



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF KHWA-, INC.

DATE: JULY 8, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a Delaware corporation operating a “returnable goods carrier solutions” business, seeks to extend the Beneficiary’s temporary employment as a President & CEO under the L-1A nonimmigrant classification for intracompany transferees. *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, initially approved the petition and later revoked its approval, concluding that the Petitioner did not establish that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition.

The matter is now before us on appeal. In its appeal, the Petitioner submits a brief and duplicate copies of previously submitted evidence and asserts that the Director erred in that the Beneficiary will be employed in a function manager capacity in the United States.

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:

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- (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.

Under U.S. Citizenship and Immigration Services (USCIS) regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, the Director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director revoked the petition's approval based on a finding that the Petitioner did not establish that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition. The Petitioner does not claim that the Beneficiary will be employed in an executive capacity. Therefore, we will restrict our analysis to whether the Beneficiary will be employed in a managerial capacity.

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

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

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, 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 on April 11, 2014. On the Form I-129, the Petitioner indicated that it has one current employee, the Beneficiary, in the United States, 152 employees globally, and a "global" gross annual income of "\$66.03 Million." In its letter of support, dated April 1, 2014, the Petitioner described the Beneficiary's duties in the United States as follows:

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As President & CEO, [the Beneficiary] continues to direct the North American business and has the responsibility of establishing and developing partnerships with key players in target sectors such as retail supply chains, convenience stores, and drugstore companies. He draws upon the extensive Global Delivery Network [of the foreign entity] to expand U.S. business activity. [The Beneficiary] oversees the U.S. office and its business structure as well as acquires new clients and maintains relationships with existing clients, making sure that U.S. business operations are carried out to the same set of standards as in the related overseas offices. Specifically, the duties of President & CEO include the following:

- Directing [the Petitioner's] strategic goods carrier solutions and product services-related activities;
- Overseeing the promotion and selling of IOW's [sic] projects to potential clients as well as agents and distributors for our products and services;
- Initiating at least two customer projects within the retail sector with identified customers. . . .;
- Managing product development projects to adjust our current offerings to fit the needs of U.S. consumers and clients;
- Scouting new premises in [redacted] in anticipation of our growth;
- Building meaningful relationships with DIY / home improvement retailers. . . .;
- Expanding operations and ensuring job creation in the U.S. by hiring two to three local sales managers, and a dedicated U.S.-based executive; and
- Analyzing changing U.S. markets as consumer behavior as well as participating in the development of a global market within the [Petitioner].

As President & CEO, [the Beneficiary] will continue to drive business development, and report directly to the CEO of [the foreign entity]. He exercises wide latitude in discretionary decision making inherent to his duties as President & CEO and routinely liaises with [the foreign entity's] executive team overseas.

The Petitioner submitted an undated business plan, describing its staffing plan as follows:

To start there will be one employee, [the Beneficiary], who will act as the [Petitioner's] President & CEO. [The Beneficiary] will report to the Group CEO, [redacted]

By 2016 our target is to have a US CEO and 2-3 local sales managers. In addition we aim to have 4-5 local agents / distributors for our products and services. These agents / distributors will have to be able to both sell and maintain the [Petitioner's] products. They will need to hire their own service organization to handle that. We assume that each of them will have 10-20 service / maintenance workers.

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The Petitioner submitted an organizational chart, dated February 27, 2014, and titled "Extended Management Team." The chart shows a CEO, [REDACTED] at the top tier of the hierarchy, directly supervising a "CFO, HR," [REDACTED] and eight individuals, one of which is the Beneficiary, in a position titled "Marketing & Sales, North America." The chart does not list any employees subordinate to the Beneficiary and appears to represent the Beneficiary's role within the foreign entity's global infrastructure.

The Director initially approved the petition on April 15, 2014. On November 2, 2014, the Director issued a notice of intent to revoke the approval of the petition (NOIR), referencing an administrative site visit performed at the Petitioner's offices in the United States and notifying the Petitioner that based on the information gained in that site visit, it appeared that the Beneficiary would not be employed in a managerial or executive capacity. The Director noted that the Beneficiary provided the following list of duties and responsibilities:

- Maintain relationships with existing customers as well as acquire new customers;
- Establish and develop partnerships with key players in target segments;
- Direct the Petitioner's strategic goods carrier solutions and products in line with the standards set by the parent company;
- Oversee the promotion and selling of projects and products to potential customers;
- Find agents and distributors for products and services;
- Manage product development projects and adjust current offerings to fit the needs of U.S. customers;
- Expand operations by hiring local managers and a U.S. based executive;
- Oversee and manage the ongoing projects;
- Establish new contacts primarily in the retail sector but also within the beverage and automotive industries;
- Help parent company find local manufacturers to potentially manufacture parts of products in the United States;
- Cooperate and discuss with the business unit managers and designers in parent company in Finland;
- Visit trade shows and take part in industry conferences;
- Report back to CEO and to the back office in project-related tasks; and
- Work with outsourced accountants and other professional services to manage operations and commuting to the office and/or to develop business.

