



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

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

MATTER OF B-F-, INC.

DATE: MAR. 31, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a Texas corporation engaging in “sales, marketing, [and] servicing of contracts from sales of goods and services,” seeks to temporarily employ the Beneficiary as a Vice President under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in an executive or managerial capacity.

The Director, California Service Center, denied the petition. The Director concluded that the Petitioner did not establish that the Beneficiary will be employed in a qualifying managerial or executive capacity in the United States.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in finding that the Beneficiary will not be employed in a qualifying executive capacity in the United States.

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

I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary’s application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(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 sole issue addressed by the Director is whether the Petitioner established that the Beneficiary will be employed in a qualifying managerial or executive capacity in the United States.

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

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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.

Finally, 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. Facts

The Petitioner filed the Form I-129 on April 23, 2015. On the Form I-129, where asked to describe the Beneficiary's proposed duties in the United States, the Petitioner stated the following:

When the beneficiary is in the United States he will be the top executive to execute the [foreign entity's] joint venture project with the [redacted] and [redacted]. The plan is to build a manufacturing facility that will produce high-quality, first-class rail cars and ancillary equipment. [The Beneficiary] will be responsible to execute the strategic plan and get the business infrastructure necessary to build the rail cars using [the foreign entity's] existing designs and technical capabilities. He will be responsible to ensure that they are in compliance with Department of Transportation regulations as well as the Environmental Protection Agency regulations for the transportation of certain cargo, such as gas, shale and oil. He will also be responsible to enter into contractual agreements with consultants and companies that can assist in the preliminary matters. The executive in this position must have the ability to bind the company in contract. . . .

In its letter of support, dated March 27, 2015, the Petitioner stated that the Beneficiary will be employed in an executive capacity and described his proposed position in the United States as follows:

[The Beneficiary] will oversee the preliminary work with the US government on railcar design and specification, then hiring of staff and consultants and managing the staff to get the production line underway.

[The Beneficiary's] executive duties will include the following:

- Implementation of the Memorandum of Understanding with [REDACTED]
- Import major parts and the entire sample of various sample railcars to the US for [REDACTED] tests and certification. Make all arrangements for testing by entering into contractual agreements with various entities. . . . It is anticipated that [the Beneficiary] will spend 15% of time working on this duty;
- Recruit, interview, select and hire a contract consultant and/or research company to complete the project feasibility study. It is anticipated that [the Beneficiary] will spend 5% of time interviewing, and contracting with said consultants;
- Recruit, interview, select and hire a design firm to produce the factory design that meets US regulatory requirements. It is anticipated that [the Beneficiary] will spend 5% of time working on this duty;
- Oversee the preparation, submission of the application process for all Environment Protection Agency (EPA) permits. This includes [the Beneficiary] attending all necessary meetings with this regulatory agency to ensure compliance with the law. It is anticipated that [the Beneficiary] will spend 15% of time working on this duty;
- Identify, interview, and contract with firms in the United States that will be used to manufacture some parts of the railcars. It is anticipated that [the Beneficiary] will spend 5% of time working this duty;
- Identify and source customers, establish and manage customer relationships. It is anticipated that [the Beneficiary] will spend 15% of time working on this duty;
- Recruit, interview and hire plant managers, engineers, technicians, sales team according to the progress of the project. It is anticipated that [the Beneficiary] will spend 5% of time working on this duty.
- Responsible to oversee the construction of the factory in conjunction with engineers and experts that have built such plants for [the foreign entity] in China. It is anticipated that [the Beneficiary] will spend 15% of time working on this duty; and
- Act as the highest level decision maker on the operation of the production facility. It is anticipated that [the Beneficiary] will spend 20% of his time working on this duty.

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[The foreign entity] through [the Petitioner] has given [the Beneficiary] the decision making authority to execute the Memorandum of Understanding with [REDACTED]. He will have the decision making authority to enter into contracts with various companies and consultants to help execute the plan. He will have the authority to hire consultants, engineers and lawyers to assist with the preparation of all required permits. He will have the authority to take whatever actions are necessary for project implementation. He will have the executive authority to hire, evaluate and terminate the contractors or personnel working on the project. He will have the authority to develop the strategy and to change strategy as the implementation of the plan moves forward. [The Beneficiary] will report directly to the Vice President of [the foreign entity] in China on the implementation of this plan. . . .

