U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF I-S- LLC

DATE: JUNE 22, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a music and art school, seeks to temporarily employ the Beneficiary as its camp director/program coordinator 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 a managerial or executive capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish that (1) the Beneficiary will be employed in the United States in a qualifying managerial or executive capacity, and (2) the Beneficiary was employed abroad in a qualifying managerial or executive capacity. The Petitioner filed an appeal. Following a preliminary review of the record of proceeding, we issued a request for evidence (RFE) to provide the Petitioner an opportunity to rebut derogatory information and to present additional information regarding the Beneficiary's prior foreign employment. We received the Petitioner's response and have incorporated it into the record of proceeding.

On appeal, the Petitioner disputes the grounds for denial, asserting that it provided sufficient evidence to overcome the grounds cited by the Director in the original decision.

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. 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.

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 October 24, 2014. On the Form I-129, the Petitioner indicated that it has a gross annual income of $574,823. The Petitioner did not provide the current number of employees in the United States on the Form I-129, however, in the letter of support submitted with the Form I-129, the Petitioner indicated that it employs 25 music and art instructors and managerial staff members.

In a supporting statement, the Petitioner provided the following overview of the Beneficiary's position:

> [The Beneficiary] will be responsible for developing and implementing the music and art school's international camp program, which will host young music students visiting from China. In coordination with the U.S. company's directors, she will be responsible for setting the program's goals, managing its finances, and developing its marketing program in China. She will also oversee the operation of the summer resident camp in the U.S. In this capacity, she will hire, train and supervise seasonal

> and year-round staff, manage housing and accommodations coordinators, develop risk management and health care procedures, and oversee the Food Service Manager. She will also market the school's regular music and art programs to the Chinese communities in

The Petitioner also described the Beneficiary's proposed duties as follows:

> As our Camp Director/Program Coordinator, [the Beneficiary] is to direct the development of the summer camp program, market it in China, and oversee its daily management and operation. [The Beneficiary's] specific duties will include:
>
> - Design, deliver and evaluate a camp program that meets the needs and interests of the target population;
> - Ensure the quality of the program and safety and well-being of the camp participants;
> - Oversee financial management and fund development to ensure adequate annual funding ad attainment of long-term goals;
> - Design and implement a marketing plan in China;
> - Design and implement a marketing plan for the Chinese community in
> - Recruit, hire, train and supervise seasonal and year-round staff; and,
> - Oversee the daily management of the summer resident camp operations, including the program, food service, accommodations, and health care.

The Petitioner provided an organizational chart of its current employees in the United States showing a director, manager, CPA, and assistant director/manager in addition to the Beneficiary's proposed position. The chart also lists (25) music instructors. The chart indicates that the Beneficiary will report to the director and supervise an undisclosed number of individuals on the sales team (located in China) and camp counselors.

After reviewing the submitted documentation, the Director issued an RFE, advising the Petitioner that the initial evidence did not establish that the Beneficiary would be employed in a qualifying managerial or executive capacity. The Director requested additional information regarding the Beneficiary's proposed duties, such as a letter from the Petitioner describing her expected managerial or executive duties and the percentage of time she would allocate to each duty. The Director also requested copies of the Petitioner's State Quarterly Wage Reports for the 1st, 2nd, and 3rd quarters of 2014 that were accepted by the State of New York, the Petitioner's payroll summary and IRS forms W-2, W-3, and 1099-MISC showing wages paid to employees under the Beneficiary's direction.

In response, the Petitioner submitted a letter reiterating the previously described duties but did not respond to the request for the percentage of time spent on each duty or respond to the Director's request for tax and payroll documentation for the Beneficiary's proposed subordinate employees.

The Petitioner further described the position as follows:

> [The Beneficiary's] role in the U.S. will be both executive and managerial. In her executive capacity, she will be responsible for designing the music camp program and defining its goals. She will also direct the management of the marketing program by the parent company in China.
>
> In a more managerial capacity, she will supervise camp counselors in the U.S, and oversee the daily operation of the summer resident camp. Although the position involves some managerial duties, it is in essence an executive position. [The Beneficiary] will have full responsibility for developing the business enterprise, will direct the management of the business operations in China, and will make decisions of wide latitude with very little oversight.

