



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

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

MATTER OF D-D- INC.

DATE: JULY 26, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a provider of IP solutions, seeks to temporarily employ the Beneficiary as its director of operations under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 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 a managerial or executive capacity.

The Director, California 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. The Director also noted that the evidence of record did not establish that the Beneficiary was employed abroad in a qualifying managerial or executive capacity for the requisite one year period.

The matter is now before us on appeal. In its appeal, the Petitioner disputes the grounds for denial, asserting that the Director applied the wrong evidentiary standard and claims that it has submitted sufficient evidence of the Beneficiary's managerial role with both the Petitioner and the foreign entity.

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.

II. EVIDENTIARY STANDARD

The petitioner must establish that it meets each eligibility requirement of the benefit sought by a preponderance of the evidence. *See Matter of Chawathe*, 25 I. & N. Dec. 369, 375-76 (AAO 2010). In other words, the petitioner must show that what it claims is "more likely than not" or "probably true." To determine whether the petitioner has met its burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.* at 376; *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989). We consider the evidence both individually and in its totality. *Chawathe*, at 376.

Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support the Petitioner's contentions that the evidence of record establishes eligibility for the benefit sought.

III. ONE YEAR OF EMPLOYMENT WITH A QUALIFYING ORGANIZATION

The first issue to be addressed is whether the Petitioner established that the Beneficiary 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. *See* 8 C.F.R. § 214.2(l)(3)(iii).

In order to establish the Beneficiary's year of qualifying employment abroad, the Petitioner would need to document one year of fulltime employment with a qualifying entity prior to July 23, 2013, when he entered the United States in F-1 nonimmigrant student status. Periods of time spent in the United States for business or pleasure, while not interruptive of the one year of continuous

employment abroad, cannot be counted toward fulfillment of the one year requirement. *See* 8 C.F.R. § 14.2(l)(1)(ii)(A).

The Director denied the petition, in part, finding that the Petitioner did not establish that the Beneficiary had one continuous year of full-time employment with the foreign entity prior to July 23, 2013. On appeal, the Petitioner submits the Beneficiary's Indian income tax records evidencing monthly salary payments from April 2012 through and including June 2013 establishing his employment by the foreign entity during those months. Accordingly, we withdraw this portion of the Director's decision.

IV. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that: (1) the Beneficiary will be employed in a managerial or executive capacity; and (2) the Beneficiary has been employed abroad in a managerial or executive capacity. The Petitioner does not claim that the Beneficiary will be employed in an executive capacity. Therefore, we 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.

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. U.S. Employment in a Managerial or Executive Capacity

1. Evidence of Record

The Petitioner filed the Form I-129 on September 14, 2015. On the Form I-129, the Petitioner indicated that it has fourteen current employees in the United States and a gross annual income of \$2.9 million.

In a supporting statement, the Petitioner explained that the Beneficiary will be the director of operations, responsible for computer and server operations, data entry, data security, data quality control and management of the services and application used for data processing. The Petitioner submitted a table listing each of the Beneficiary’s proposed duties and their “corresponding routine operational activities” as follows:

Function and breakdown of time the Director of Operations will spend on the respective function:	Managerial duties related to the function performed by the Director of Operations for the US employer:	Corresponding routine operational activities, and who will perform said duty for the US employer to relieve the Beneficiary from performing said operational activity:
Plan, design, construct and operate [the Petitioner’s] data center. (20%)	Discussion and meetings with Senior management to define product road map. Keeps offshore engineering team informed about new decisions.	Other Team Lead ensures that teams are designing the product based on defined architecture and testing procedures.
Develop and implement	Meetings with other teams to	IT Networking Team