The Director noted that the duties the Beneficiary described appeared to include multiple non-qualifying activities directly associated with sales and marketing and, as the Beneficiary was the only employee of the Petitioner in the United States, it was not evident that he would be sufficiently relieved from performing non-qualifying activities or that his position satisfied all four parts of the definition of both a manager and an executive. The Director observed that, based on the description of continuing expansion plans for the Petitioner's U.S. company, it did not appear that the U.S.

company was, in fact, sufficiently staffed and operational to support an L-1A manager or executive who primarily performs qualifying duties. The Director instructed the Petitioner to submit evidence demonstrating that the Beneficiary was employed in a qualifying managerial or executive capacity.

In response to the NOIR, the Petitioner submitted a letter, dated December 8, 2014, contending that the petition was initially approved under the New Office standards and as such, review of the petition should be consistent with that standard. The Petitioner stated that “[a]lthough the petition was an extension, [the Petitioner] proposed that it be adjudicated under the New Office standard for one year because the business was not able to ramp-up to qualify for a two-year extension.” The Petitioner further stated that “[b]ecause the extension was approved under the New Office provision, the Service accepts that the beneficiary is permitted to take part in day-to-day operations, in addition to directing the business during until May 31, 2015.”

In its letter, the Petitioner also stated that the Beneficiary is a function manager, responsible for directing business relationships (marketing and production) for the Petitioner and described his position in the United States as follows:

[The Beneficiary] is the Petitioner’s President and CEO, a functional managerial position. He drives the development of partnerships with iconic retail supply chains, convenience stores, and drugstore companies in the U.S., an essential function of our global organization.

....

In managing business relationships (marketing and production) on behalf of the Petitioner, [the Beneficiary] directs staff in Finland to implement his directives. That staff is responsible for follow-up with customers and potential customers, filling orders, and producing documentation needed for him to carry out his functional managerial duties. . . . [The Beneficiary] is therefore delegating non-qualifying tasks to his team in Finland while managing the customer relationships in the U.S.

....

The beneficiary manages an essential function but does not perform it directly. In his capacity managing business development (marketing and production), [the Beneficiary] leads client side communications and passes on directives to his Finland-based staff.

....

[The Beneficiary’s] focus is on managing the development of account generation with large national corporations. To carry out his managerial responsibilities, he

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delegates logistics, marketing and production and administrative tasks to select individuals in Finland. . . . The employees identified in the organizational chart assist with Marketing and Production activities.

....

[The Beneficiary] leads the named specialists to coordinate a range of functions that include production management, and marketing and client services. Product development employees, led by [REDACTED] indirectly report to [the Beneficiary] and respond to his fabrication and design requests. . . .

The beneficiary delegates production and marketing tasks to the aforementioned [foreign entity] employees in supervisory, managerial, and professional positions, thereby relieving himself of any necessity to take part in non-qualifying duties as they relate to his managerial function of business development (market and production).

....

As President and CEO, [the Beneficiary] has full authority to hire and fire on behalf of [the Petitioner] and is authorized to make personnel recommendations pertaining to his team in Finland. Presently, [the Beneficiary] is recruiting a Sales Manager for the U.S. business. . . .

....

[The Beneficiary] will hire two more sales managers and a market services employee as the need arises. . . .

Moreover, [the Beneficiary] functions at a senior level within the U.S. and global organization. The organizational chart included . . . demonstrates that the beneficiary is aligned with the CFO Administration and Finance, [REDACTED]. Together, they are responsible for the entire North American Marketing and Sales division, which is currently a team of 22 employees. [The Beneficiary] is the Head of Marketing and Sales and, therefore, is ranked very highly in the organization as a whole. [The Beneficiary] reports only to the Group CEO who reports to the Board of Directors located in Finland.

....

[The Beneficiary] exercises discretion over the day-to-day operations of the activity and function that he manages. In his functional managerial role as President and CEO, he directs the development of partnership with major

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consumer goods corporations in the U.S., managing all aspects of marketing, production, client relationships, and company growth in North America.

....