The Petitioner also submitted a second job description for the Beneficiary as follows:

1. Design, deliver and evaluate camp program that meets the needs and interests of the camps target populations and ensure their delivery in a safe and quality manner.
    - Remain current with information on the developmental needs of youth.
    - Annually seek and analyze input from youth, families, and staff regarding the quality, safety, and enjoyment of the program and staff.
    - Develop and implement crisis and risk management procedures.
    - Design and ensure delivery of programs and activities appropriate to the camper population.
2. Oversee financial management and fund development to ensure adequate annual funding and attainment of long-term goals;
    - Develop and monitor budget for the camp operations.
    - Develop and design long-term fund-raising strategies for the camp program and facilities.
3. Design and implement a marketing plan to increase camper attendance and camp usage;
    - Prepare and analyze enrollment trends.
    - Develop and implement recruitment and retention strategies.
4. Implement human resource management practices to recruit, hire, train and supervise seasonal and year-round staff;
    - Recruit staff based on camper enrollment and program management requirements.
    - Hire, train, supervise, and evaluate seasonal and year-round staff.
5. Manage facility development and maintenance needs to ensure stewardship of current resources and identification of future needs.
    - Conduct annual assessment of facility and maintenance needs.
    - Prepare annual and long-term facility plan.

6. Oversee the daily management of the summer resident camp, including food service, program, business, camper staff supervision, and health care.
    - Oversee the management of the food service area through supervision of food services manager and review of food service program.
    - Secure sufficient coverage in health care staff and their implementation of the health care plan.
    - Develop and oversee the business management functions of the camp including financial record keeping, office operations, camp store, etc.
    - Oversee the systematic approach to database management for campers, families, alumni, and donors.
    - Work collaboratively with internal and external groups to ensure the enhancement of the camp operation.
7. Design and implement a marketing plan for regular programs to expand student enrollment in Asian community.
    - Prepare and analyze enrollment trends.
    - Develop and implement recruitment and retention strategies.

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. The Director found that the Petitioner described the Beneficiary's proposed duties in overly broad and non-specific terms and that, given the size and nature of the business, it is more likely than not that the Beneficiary would perform the tasks necessary to the operation of the business. In this regard, the Director observed that the Petitioner had not established that it has employees to perform the day-to-day tasks of the company.

On appeal, the Petitioner submits a more detailed description of the Beneficiary's proposed employment and states that she will manage a function of the business: the planning, marketing, coordination, and operation of the U.S. company's international music camp program. The Petitioner states that:

> [T]he function involves tasks performed by specialized staff (music instructors), administrative staff (an administrative assistant and camp counselors), and management staff. [The Beneficiary] will not and cannot primarily perform all of the tasks necessary to provide the service. The tasks require a team of music instructors, camp counselors, and marketing staff, coordinated and managed by a Camp Director/Program Coordinator.

Also on appeal, the Petitioner submitted a letter dated February 27, 2015, stating that the Beneficiary arranged music programs in and will be responsible for auditioning, rehearsing, and other duties.

The Petitioner also submitted a document titled "[The Beneficiary's] job description and [the Beneficiary's] job responsibilities description." This document indicates that, "on April 6, 2015,

[the Beneficiary] will be solely responsible for band's visiting China activities with the six primary and secondary schools. Afterwards it will organize a team about 100 people to participate in first session of "

2. 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 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 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.

Here, the Petitioner initially provided a list of the Beneficiary's job duties including "design, deliver and evaluate a camp program that meets the needs and interests of the target population," "ensure the quality of the program and safety and well-being of the camp participants," "design and implement marketing plans," "recruit, hire, train, and supervise seasonal and year-round staff," and "oversee the daily management of summer resident camp operations, including the program, food service, accommodations and health care." The Petitioner did not indicate which duties would be her primary duties, nor did it explain how non-qualifying duties associated with implementing these broad goals would be performed by the Petitioner's other employees. Based on the first set of job duties submitted, it is reasonable to conclude that the Beneficiary would spend her time involved in performing non-qualifying market research, sales, and advertising activities as well as daily financial tasks of the business.