[D]ue to [the Beneficiary's] expertise, he will continue to oversee several divisions of [the foreign entity] in China. These divisions will be responsible for making any necessary changes. . . .

As the Vice President of the U.S. entity, [the Beneficiary] will have the authority to set the goals and policies of the organization on this project. He will exercise wide latitude in discretionary decision making and will report to the Vice President of the parent company in China. In addition, due to the nature of this position, he will not only have ultimate decision making authority in the U.S. entity, he will also continue to oversee the Rail Transportation Division in [REDACTED]. The Rail Transportation division of [the foreign entity] is comprised of the Rail Car Division, the Finance Division, and a Legal and Regulation Division. All of the individuals in these divisions ultimately report to [the Beneficiary] and will continue to report to him even after he is transferred to the United States.

The Petitioner submitted its organizational chart, depicting the Beneficiary as the Vice President, reporting to the "Chairman & President" and the "Vice President" of the foreign entity. As the Vice President of the Petitioner, the Beneficiary supervises a "Business Manager," and an "Accounting" employee. The chart also indicates that the Beneficiary supervises 15 individuals located in [REDACTED] including: a "Rail Transportation Manager," who supervises a Rail Car Division with four "Senior Engineers," three "Marketing" employees, and one "Project Assistant"; a Finance Division with two "Accounting" employees and one "Investment Financing" employee; and a Legal & Regulation Division with one Lawyer, one "Regulation & Homologation" employee, and one "Administration" employee.

The Petitioner also submitted a Memorandum of Understanding (MOU) by and among the foreign entity, [REDACTED] dated March 11, 2014, where the foreign entity will "co-own and operate the Project, or will provide the railcars, the spare parts, marketing support, its technology and technical support under a license to a third-party which will own and

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operate the Project.” The Petitioner further submitted its business plan, dated January 2015, for the

The Petitioner submitted its 2012 IRS Form 1120, U.S. Corporation Income Tax Return, showing that it had no gross receipts or sales and earned \$1,041,473 in gross rents. The 2012 Form 1120 also shows that the Petitioner paid \$170,279 in compensation of officers and \$33,500 in salaries and wages. The Petitioner also submitted its 2013 Form 1120, showing no gross receipts or sales and \$1,024,946 in gross rents. The 2013 Form 1120 also shows that the Petitioner paid \$170,279 in compensation of officers and \$36,000 in salaries and wages.

The Director issued a request for evidence (RFE) on May 6, 2015, instructing the Petitioner to submit evidence demonstrating that the Beneficiary will be employed in a managerial or executive capacity in the United States.

In response to the RFE, the Petitioner submitted a letter, dated July 10, 2015, explaining that the U.S. company has focused on the development of industrial buildings, which are rented, until recently when the parent company decided to grow its railcar business in the United States. The Petitioner then described the Beneficiary’s proposed position in the United States, stating that in addition to the previously enumerated duties, the Beneficiary’s executive duties would also include:

- Develop the strategic investment plan for approval by the [foreign entity’s] Board of Directors;
- Implement the [MOU] with [redacted], including the following activities:
 - Direct and coordinate the financial activities of the project to ensure sufficient funding for project and that the project remains on budget.
 - Analyze operations to evaluate the performance of the company and its products.
 - Direct, plan, and implement policies and objectives to ensure continuing operations in order to maximize return on investment.

....

- Coordinate activities between [the Petitioner] and [the foreign entity] to address defects and requests for alterations of rail car design to ensure appropriate government approvals.
- Direct engineers, legal staff and marketing staff at [the foreign entity] in China to make modifications, draft agreements and perform other tasks as needed to support U.S. activities.
- Negotiate and approve contracts between [the Petitioner’s] suppliers, distributors, federal and state agencies, and other entities.

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- Report to Board of Directors of [the foreign entity] concerning status of U.S. operations; budgets, government rulings and other items affecting U.S. business activities.

....

- Evaluate manufacturing capabilities and decide when it is appropriate to outsource manufacturing of railcar components and parts.

....

- Oversee programs for selection of sites, construction of buildings, and provision of equipment and supplies.
- Review and approve promotional campaigns developed by marketing staff for company products.

The Petitioner did not indicate how the Beneficiary would divide his time between the original duties and the duties added in response to the RFE.