[The Beneficiary] receives marketing, production, logistical, and administrative support from his team in Finland. Once the Sales Manager is hired, that employee will engage with the marketing and production team in Finland to fulfill customer orders and [the Beneficiary] will direct that employee and his team in Finland.

The Petitioner provided a second letter, dated December 5, 2014 and signed by [REDACTED] CFO Administration & Finance, outlining the same descriptions of the Beneficiary's position and duties described above. The letter adds the following information pertaining to staffing and the percentages of time the Beneficiary will devote to his listed duties:

As our headquarters in Finland executes tasks and orders delegated and directed by [the Beneficiary] we can operate very leanly in the U.S. and have not yet needed to hire additional local staff. . . . We expect to enjoy gross annual revenue of approximately \$5 million by 2016, by which time we intend to have hired a U.S.-based CEO, 2-3 local sales managers, and 4-5 local agents/distributors for our products and services.

....

[The Beneficiary] is a senior executive manager within the global organization and as President & CEO of the U.S. operation, he continues to direct the North American business and has the responsibility of establishing and developing partnerships with key players in target sectors such as retail supply chains, convenience stores, and drugstore companies. . . . In this regard, he directs a support team located in Finland to fulfill customer orders, engage customer managers and teams, and implement company directives. . . .

Specifically, the duties of President & CEO include the following:

- Directing [the Petitioner's] strategic goods carrier solutions and product services-related partnering activities; 20%
- Overseeing the promotion and selling of projects to potential clients as well as agents and distributors for our products and services; 20%
- Initiating customer projects within the retail sector with identified customers. . . .; 20%
- Managing product development projects to adjust our current offerings to fit the needs of U.S. consumers and clients; 10%

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- Scouting new premises in [redacted] in anticipation of our growth; 10%
- Building meaningful relationships with DIY / home improvement retailers. . . .; 10%
- Expanding operations and ensuring job creation in the U.S. by hiring two to three local sales managers, and a dedicated U.S.-based executive by 2016; 5% and
- Analyzing changing U.S. markets as consumer behavior as well as participating in the development of a global market within the [company]. 5%

The Petitioner's letter also briefly and broadly described the Beneficiary's subordinates' positions abroad and how they support the Beneficiary in the United States.

The Petitioner submitted a new organizational chart, titled "Marketing and Sales, North America, total supporting organization." The chart shows the Beneficiary in the position of "Marketing and Sales - [Foreign Entity] North America President & CEO - [Petitioner], parallel to the CFO Administration & Finance, [redacted]. According to the chart, the Beneficiary directly supervises outsourced tax and account services, a "Sales Manager US," who appears to supervise two additional Sales Managers, and a "Market Service" position, all of which have not been hired. The chart further indicated that the Beneficiary supervises five positions located at the Finland office abroad: "Marketing & Marketing Services," [redacted] who supervises three individuals; a "Head of PD," [redacted] who supervises four individuals; a "Sales [redacted]," [redacted] a "Production Product Management & Purchase," [redacted] who supervises five individuals; and a "PU Finland," [redacted] who supervises one individual. The Petitioner also submitted resumes for [redacted] and [redacted].

The Director revoked the approval of the petition on April 10, 2015, 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 revoking its approval of the petition, the Director acknowledged the Petitioner's contention that the petition warranted new office treatment, but noted that the approval of the petition for one year does not constitute a second approval for a new office, as the regulation does not allow for a new office petition to be approved under the new office standard for a second full year. The Director found that, although it is evident from the documentation submitted that the Beneficiary performs duties in a managerial capacity, it is not evident that the Beneficiary is primarily acting in a managerial capacity. The Director further found that the documentation submitted indicated that, although the Beneficiary was delegating some tasks to the team in Finland, he appeared to be spending the majority of his time engaging in important sales activities; specifically, travelling to client and potential client sites and attempting to garner business and sell products. The Director found that, while the Beneficiary may have a team in place to fill orders and provide follow-up, he was still acting in the capacity of a sales representative.

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On appeal, the Petitioner submits a brief, dated May 7, 2015, stating that the Beneficiary will be employed in a managerial capacity, as a function manager, and disputing the Director's findings by stating the following:

[H]ere, [the Petitioner] provided detailed explanations of [the Beneficiary's] proposed job duties in its job description illustrating that the managerial tasks are the most important to his position in the United States. Admittedly, [the Beneficiary] must participate in some day-to-day duties for [the Petitioner] because it is still a growing business. But, [the Beneficiary's] most important and primary duties are: (1) directing [the Petitioner's] strategic goods carrier solutions and product services-related partnering activities; and (2) overseeing the promotion and selling of projects to potential clients as well as agents and distributors for our products and services. These tasks are inherently managerial as [the Beneficiary] is responsible for developing then overseeing the implementation of the overall policy and goals for partnering activities and selling of projects. . . . [The Beneficiary] is supported in his management of this function by professional employees in Finland. These employees include:

- [REDACTED] – Head of Product Development;
 - [REDACTED] – Head of Production Product Management and Purchasing;
 - [REDACTED] – Head of Marketing and Marketing Services Manager;
 - [REDACTED] – Head of Production Unit Finland;
 - [REDACTED] – Market Services Representative for [REDACTED]
- and
- [REDACTED] – General Manager for [REDACTED]

[The Beneficiary] is primarily managing the business development essential function in the United States by delegating the tasks necessary to complete the sales, marketing, and production to professional employees in Finland.

The only new evidence submitted by the Petitioner on appeal is its 2014 IRS Form 1120, U.S. Corporation Income Tax Return, indicating that it grossed \$446,894.00 in receipts or sales, and paid \$221,715.00 in compensation of officers to the Beneficiary and \$0 in salaries and wages during 2014.

B. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that the Beneficiary will be employed in a managerial capacity under the extended petition. Again, the Petitioner does not claim that the Beneficiary will be employed in an executive capacity. Therefore, we will restrict our analysis to whether the Beneficiary will be employed in a managerial capacity, specifically as a function manager.

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As a preliminary matter, we will address the Petitioner's contentions that the Director initially approved the petition for a second year as a new office. The Beneficiary was initially granted a one-year period of stay to open a new office in the United States under [REDACTED] which was approved on May 29, 2013 for a period from June 1, 2013 to May 31, 2014. In the prior petition, the Petitioner indicated that it was a new office, and the petition was adjudicated under the relevant regulation for new offices. *See* 8 C.F.R. § 214.2(l)(3)(v). In the present matter, the Petitioner is no longer a new office, and the regulation at 8 C.F.R. 214.2(l)(3)(v) does not apply. As the Petitioner is requesting a first extension after the opening of a new office, the Petitioner must now satisfy its burden under the regulation at 8 C.F.R. 214.2(l)(14)(ii) in order to establish eligibility.

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 have two parts. First, the Petitioner must show that the beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See, e.g., Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World, Inc. v. INS*, 940 F.2d 1533. 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 the instant matter, the Petitioner characterized the Beneficiary's role as President & CEO and initially provided a broad list of duties to be performed by the Beneficiary, as listed above. In the initial petition, the Petitioner claimed that the Beneficiary would devote time to directing the strategic goods carrier solutions and product services-related partnering activities, overseeing the promotion and selling of projects, expanding operation and ensuring job creation in the United States, and analyzing changing U.S. markets and participating in the development of a global market within the organization. The Petitioner also stated that the Beneficiary would devote time to initiating customer projects, managing product development projects, scouting new premises in [REDACTED] and building meaningful relationships with DIY / home improvement retailers. Although the Petitioner did not explain how the claimed duties were managerial in nature or delineate how the Beneficiary would split his time among the listed duties, the petition was approved.

During the site visit, the Beneficiary described his duties in the U.S. in a manner which indicated that he actually performs more of the sales and customer service tasks required to continue operations. The Beneficiary stated, in part, that he acquires new customers, oversees the promotion and selling of projects and products to potential customers, oversees and manages ongoing projects,

establishes new contacts, and manages product development projects, adjusting current offerings to U.S. customers. However, he did not indicate how such duties qualify as managerial or executive. The Beneficiary also stated that he attends trade shows, finds manufacturers to potentially manufacture products in the United States, and finds agents and distributors. These duties, which emphasize the Beneficiary's role in the day-to-day operations of the company and are not managerial in nature, were not previously disclosed. While the duties described by the Beneficiary during the site visit do overlap, the duties originally provided by the Petitioner, the new set of duties emphasizes the Beneficiary's role in the daily sales activities of the company. Here, almost all of the listed duties include some aspect of sales or customer service that will be carried out by the Beneficiary. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Neither the Beneficiary nor the Petitioner have identified staff, either in the U.S. or abroad, that would relieve the Beneficiary from this routine direct contact with the Petitioner's customers.