The duties submitted in response to the RFE contain more detail; however, they do not include percentages of time spent on each duty, or explain how the Petitioner's subordinates will actually perform the tasks that the Beneficiary is said to manage. For example, the Beneficiary's duties include, "oversee the management of the food service area through supervision of food services manager," however, the Beneficiary's subordinates include only a sales team and camp counselors. In fact, there is no food service manager listed on the organizational chart. The RFE response also described how the Beneficiary would "develop and oversee the business management functions of the camp including financial record keeping, office operations, camp store," however, the Petitioner does not indicate who will perform the record keeping or run the office or camp store. Without a

more detailed description of the Petitioner's organizational structure, it is likely that the Beneficiary would likely perform these duties herself, rather than assigning them to the company's employees.

Also in the RFE response, the Petitioner characterized the Beneficiary's position as both executive and managerial. The Petitioner stated the following:

> [I]n her executive capacity, [the Beneficiary] will be responsible for designing the music camp program and defining its goals. She will also direct the management of the marketing program by the parent company in China. In a more managerial capacity, she will supervise camp counselors in the U.S, and oversee the daily operation of the summer resident camp. Although the position involves some managerial duties, it is in essence an executive position.

For the first time on appeal, the Petitioner states that the Beneficiary will manage a "function," namely, the planning, marketing, coordination, and operation of the U.S. company's international music camp program. The Petitioner indicates that the tasks require a team of music instructors, camp counselors, and marketing staff, coordinated and managed by a camp director/program coordinator. But the Petitioner also submitted a letter on appeal stating the following:

> On 4/2/2015 [the Beneficiary] will bring a group of 15 students to China to have its first international music tour. [The Beneficiary] organized an event at the to present programs on 4/6. She also arranged music exchange programs with schools in During the 10 day music tour, the American students will perform 6 concerts. will also host the American students their staying for their meals hotels and cultural experience. [The Beneficiary] will continue to recruit the Chinese students from the schools that the American kids visited during its tour. We are expecting 100 Chinese students coming to U.S. in July for summer camp. She and staffs will be responsible for auditioning, rehearsing, language and culture training and visa application for the Chinese students.

Based upon the Petitioner's statement, it appears that the Beneficiary is actually engaged in the recruiting, auditioning, and training that she is said to oversee. Without additional information, we cannot determine the total portion of the Beneficiary's time that would be allocated to the operational tasks of the camp. It is critical for the Petitioner to not only list the Beneficiary's prospective job duties, but also to specify what portion of time the Beneficiary would allocate to each individual daily task.

In the present matter, the Petitioner did not provide a comprehensive percentage breakdown establishing what portion of the Beneficiary's time would be allocated to managerial or executive duties versus the operational non-qualifying tasks. While no beneficiary is required to allocate 100% of his or her 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 International*, 19 I&N Dec. at 604. In the matter at hand, the Petitioner has not provided sufficient evidence to meet that burden.

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.

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."

The organizational chart submitted with the initial position indicates that the Beneficiary will supervise two groups of employees: the sales team and camp counselors. The expanded list of duties submitted in response to the RFE include tasks such as, "oversee the management of the food service area through supervision of food services manager and review of food service program," "secure sufficient coverage in health care staff and their implementation of the health care plan," "develop and oversee the business management functions of the camp including financial record keeping, office operations, camp store etc.," and "oversee the systematic approach to database management for campers, families, alumni and donors." Again, the organizational chart submitted does not reflect that the Petitioner employs a food services manager, health care staff, IT professionals, or office staff to relieve the Beneficiary from performing the day to day tasks associated with these responsibilities.

Also in response to the RFE, the Petitioner indicated that the Beneficiary will "direct the management of the marketing program by the parent company in China . . ., and supervise camp counselors in the US." The Petitioner did not provide descriptions of subordinates job duties or their requirements, demonstrating that these positions are professional, managerial, or supervisory in nature.

Furthermore, the Petitioner must establish that it does in fact employ the claimed individuals such that the Beneficiary is relieved from performing non-qualifying duties. On the Form I-129, the Petitioner did not indicate how many individuals it employed at the time of filing and it did not

submit copies of its Employers Quarterly Reports filed with the state of New York, payroll records or IRS W-2 or W-3 tax documents as requested by the Director. Without such documentation or explanation, we cannot determine the true size of the Petitioner nor can we ascertain the entity's organizational structure or the Beneficiary's place in it.