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sophisticated network & computational algorithms to improve and increase the speed, security and reliability of the data center. (30%)	define/discuss data center architecture, testing and quality control strategies.	coordinate with Support and Development team to ensure that all IT resources are up to their satisfaction.
Interaction and Communication with Senior Management (CEO, CTO) to decide company roadmap. (10%)	Meet with Marketing Managers, Sales, CEO and CTO on a regular basis to discuss company requirements in regards to data center and to set company's future milestones.	Senior Development engineering team ensures that their teams are following appropriate processes.
Supervise offshore engineering teams to manage and control offshore datacenter. (10%)	Coordinate with other teams to ensure that teams are following new processes.	QA teams ensure that each release maintain quality standards.
Develop and implement new policies, processes, procedures and systems to ensure an efficient and effective operation of the data center. (10%)	Develop new processes to improve team performance and coordination between teams. Consistently review the operations of the data center and ensure offshore team is following the quality and standard set by the management.	Team Leads and other managers plan and review daily work progress of teams.
Explore new technologies and software for the data center network and build proof of concept for new features. (10%)	Build proof of concepts for new features for future improvements.	IT Networking teams converts the Proof of Concepts into physical operational data center.
Ensure Engineering team satisfaction and provide optimal level customer services for various engineering development departments. (10%)	Host these meetings plan and review monthly progress.	
Respond to phone calls or follow up on emails, regardless of what time of day or night it may be.	Conduct 1st round telephonic interviews & host 2nd round face to face interviews with CEO and CTO for final decision of the hiring process.	

The Petitioner also submitted an undated organizational chart depicting the Beneficiary as director of operations with two subordinates subject to the Beneficiary's oversight: "[REDACTED] VP of [REDACTED]" and "[REDACTED] Director of Marketing."

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The Director issued a request for evidence (RFE), instructing the Petitioner to provide evidence pertaining to various eligibility factors, including evidence establishing that the Beneficiary's U.S. employment would be primarily comprised of managerial or executive job duties.

In response, the Petitioner provided a second list of proposed job duties along with percentages of time devoted to each group of tasks as follows:

- **Planning & Execution 60%**

Responsible for assigned services and activities of the Information Technology Division including designing, implementing, and administering information technology activities; manage, upgrade, and direct the installation, operation, and maintenance of information technology hardware and software; manage and maintain data and equipment security; administer and provide ongoing technical support and training staff.

- **Managing and Monitoring 20%**

Manage and participate in the development and implementation of goals, objectives, policies and priorities for assigned programs; recommend and administer policies and procedures.

- **Maintenance and Upgradation 20%**

Manage and provide the deployment, monitoring, maintenance, development, upgrade and support of all information technology systems, including servers, PC's, operating systems, hardware, software, peripherals and application development, and telecommunication systems.

- **Work responsibilities and Planning 10%**

Plan, direct, coordinate, and review the work plan for information technology staff; assign work activities, projects, and programs; review and evaluate work products, methods, and procedures; meet with staff to identify and resolve problems.

The Petitioner also provided photocopies of IRS Form 1099-MISCs for 2014, indicating that contracted with "[REDACTED]" and "[REDACTED]". Also, the Petitioner submitted IRS Form W-2 Wage & Tax Statements for the following employees for 2014: [REDACTED] and [REDACTED].

The Petitioner also provided a copy of the Petitioner's quarterly wage reports for the first and second quarters of 2015. The wage reports indicate that the Petitioner employed three individuals in the first quarter of 2015: [REDACTED] and [REDACTED]. In the second quarter of 2015, the Petitioner added [REDACTED].

Also contained in the supporting statement, the Petitioner explained:

[The Beneficiary] does not perform non-qualifying everyday marketing and PR duties, as those are taken care of by subordinates. Please refer to the organizational chart and supplement to the organizational chart which clarifies how such tasks are allocated among staff directed by (beneficiary). He is limited to assigning and approving actions taken by subordinates as (including Web master, PR agency

providing technical writers, graphic designers, market research analysts, and Customer Service Warehouse), and therefore manages rather than performs any operations related to the function.

The Director denied the petition, noting that the evidence submitted did not establish that the Beneficiary will primarily perform managerial or executive duties. The Director explained that the Beneficiary's duties were mostly non-qualifying tasks related day-to-day operations. The Director also noted that the limited number of U.S. employees makes it questionable whether the Beneficiary will be able to primarily perform managerial or executive functions and that the record contains inconsistencies regarding the number of employees and their respective roles.

