneficiary were employed by the Petitioner.

On appeal, the Petitioner submitted a third organizational chart. This chart depicts the Beneficiary as President with Account Manager [REDACTED] and Operations Manager [REDACTED] reporting to him directly. Below the Account Manager is “Logistics (to be hired).” Reporting to the Operations Manager, are “Oil Pipe Product Manager, [REDACTED]” and “Construction Material Sales Manager, [REDACTED]”.

We note several inconsistencies regarding the Petitioner’s stated organizational structure. First, the Petitioner’s RFE response states that Oil Pipe Department Manager, [REDACTED] was hired in July 2015, however, he does not appear on the organizational chart dated October 1, 2015. Also, the statement supporting the Petitioner’s RFE response indicates that [REDACTED] was hired in July 2015, however, the Petitioner’s initial organizational chart (dated October 1, 2015) stated that he resigned as Construction Material Sales leaving the position vacant. He is included on the subsequent organizational charts but there is no explanation of when he left or when he returned.

Also, on appeal, the Petitioner claims that, [the Beneficiary] will supervise directly the “Account Manager,” the “Sales and Marketing Manager,” and through them supervise indirectly other “submanagers and/or employees.” The Sales and Marketing Manager only appears on the first

¹ We note that the Petition was filed October 19, 2015, and the Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg’l Comm’r 1978).

Matter of T-B-USA LLC

organizational chart and the individual noted in that role, [REDACTED] is not further identified. The Petitioner has not submitted payroll receipts or employee records to verify this position. 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). Here, the inconsistencies noted cast doubt on the reliability of the evidence submitted describing the Petitioner's organizational structure, such that we cannot determine who was actually employed at the time of filing, what their respective roles are, and how they relate to the Beneficiary's claimed managerial position.

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).

Although the beneficiary is not required to supervise personnel, 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. Here, the Petitioner provided multiple organizational charts. While the Petitioner indicates that the Beneficiary directly supervises employees, given the inconsistent evidence provided, we cannot determine exactly who the Beneficiary's proposed subordinates are, their titles, job descriptions or dates of employment. While the Petitioner provided very brief summaries of the job duties for some of the Beneficiary's claimed subordinate employees – office manager [REDACTED] oil pipe department manager [REDACTED] and construction materials department manager [REDACTED] – the previously mentioned inconsistencies regarding [REDACTED] and [REDACTED] employment have not been explained.

On appeal, the Petitioner asserts that the Director stated that the Beneficiary's subordinates are not professionals and did not explain what constitutes a professional. The Petitioner explained that "the job duties of the employees are mostly in business management and marketing, which are related to the degrees that they have obtained and which require that they exercise their judgment and discretion in business marketing and sales using their skills, knowledge, and ability where they have learned from college and their professional experience."

In evaluating whether the 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. Cf. 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry

Matter of T-B-USA LLC

into the occupation”). 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. *See, e.g., Matter of Sea*, 19 I&N Dec. 817 (Comm’r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, we must focus on the level of education required by the position, rather than the degree held by 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 this case, while the Petitioner submitted degrees and transcripts for [REDACTED] and [REDACTED] the actual job duties listed for the Beneficiary’s subordinates do not demonstrate that they require a professional degree nor do they indicate that the positions have supervisory or managerial responsibilities. *See* section 101(a)(44)(A)(ii) of the Act.

The Petitioner has not established, in the alternative, that the Beneficiary is employed primarily as a “function 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 position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary’s daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, a 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. Here, the Petitioner did not indicate that the Beneficiary is a function manager. The Petitioner did not describe an essential function to be managed by the Beneficiary or provide a breakdown of the Beneficiary’s job duties to support such a claim.

As discussed above, the Petitioner in the present matter provided a deficient job description that did not provide an accurate account of the actual job duties the Beneficiary would carry out in his proposed employment. This considerable deficiency as well as the Petitioner’s limited and inconsistent staffing composition leads us to question the Petitioner’s ability to support the Beneficiary in a position where his time would be allocated to primarily managerial-level tasks. While no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the Petitioner nevertheless has the burden of establishing that the non-qualifying tasks that the Beneficiary would perform are only incidental to the proposed position. An employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial

or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988). In the matter at hand, the Petitioner has not provided sufficient evidence to meet that burden.

On appeal, the Petitioner submits a brief stating, “[t]he essential function for the business concern of this nature rests on the company’s marketing and sales strategy, ensurety [*sic*] of supplying sources and maintaining and exploring markets and supplying channels.” However, these operational tasks do not establish that the Beneficiary would be primarily employed in a managerial capacity. The Petitioner also claims that the Beneficiary would be relieved from the daily operational tasks because he would function at a senior level within the organization. However, we find that the Beneficiary’s placement within the Petitioner’s hierarchy may be wholly unrelated to the nature of the job duties he would carry out, and has not been adequately established. As discussed previously, neither the Beneficiary’s job description, nor the evidence of the Petitioner’s staffing, is sufficient to establish that the Beneficiary would be relieved from having to allocate his time primarily to performing non-qualifying operational tasks, despite the Beneficiary’s placement at the top of the Petitioner’s organizational hierarchy. Based on these deficiencies, we find that the Beneficiary will not be employed as a function manager.

The statutory definition of the term “executive capacity” focuses on a person’s elevated position within an 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 definition of “executive capacity” does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner’s burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization. Here, the Petitioner did not demonstrate that the Beneficiary’s duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. The list of the Beneficiary’s job duties does not demonstrate that the Beneficiary will focus the majority of his time on executive duties rather than the day-to-day operations of the business.

We note 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 to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS “may properly consider an organization’s small size as one factor in assessing whether its operations are

substantial enough to support a manager.” *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company’s small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a “shell company” that does not conduct business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Given the inconsistencies noted above regarding the Petitioner’s staffing structure, we find that the Beneficiary does not have sufficient subordinate employees to carry out the routine tasks associated with the Petitioner’s intended business of selling oil pipe and construction materials. As previously indicated, an employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int’l*, 19 I&N at 604.

Furthermore, throughout the description of the Beneficiary’s job duties, the Petitioner continuously refers to “department managers” and their role in the business, as well as in performing the routine duties managed or directed by the Beneficiary. However, the Petitioner has not shown that it employs any “department managers,” rather the only employee that is consistently identified on all three organizational charts is the office manager. 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 Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). As such, it appears that the Beneficiary will be performing the routine tasks that he has been listed as managing or directing.

Further, in the present matter, the regulations provide strict evidentiary requirements for the extension of a “new office” petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). 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 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. In the instant matter, the Petitioner has not reached the point that it can employ the Beneficiary in a primarily managerial or executive capacity.

On appeal, the Petitioner further refers to an unpublished decision in which we determined that a beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though that beneficiary was the sole employee. The Petitioner has furnished no

evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that Administrative Appeals Office precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a primarily managerial or executive capacity, or that the Petitioner has grown to the point where it will require the services of a full-time manager or executive. Accordingly, the appeal will be dismissed.

III. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of T-B-USA LLC*, ID# 18231 (AAO Aug. 22, 2016)