The Petitioner has not established, in the alternative, that the Beneficiary will be 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. 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 clearly describe 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.

The Petitioner has not provided evidence that the Beneficiary manages an essential function. The Petitioner asserts on appeal that the Beneficiary will manage a function: the planning, marketing, coordination, and operation of the U.S. company's international music camp program. The Petitioner also describes how the Beneficiary is responsible for auditioning, rehearsing, language and culture training, and visa applications for Chinese students. Thus, it appears that the Beneficiary is actually engaged in the recruiting, auditioning, and training that she is said to oversee. For these reasons, the Petitioner has not established that the Beneficiary will be employed as a function manager.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and a 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 an owner or sole managerial employee. A 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.*

In the matter at hand, the Petitioner asserted in its letter of support that the Beneficiary would oversee the overall operations of the Petitioner, and that her primary responsibilities in an executive capacity would include developing the business and establishing the goals and policies of the U.S. organization. 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 Beneficiary has not been shown to be employed in a primarily executive capacity. The Petitioner has not demonstrated 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. In fact, despite the Petitioner's initial claims that the Beneficiary is an executive at the U.S. company, the only executive duties listed for the Beneficiary merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. Conclusory assertions regarding the Beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the Petitioner's burden of proof. *See 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

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. v. USCIS*, 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.

As previously noted, it is unclear who will be performing the actual day-to-day operations of the company. Given that the Petitioner has a limited organizational structure, which has not been fully described, and her only subordinates include sales agents and camp counselors, it is not reasonable to assert that the Beneficiary's role with regard to recruitment, operations, or administration would be limited to mere oversight. Rather, it appears unlikely that the Petitioner would meet its objectives or actually be able to run a summer camp without the Beneficiary's direct involvement in carrying out some of the underlying operations or administrative duties. If USCIS finds reason to believe that an assertion stated in the petition is not true, USCIS may reject that assertion. *See, e.g.*, section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d at 15.

For the foregoing reasons, the Petitioner has not established that the Beneficiary will be employed in a primarily managerial or executive capacity. Accordingly, for this reason the appeal will be dismissed.

B. Foreign Employment in a Managerial or Executive Capacity

1. Evidence of Record

In the Form I-129, the Petitioner stated that the Beneficiary had been working for since August 2011.[1] On the L Classification Supplement to Form I-129, the Petitioner stated that the Beneficiary was employed as the executive director of the foreign entity, responsible for determining corporate strategy, directing the company's finances and business operations, and supervising the general manager in the daily management and operations of the company.

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[1] While the Petitioner indicated that the Beneficiary has been employed as an executive director for from August 28, 2011, to present, U.S. Department of State records indicate that when the Beneficiary applied for a B1/B2 visa on January 22, 2013, she stated on her visa application that she was employed by in the "HR Department." Records further show that on February 8, 2014, the Beneficiary again applied for a B1/B2 visa and indicated that she was employed by in "Compensation Management of Human Resources" from November 1, 1994, to February 7, 2014. On March 22, 2016, we issued a notice of intent to dismiss and request for evidence providing the Petitioner with an opportunity to submit evidence resolving this inconsistency. In response, the Petitioner stated the following:

> [The Beneficiary] was employed as Vice President of Human Resources from November 1994 to December 2014. In August 2011, while employed by she founded Since August 2011, she has been primary shareholder, legal representative and Executive Director. As an employee of the company, she has earned a salary of one yuan (US $0.15) per year. Her income from the company is derived from her profit earnings as an owner-shareholder of the company.

The Petitioner has not explained how the Beneficiary was able to work full-time for the foreign entity while simultaneously working for as Vice President of Human Resources.