On appeal, the Petitioner contends that the Director erred in concluding that the Beneficiary's duties are not qualifying managerial or executive duties. The Petitioner asserts that the Beneficiary's position is closely related to the Occupational Outlook Handbook (OOH) description of the Computer and Information Systems Manager and attaches a description of this job category. The Petitioner also asserts that the Director's decision reflects an improper evidentiary standard. In a statement supporting the appeal, the Petitioner submits a third set of proposed job duties as follows:

- Plan, design, construct and operate [Petitioner's] data center. (10%)
- Develop and implement sophisticated network & computational algorithms to improve and increase the speed, security and reliability of the data center. (20%)
- Interaction and Communication with Senior Management (CEO, CTO) to decide company roadmap. (10%)
- Supervise offshore engineering teams to manage and control offshore data center. (10%)
- Develop and implement new policies, processes, procedures and systems to ensure an efficient and effective operation of the data center. (10%)
- Explore new technologies and software for the data center network and build proof of concept for new features. (10%)
- Ensure Engineering team satisfaction and provide optimal level customer services for various engineering development departments. (10%)
- Manage a team of consultants to debug and verify a RFIC test chip. (10%)
- Design, manage and maintain data and network security depending on client needs. (10%)

2. Analysis

Upon review of the petition and the evidence of record, we conclude that the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States.

When examining the managerial or executive 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 a managerial or executive capacity. *Id.*

The definitions of managerial and executive capacity each 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 *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

In the matter at hand, the Petitioner initially offered a job description that does not establish that the Beneficiary would primarily perform tasks within a managerial or executive capacity. Namely, the job duties noted almost exclusively relate to the Beneficiary's engineering responsibilities with the Petitioner's data center. For example, the Beneficiary will spend 30% of his time developing and implementing sophisticated network & computational algorithms to improve and increase the speed, security and reliability of the data center; and 20% of his time planning, designing, constructing and operating [Petitioner's] data center. He will also develop policies and technologies and software for the data center. While the Petitioner indicated that the Beneficiary will spend 10% of his time managing offshore engineering teams, the Petitioner did not explain how the Beneficiary will manage these teams remotely and the teams were not identified on the organizational chart.

Although the Director issued an RFE regarding the Petitioner's capability to support the Beneficiary in a managerial or executive capacity and instructing the Petitioner to supplement the record with a job description listing the Beneficiary's typical job duties, the Petitioner did not comply with the request or dispel the Director's concerns about its ability to relieve the Beneficiary from having to carry out the non-qualifying tasks of an organization. For instance, in the second set of job duties submitted, the Petitioner indicated that 60% of the Beneficiary's time would be allocated to designing, implementing, and administering information technology activities along with directing the installation, operation, and maintenance of information technology hardware and software; managing and maintaining data and equipment security; and administering and providing ongoing technical support and training staff. This broad cluster of duties provides little insight into exactly what portion of the Beneficiary's responsibilities reflect day-to-day engineering and data administration tasks and what percentage is managerial or executive. While the Petitioner does indicate that the Beneficiary will review the work of the information technology staff, it is unclear how much time the Beneficiary will devote to this task. Overall, the second set of duties submitted is too vague and contains clusters of responsibilities without actually delineating what tasks are managerial or executive.

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary, when the petition was filed,

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merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

The information provided by the Petitioner in its response to the Director's RFE did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. This material change to the proffered position precludes us from determining the true nature of the position. As the Petitioner has not established what the actual duties of the proffered position are, we cannot analyze whether or not the duties are primarily managerial or executive in nature.

On appeal, the Petitioner submits a third set of job duties that are very similar to the first set of duties submitted, however, it contains additional tasks not previously described such as "manage a team of consultants to debug and verify a RFIC test chip," and "design, manage and maintain data and network security depending on client needs." These duties are not described in the initial filing or the RFE response and without further detail, we cannot determine how they relate to his daily tasks or why they were not previously listed. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Also, the Petitioner has submitted inconsistent information regarding the percentage of time the Beneficiary will spend on each task. For example, in the first submission, the Petitioner indicates that the Beneficiary will spend 20% of his time operating the Petitioner's data center; however, in the set of duties submitted on appeal, this task requires 10% of the Beneficiary's time. Similarly, in the initial submission, developing network algorithms for the data center requires 30% of the Beneficiary's time; however in the set of duties submitted on appeal, this task requires 20% of the Beneficiary's time. This is important because, 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 manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify a beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "*primarily*" performing managerial or executive duties. Section 101(a)(44) of the Act. We also note that the inconsistencies among the three sets of job duties submitted casts doubt on the reliability of the evidence. 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 Petitioner has not shown how the Beneficiary's duties would be primarily managerial or executive in nature.