The Petitioner's RFE response letter also included information about the Beneficiary's subordinates in the United States, [REDACTED] Business Manager, and [REDACTED] Accounting employee. The Petitioner provided a list of 10-12 job duties for each listed position. The Petitioner also identified the 15 employees of the foreign entity that will also be managed by the Beneficiary while he is employed in the United States and provided a brief description for each position.

Also in response to the RFE, the Petitioner submitted its 2014 IRS Forms W-2, Wage and Tax Statement, for [REDACTED] showing he earned \$170,278.64 in wages, tips and other compensation, [REDACTED] showing he earned \$36,000.00 in wages, tips, and other compensation, and a 2014 IRS Form 1099-MISC, Miscellaneous Income for [REDACTED] [sic], showing that she earned \$5,650.00 in nonemployee compensation. The Petitioner then submitted its 2014 IRS Form 1120, showing that it earned \$1,074,741 in gross receipts or sales and \$0 in gross rents. The 2014 Form 1120 also shows that the Petitioner paid \$170,279 in compensation of officers and \$36,000 in salaries and wages.

The Director denied the petition on August 10, 2015, concluding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity in the United States. In denying the petition, the Director found that the listed duties for the Beneficiary's proposed position do not appear to be consistent with those typically performed by someone in a managerial or executive position. The Director found that the duties described are more indicative of an employee who will be performing the necessary tasks to provide a service or to produce a product of the U.S. company. The Director also found that based on the organizational structure provided, it appears the U.S. position of Vice President is primarily assisting with the day-to-day, non-supervisory duties of the business. The Director observed that although the Petitioner stated that the foreign entity has given the Beneficiary decision-making authority to execute the MOU with [REDACTED]

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no documentation was submitted to substantiate the claim. The Director further found that the Petitioner did not establish that the Beneficiary will supervise professional employees.

On appeal, the Petitioner contends that the Director's focus on only five of the 21 listed duties for the Beneficiary's proposed position in the United States signifies that the Director agrees "that slightly more than 75% of those [listed] duties are executive in nature." The Petitioner then contends that at least four of the five identified duties correlate to a specific duty list in the O*NET OnLine Database for Chief Executives, thus demonstrating that they are executive in nature. The Petitioner asserts that the Beneficiary devotes at least 95% of his time to executive duties.

The Petitioner also contends that the Beneficiary will have subordinate employees to carry out the routine non-executive duties associated with running the business. Specifically, the Petitioner describes its company structure as follows:

[The Beneficiary] will immediately have two individuals working under him at [the Petitioner's] office in the United States. . . . is the Business Manager and is the Accountant. In addition, he will be supported by and direct the activities of 15 additional individuals at the company offices in China. These individuals are primarily senior-level engineers and other highly-skilled professionals, including attorneys. Further, he will receive administrative support from the office in China, which will relieve him of non-executive functions.

In support of the appeal, the Petitioner submits a copy of the O*NET OnLine job description for Chief Executives, a copy of a request for indicative pricing from to the foreign entity, copies of educational degrees obtained by the Beneficiary's subordinates located at the foreign entity in China, and duplicate copies of the letter from the and the list of job duties for each of the Beneficiary's subordinate employees located at the foreign entity in China.

B. Analysis

Upon review, and for the reasons stated herein, the Petitioner has not established that the Beneficiary will be employed in a qualifying managerial or executive capacity in the United States.

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the

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beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of “manager” or “executive”).

In the instant matter, the Petitioner first characterized the Beneficiary’s role as Vice President and described his duties in broad terms. Certain duties such as “act as the highest level decision maker on the operation of the production facility,” and “oversee construction of the factory in conjunction with engineers and experts,” may appear managerial or executive in nature, but give us little insight into what the Beneficiary will actually do on a daily basis. Here, the Petitioner did not include additional details or specific tasks related to each duty, nor did the Petitioner indicate how such duties qualify as managerial or executive in nature. Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990). Certain other duties assigned to the Beneficiary, absent further information or explanation, do not appear to fit within the statutory definitions of managerial or executive capacity. For example, the Petitioner stated that the Beneficiary will “[i]dentify and source customers and establish and manage customer relationships,” will “[i]dentify, interview, and contract with firms in the United States that will be used to manufacture some parts of the railcars,” and will “[i]mport major parts and the entire sample of various sample railcars to the US for [REDACTED] tests and certification.” Importantly, the record indicates that the Beneficiary will perform these various non-qualifying customer service and production duties himself rather than assigning them to subordinate staff.