We further note that the Petitioner submitted two different versions of the Beneficiary's resume. A resume submitted with the initial filing on October 24, 2014, indicates that the Beneficiary worked simultaneously for the two entities. That resume provides the following:

> November 1994 – Present, Vice President, Brokerage Department, Research Department and HR Department,
>
> September 2011 – Present, Executive Director,

A resume submitted in response to the Director's RFE on January 30, 2015, indicates that the Beneficiary did not work simultaneously for the two companies, and stopped working for in August 2011. The latter submitted resume provides the following:

> November 1994 – August 2011, Vice President, Brokerage Department, Research Department and HR Department,
>
> September 2011 – Present, Executive Director,

The Petitioner also provided an organizational chart of its employees abroad, showing the executive director role with 11 positions reporting to the executive director, however, no individuals were specifically named. The record also contains a "shareholder meeting resolution," dated August 28, 2011, indicating that the Beneficiary was elected as the executive director of the foreign entity, along with copies of the Beneficiary's tax payment certificates for January 2012 through June of 2014.

After reviewing the submitted documentation, the Director issued an RFE, advising the Petitioner that the initial evidence did not establish that the Beneficiary was employed abroad in a qualifying managerial or executive capacity. The Director advised the Petitioner that the initial job description was insufficient to establish the Beneficiary's employment in a managerial or executive capacity, and suggested that the Petitioner submit an organizational chart and a more detailed description of the Beneficiary's typical managerial or executive duties.

In response, the Petitioner submitted a letter from General Manager of the foreign entity who stated that [the Beneficiary's] duties include the following: (verbatim)

- Defining the company's long term and short-term business goals;
- Determining the company's business and income-generation strategies;
- Determining the company's financial strategies, including making or receiving capital investments;
- Establishing the company's operational procedures;
- Negotiating and executing business agreements on behalf of the company;
- Hiring the company's managerial staff;
- Supervising the Financial Manager's and Human Resources Manager's management of the company's daily business operations;
- Investigating additional opportunities for revenue generation and enterprise development and exercising executive decision making on the company's new business policies;
- Developing the company's public image and brand name;
- Overseeing the company's cultural and artistic exchange and event planning activities and operations;
- Establishing relationships with external business entities and other organizations;
- Ensuring the company's compliance with national and municipal laws and regulations; and,
- Exercising executive authority over all company budgetary and financial matters.

The Petitioner also submitted an undated organizational chart depicting the executive director with eleven subordinates.

The Director denied the Petition stating that the Petitioner did not establish that the foreign entity's organizational structure and staffing levels are such that the Beneficiary was relieved from performing the non-qualifying duties of the organization, such that she was primarily performing managerial or executive tasks.

On appeal, the Petitioner states that the Beneficiary directed "its major function" and "manages the organization and supervises the work of a managerial employee."

2. 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 has been employed in a managerial or executive capacity abroad.

When examining the managerial or executive capacity of the Beneficiary, 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 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 performed 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 has been *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the foreign entity's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

As described above, the Petitioner first characterized the Beneficiary's role at the foreign entity as executive director and described her duties in very broad terms, stating that she "engaged in organizing and conducting cultural and artistic exchange activities and event planning."

In response to the RFE, the Petitioner provided a second description of the Beneficiary's position at the foreign entity in a letter signed by General Manager. The letter stated, in part, that the Beneficiary performed duties such as "determining the company's business and income-generation strategies," "determining the company's financial strategies, including making or receiving capital investments," "establishing the company's operational procedures," "negotiating and executing business agreements on behalf of the company," "hiring the company's managerial staff," and "supervising the Financial Manager's and Human Resources Manager's management of the company's daily business operations," and "investigating additional opportunities for revenue generation and enterprise development and exercising executive decision making on the company's new business policies."

We find that the content of the job description lacked sufficient detail to convey a meaningful understanding of the actual daily tasks the Beneficiary performed within the context of the teahouse business or who performed the daily tasks that the Beneficiary oversaw. Also, the description of duties did not include an allocation of percentages of time the Beneficiary spent on specific duties. This is important because the Petitioner has the burden of establishing that the non-qualifying tasks that the Beneficiary performs 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. 593, 604 (Comm'r 1988). In the matter at hand, the Petitioner has not provided sufficient evidence to meet that burden. 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.

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.

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."