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 company's

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organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the 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. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. 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)(4). If a petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act; 8 C.F.R. §§ 214.2(l)(1)(ii)(B)(2)-(3).

To determine 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 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."

Here, the Petitioner claims throughout the record that the Beneficiary will manage subordinates; however, there are several inconsistencies regarding which employees will directly report to the Beneficiary and the Petitioner's actual number of employees. First, in the initial filing, the Petitioner submitted an organizational chart depicting the Beneficiary overseeing [REDACTED] (VP of [REDACTED]) and [REDACTED] (Director of Marketing). [REDACTED] does not appear on the Petitioner's quarterly wage reports for the second quarter of 2015. Furthermore, while the Petitioner states on Form I-129 that it has 14 employees, only four employees appear on the first quarter wage statement and eight appear on the undated organizational chart.

The first set of job duties submitted states that the Beneficiary will oversee offshore engineering teams that are not identified on the organizational chart. The first set of job duties also states that the Beneficiary will "ensure engineering team satisfaction and provide optimal level customer services for various engineering development departments." The Petitioner has not identified these engineering teams or engineering development departments nor do they appear on the organizational chart. The job description submitted on appeal includes management of teams of consultants which also do not appear on the organizational chart and their responsibilities have not been explained.

As discussed above, the Petitioner in the present matter provided three different and deficient job descriptions that did not provide an accurate account of the actual job duties the Beneficiary would

carry out in his proposed employment. This deficiency as well as the Petitioner's limited 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. 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 Dec. at 604. In the matter at hand, the Petitioner has not provided sufficient evidence to meet that burden.

The Petitioner has not established, in the alternative, that the Beneficiary will be employed primarily as a "function manager," as claimed. 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that a beneficiary will manage an essential function, a 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 a beneficiary's daily duties dedicated to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, a petitioner's description of a beneficiary's daily duties must demonstrate that the Beneficiary will manage the function rather than perform the duties related to the function.

As discussed above, the Petitioner in the present matter provided three different job descriptions that do not provide an accurate account of the actual job duties the Beneficiary would carry out in his proposed employment. The Petitioner has not identified a function to be managed or explained how the Petitioner's limited staffing composition has the ability to support the Beneficiary in a position where his time would be allocated to primarily managerial-level tasks. All three job descriptions provided indicate that the Beneficiary will be performing the engineering functions of the organization, not managing the function. 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 Dec. at 604. In the matter at hand, the Petitioner has not provided sufficient evidence to meet that burden.

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 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 USCIS 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.*, 469 F.3d 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15.

Here, the Petitioner has submitted inconsistent information regarding the number of its current employees, their roles, how much time the Beneficiary devotes to management of subordinate employees and how they relieve him from the day-to-day engineering responsibilities described in his three different job descriptions. Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity.

B. Foreign Employment in a Managerial or Executive Capacity

In order to establish eligibility, the Petitioner must demonstrate that the Beneficiary was employed abroad for one continuous year in the three years preceding the filing of the petition and that the employment was in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(iii)-(iv).

1. Evidence of Record

The record contains a letter from the foreign entity describing the Beneficiary’s job as follows: “the Beneficiary’s role as an IT manager is for computer and server operations, data entry, data security, data quality control and management of the services and application used for data processing.”