Moreover, while the Beneficiary stated that he "oversees" the promotion and selling of projects and products and "oversees" ongoing projects, he did not identify any subordinate employees who would perform the work he claims to oversee. Rather, it appears that he is performing the tasks associated with promoting and selling the projects and products and other duties associated with ongoing projects. Although the Petitioner stated that the Beneficiary receives marketing, production, logistical, and administrative support from his team at the foreign entity, the listed duties indicate that he directly performs all of the sales and customer service tasks at the U.S. company. No staff has been identified at either the foreign or U.S. entity that would relieve the Beneficiary from being directly involved in the day-to-day routine sales and customer service tasks of the business. The Beneficiary also did not indicate the amount of time he devotes to each of the listed duties, which is significant as most of them appear to involve the routine sales and customer service tasks associated with continuing operations. As such, we are unable to determine whether the claimed managerial duties constitute the majority of the Beneficiary's duties, or whether the Beneficiary primarily performs non-managerial operational duties. The description of the Beneficiary's job duties does not establish what proportion of the duties are managerial in nature, and what proportion are actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

In response to the NOIR, the Petitioner emphasized the original list of duties and provided a breakdown of how the Beneficiary would spend his time. The Petitioner admitted that the Beneficiary "must participate in some day-to-day duties for [the Petitioner] because it is still a growing business." The Petitioner goes on to state, that the Beneficiary's most important and primary duties are directing the Petitioner's strategic goods carrier solutions and product services-related partnering activities and overseeing the promotion and selling of projects. The Petitioner appears to assert that these duties should be considered managerial; however, we disagree. Upon providing additional clarification of the Beneficiary's duties, the Petitioner did not indicate how these duties actually qualify as managerial or executive. The Petitioner's description of the duties does not provide sufficient information to conclude that these are in fact qualifying duties, rather it appears that they directly involve providing a service of the business.

Moreover, even if we were to consider these qualifying duties, they account for only 40 percent of the Beneficiary's time. The remainder of the Beneficiary's time is spent on other sales and customer service duties, as described above. The Petitioner's admission that the Beneficiary must perform some of the day-to-day duties for the business, coupled with the actual descriptions of the Beneficiary's duties provided, further indicate that the Beneficiary is primarily directly involved in the day-to-day routine sales and customer service tasks of the business. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

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 the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

The 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). 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 stated, for the first time in response to the NOIR, and again on appeal, that the Beneficiary is a function manager and directs the essential function of "directing business relationships (marketing and production) for the Petitioner." However, the Petitioner did not provide any clarification or explanation of this essential function, nor did it show how the function of directing business relationships is essential to the U.S. company. When claiming that the Beneficiary will be a function manager, the Petitioner must provide information pertaining to the essential function, identify the function with specificity, and articulate the essential nature of the function. See 8 C.F.R. § 214.2(l)(3)(ii). Here, the Petitioner has not done so.

In stating that the Beneficiary will be a function manager, the Petitioner went on to describe the Beneficiary's position and duties, but did not sufficiently demonstrate that the Beneficiary manages the function rather than performs the tasks associated with carrying out the function. The Petitioner consistently stated that the Beneficiary is supported by staff located at the foreign entity in Finland and submitted copies of electronic correspondence between the Beneficiary and those employees overseas as evidence of his delegated tasks. However, the majority of that electronic correspondence is dated after the Director's NOIR and does not sufficiently demonstrate that the Beneficiary was managing the function and delegating the administrative and operational tasks to said employees at the time of filing, rather than just soliciting information to provide to customers. The few examples of electronic correspondence submitted provide information about current clients and sales to those employees, sometimes requesting a purchase order or other information. Further, although the Petitioner provided resumes and a list of foreign employees, including their salaries, it did not provide any evidence of their actual employment or wages paid to them by the foreign entity. Although the Beneficiary is not restricted to delegating tasks to employees solely located at the U.S. company, the Petitioner has not provided evidence to demonstrate that the foreign employees are actual subordinates of the Beneficiary or perform tasks specifically related to the operations of its U.S. company. The Petitioner did not submit information relating to their actual day-to-day duties showing that they specifically support the Beneficiary and his work at the U.S. company. Despite its assertions to the contrary, the Petitioner has not provided sufficient evidence to establish that the Beneficiary manages an essential function.

The Petitioner further refers to an unpublished decision in which we determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he 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 AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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. 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). 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 position.

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). Here, it is not the Petitioner’s size, but rather the lack of evidence to demonstrate that the Beneficiary would perform managerial or executive duties, that is determinative.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial capacity

III. CONCLUSION

We find that the basis specified for the revocation action in the instant matter is a proper ground for such action. The Director’s statements in the NOIR regarding the evidence indicating that the Beneficiary was not employed in a qualifying managerial or executive capacity were adequate to notify the Petitioner of the intent to revoke the approval of the petition in accordance with the provision at 8 C.F.R. § 214.2(l)(9)(iii)(A)(2).

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 KHWA-, Inc.*, ID# 14745 (AAO July 8, 2016)