While the Petitioner submitted an undated organizational chart depicting the executive director with eleven subordinates, the subordinates are not named and their titles are very general, such as "assistant" and "general." The chart also depicts two subordinates titled "head of" with two positions below each titled "accounts" and "tea art." The Petitioner did not submit job descriptions for subordinates, payroll summaries, or employment tax records. Without more detailed descriptions of who works for the foreign entity, what their exact roles are, and how they interact with the Beneficiary within the context of running a teahouse, we are unable to determine that the Beneficiary managed subordinate employees, or that those subordinates were professionals as defined by the regulations. 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) (quoting *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The Petitioner has not established, in the alternative, that the Beneficiary has been 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that a beneficiary manages an essential function, a petitioner must clearly describe 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 has been managing the function rather than performing the duties related to the function.

The Petitioner states the following:

> Although the company is small and [the Beneficiary] may not supervise many managers or departments, she has directed its major function. To date, that function has been to establish and operate the company's teahouse business. To that end, [the Beneficiary] has sought and obtained business capital, hired a manager, administrative staff, and teahouse operations staff. She has established the goals and policies of the company, exercised exclusive discretion in decision-making, and received no supervision from higher level executives. As the company's founder, initially sole owner, and general director, she has, by definition had executive capacity over its function.
>
> A second function of the company has been to seek new business opportunities. To this end, [the Beneficiary], on behalf of [redacted] has invested $250,000 in the U.S. company [the Petitioner].
>
> [The Beneficiary] manages the organization and supervises the work of a managerial employee (the General Manager). She also manages (and directs) the company's function of operating its teahouse and seeking new business opportunities. In addition, she hired all members of her staff, so she has the authority to hire and fire, and functions at a senior (the most senior) level within the organization. Finally, she exercises full discretion over the day-to-day operations of the company.

The Petitioner has provided minimal evidence of the foreign entity's organizational structure or employees. As stated above, 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) (quoting *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Also, the fact that the Beneficiary has had managerial control over all aspects or functions of the business does not establish that she qualifies as a function manager. While such authority is consistent with the statutory definition of managerial capacity, it is not sufficient to establish that the Beneficiary has been employed in a managerial capacity. Whether the Beneficiary is a function manager turns in part on whether the Petitioner has sustained its burden of proving that her duties were "primarily" managerial. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Without evidence indicating that other employees perform the day to day functions involved in operating a teahouse, we cannot determine that the Beneficiary has been performing primarily managerial duties. As discussed above, the record does not indicate that, at the time of filing, the Petitioner employed a sufficient staff to relieve the Beneficiary from performing the non-qualifying duties associated with any of the essential or "central functions" the Petitioner claims she manages. For these reasons, the evidence submitted is insufficient to establish that the Beneficiary has been primarily managing an essential function of the foreign entity.

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

Here, the Petitioner emphasizes that the Beneficiary's role as director is evidence of her performance of qualifying executive duties. However, we do not evaluate a position based on job title alone, and as discussed above, the Petitioner's description of the Beneficiary's duties, considered within the totality of evidence, does not support a finding that the Beneficiary primarily focused on the broad goals and policies of the organization, rather than on the day-to-day operations.

We acknowledge that the Beneficiary is the highest-level employee of the foreign entity; however, as noted above, this alone is not sufficient to establish that she has been *primarily* employed in an executive or managerial capacity. The designation hinges on whether or not the Petitioner demonstrates that it has the requisite level of subordinate staff capable of carrying out the duties associated with the day-to-day operation of the business. In this case, incorporating our earlier

discussion of the deficiencies of the job description provided and the lack of evidence regarding the entity's organization structure, we find that the Petitioner has not established that the foreign entity has an organizational structure sufficient to support a position that is primarily executive in nature or that the Petitioner had sufficient subordinate staff to relieve the Beneficiary of non-qualifying duties at the time the petition was filed. For the reasons discussed above, we find that the Petitioner has not established that Beneficiary has been employed as an executive.

As noted by the Petitioner, 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)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's 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, although the Petitioner claimed the foreign entity employed eleven employees, the record does not contain employment records, payroll documentation, or tax records supporting this assertion.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary has been employed by a qualifying foreign entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed for this additional reason.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of I-S-, LLC*, ID# 15895 (AAO June 22, 2016)