The statement also included a table showing the Beneficiary’s job duties as IT manager as follows:

Function and percentage breakdown of time the manager will spend on the respective function (list of general functions manager is responsible for):	Managerial Duties related to the function performed by the Manager for the employer with a percentage breakdown (list of specific duties manager performs in relation to the functions):	Corresponding routine operational activities, and who will perform said duty for the employer to relieve the Beneficiary from performing said operational activity (list of non-managerial tasks done by others):
Plan, design, construct and operate [Petitioner’s] data center. Develop and implement sophisticated network & computational algorithms to improve and increase the speed, security	Meet with Marketing Managers, Sales, CEO and CTO on a regular basis to discuss company requirements in regards to data center and to set company’s future milestones.	Monitor all functional resources required for growth and ensure appropriate working.

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and reliability of the data center. (30%)		
Ensure client satisfaction and provide optimal level customer services for various departments. (30%)		
Design circuits and layouts for a particular process node. (20%)	Manage and maintain the workflow of the tasks given to subordinates and ensure delivery of the project before the deadline.	
Conduct interviews and hire appropriate people for the job. (20%)	Set test question papers, validate the candidate's claims in the answer sheets and conclude the interview.	

The Petitioner also submitted an undated organizational chart depicting the Beneficiary as "Sr Staff Engineer," overseeing four direct reports who are identified as follows: [REDACTED] and [REDACTED] (Engineer). The chart is accompanied by a brief explanation of each position and each subordinate's bachelor's degree is noted. No additional evidence of the foreign entity's employment of these individuals, such as tax documents or employment records, is contained in the record.

In the RFE, the Director requested that the Petitioner submit evidence that the Beneficiary was employed in a managerial capacity for the foreign entity. The Director requested a more detailed statement from the foreign entity describing the position in detail, along with a description of the duties of any subordinate employees, their education levels and salaries, and whether they worked full-time or part-time.

In response, the Petitioner provided a second job description as follows:

- **Planning & Execution 60%**

Responsible for assigned services and activities of the Information Technology Division including designing, implementing, and administering information technology activities; manage, upgrade, and direct the installation, operation, and maintenance of information technology hardware and software; manage and maintain data and equipment security; administer and provide ongoing technical support and training staff.

- **Managing and Monitoring 20%**

Manage and participate in the development and implementation of goals, objectives, policies and priorities for assigned programs; recommend and administer policies and procedures.

- **Maintenance and Upgradation 20%**

Manage and provide the deployment, monitoring, maintenance, development, upgrade and support of all information technology systems, including servers, PC's, operating systems, hardware, software, peripherals and application development, and telecommunication systems.

- **Work responsibilities and Planning 10%**

Plan, direct, coordinate, and review the work plan for information technology staff; assign work activities, projects, and programs; review and evaluate work products, methods, and procedures; meet with staff to identify and resolve problems.

We note that the percentages of time delineated add up to 110%. The foreign entity also provided a list of "responsibilities," as follows:

- Provide overall IT governance for the firm
- Plan, implement and monitor changes in infrastructure configurations
- Install new servers and configure hardware
- Develop and maintain system standards
- Perform daily backup operations
- Perform system monitoring for security purposes
- Monitor Service Desk for tickets assigned to the queue and process first-in first-out based on priority
- Work with team to enhance current technologies to improve client services
- Communicate regularly with executive management on information technology
- Manage IT staff, which includes hiring, training, guidance, and discipline
- Develop best practices and written documentation for all server maintenance
- Oversee the provisioning of the end-user services
- Manage the financial aspect of IT development
- Manage hardware and software vendor relationships

The Director denied the petition noting that the evidence submitted did not establish that the Beneficiary primarily performed managerial duties. The Director explained that the Beneficiary's duties were mostly non-qualifying tasks related to day-to-day operations. The Director also noted that the foreign entity's organizational structure is not 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 contends that the Director erred in concluding that the Beneficiary's duties were qualifying managerial or executive duties. The Petitioner states that the Beneficiary's position should be equated with the Occupational Outlook Handbook O'NET description for an IT manager and that it has established that the Beneficiary qualifies for the classification sought.

2. Analysis

Upon review, and for the reasons stated below, we find that the Petitioner has not established that the Beneficiary's position abroad was in a qualifying managerial or executive capacity for at least one continuous year within the three years preceding the filing of the petition.

As noted earlier, when determining whether a beneficiary was employed in a managerial or executive capacity, we 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 performed by the beneficiary and indicate whether such duties were either in a managerial or executive capacity. *Id.* A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108, *aff'd*, 905 F.2d 41. We will then consider this information in light of other relevant factors, including (but not limited to) job descriptions of the beneficiary's subordinate employees, the nature of the business conducted, and any other facts that may contribute to a comprehensive understanding of the beneficiary's actual duties and role in the foreign entity's organizational hierarchy.

As described above, the Petitioner submitted two different sets of job duties and an additional list of responsibilities, without explaining why the job descriptions are inconsistent. In the first set of job duties provided in the table, the Petitioner claims that the Beneficiary spent the majority of his time constructing and operating the foreign entity's data center, providing customer service, and designing circuits and layouts. These are engineering tasks that reflect that the Beneficiary was performing the data analysis and engineering functions of the organization.

While the table submitted by the foreign entity also lists "managerial duties" related to each of the Beneficiary's tasks, it is not clear that the managerial tasks even relate to the corresponding job duty or what percentage of time the claimed managerial tasks required. For example, the foreign entity indicates that the Beneficiary spent 30 percent of his time planning, designing, constructing, and operating the foreign entity's data center. The foreign entity further states that this task required the Beneficiary to "meet with Marketing Managers, Sales, CEO and CTO on a regular basis to discuss company requirements in regards to data center and to set company's future milestones." The foreign entity did not explain what percentage of time the managerial component required. Thus, we are unable to discern what percentage of time the Beneficiary actually spent performing managerial tasks. As stated above, this is critical because, absent a clear and credible breakdown of the time spent by the Beneficiary performing her/his duties, we cannot deduce whether the beneficiary was *primarily* performing the duties of a manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify a 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 was "*primarily*" performing managerial or executive duties. Section 101(a)(44) of the Act.

In a different job description submitted in response to the RFE, the foreign entity provided vague categories of job duties that did not adequately describe what the Beneficiary did on a day-to-day basis and the tasks noted add up to more than 100%, casting doubt on the reliability of the evidence submitted. 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 Petitioner did not explain why the job descriptions changed between the time of the initial filing and the RFE response, nor did the Petitioner explain how the list of "responsibilities," submitted with the RFE response, relates to the job description. We also note that the listed responsibilities are also almost exclusively day-to-day engineering tasks related to monitoring service desk, server maintenance, performing back up operations, and provisioning end-user services.

In addition, the Petitioner assigned two different sets of percentages to the Beneficiary's foreign duties, did not provide an explanation for the revision of these percentages, and did not respond to the Director's request to submit a more detailed and specific account of the Beneficiary's actual tasks. Therefore, the Petitioner's descriptions of the Beneficiary's job duties with the foreign entity, do not sufficiently establish what proportion of his duties were managerial or executive in nature, and what proportion were actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

In addition to the actual job descriptions, we find insufficient evidence to establish how the foreign entity supported the Beneficiary in a position in which he performed primarily managerial or executive duties. 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 company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

Although the Petitioner claims the Beneficiary supervised a team of four professionals, the record does not establish that he was primarily engaged in the supervision of these employees or that he otherwise performed primarily qualifying duties. The record also does not contain evidence of their employment such as payroll records or income tax documents, nor does the record contain a sufficiently detailed explanation of the subordinate's duties, such that we can discern that they relieved the Beneficiary from performing day-to-day engineering tasks.

Based on the statements provided in the record, we are unable to determine whether the claimed managerial duties constituted the Beneficiary's primary duties, or whether the Beneficiary primarily performed non-managerial administrative or operational duties as described above. The Petitioner's descriptions of the Beneficiary's job duties do not sufficiently establish what proportion of the Beneficiary's duties was managerial in nature, and what proportion was actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

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The record, taking into account the totality of the evidence presented, does not establish that the Beneficiary was employed in a managerial or executive capacity with the entity abroad for the required one year.

V. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains 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.

ORDER: The appeal is dismissed.

Cite as *Matter of D-D- Inc.*, ID# 17704 (AAO July 26, 2016)