The Petitioner also states that the Beneficiary will have the authority to take whatever actions are necessary for project implementation, have the executive authority to hire, evaluate, and terminate the contractors or personnel working on the project, have the authority to develop the strategy and to change strategy as the implementation of the plan moves forward, exercise wide latitude in discretionary decision making, and report to the Vice President of the parent company in China. While the beneficiary may exercise discretion over the Petitioner’s day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, the position description alone is insufficient to establish that his actual duties, as of the date of filing, would be *primarily* managerial or executive in nature.

Furthermore, although the Petitioner included the percentage of time the Beneficiary would devote to the original list of duties, the Petitioner did not explain how the duties added in the RFE response would factor into the Beneficiary’s daily work. If the additional duties were meant to clarify or modify the previously described duties, the Petitioner did not explain as much. Alternatively, if the additional duties were meant to represent additional responsibilities to be performed by the Beneficiary, the Petitioner did not amend its description of how the Beneficiary would spend his time. The original position description assigned 100 percent of the Beneficiary’s time, so it is unclear what proportion of time the Beneficiary would spend performing the duties newly reported in the RFE response. As such, we are left questioning what the Beneficiary will actually do on a

daily basis, and we cannot determine what portion of the Beneficiary's time will be spent on qualifying duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991). Absent a clear and credible breakdown of the duties to be performed, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

On appeal, the Petitioner focuses on the five duties specifically highlighted by the Director and concludes that the Director's lack of focus on the remaining duties indicates that they are considered qualifying executive duties. This is not necessarily accurate; the Director was merely using the five specifically mentioned duties as examples on non-qualifying duties in her decision. For example, some of the other duties not specifically mentioned by the Director, such as implement the Memorandum of Understanding, coordinate activities between the Petitioner and the foreign entity, oversee the preparation and submission of applications for the Environmental Protection Agency permits, evaluate manufacturing capabilities, and establish and manage customer relationships, also do not appear to be managerial or executive in nature. The Petitioner further submits that when compared to the position description found in the *O*NET OnLine* Database (*O*NET*) for Chief Executives, four of the five duties noted by the Director are in fact duties that are similar to those classified as executive. However, the Petitioner's reliance on the general descriptions found in the *O*NET* is misplaced, as the *O*NET* provisions do not take into account the statutory and regulatory requirements that pertain to the matter at hand. Specifically, the Petitioner in the present matter is subject to section 101(a)(15)(L) of the Act as well as the definitions and provisions found in 8 C.F.R. § 214.2(l). The relevant statutory and regulatory provisions require the Petitioner to establish that the Beneficiary's proposed employment would primarily be in a qualifying managerial or executive capacity, both of which are statutorily defined. The regulation at 8 C.F.R. § 214.2(l)(3)(ii) expressly instructs the Petitioner to provide a detailed description of the Beneficiary's proposed job duties in order to facilitate an accurate understanding of the proposed employment and allow for a proper determination as to whether the proposed employment meets statutory and regulatory guidelines. Simply meeting general guidelines in the *O*NET* is not sufficient to establish eligibility. Here, although the Petitioner asserts on appeal that the Beneficiary will be employed in an executive capacity, it has not provided sufficient information detailing the Beneficiary's duties at the U.S. company to demonstrate that these duties will qualify him as a manager or an executive.

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

As the Petitioner has at times asserted that the Beneficiary will be employed in a managerial capacity and that he will be employed in an executive position, we will evaluate the proposed position under both definitions. The statutory definition of “managerial capacity” allows for both “personnel managers” and “function managers.” See sections 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. §§ 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word “manager,” the statute plainly states that a “first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor’s supervisory duties unless the employees supervised are professional.” Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

In response to the RFE, the Petitioner described the Beneficiary’s duties and added several duties relating to his supervision of the Rail Transportation Division employees at the foreign entity. The Petitioner stated that “those employees in China that [the Beneficiary] will direct while employed by the US entity are qualifying employees for the purposes of this analysis.” On appeal, the Petitioner contends that the Director solely focused on the Beneficiary’s subordinate employees, or lack thereof, in the United States, and further emphasizes the Beneficiary’s supervision of subordinate employees performing duties related to the U.S. company while located at the foreign entity in China. While the lists of job duties provided for each of the 15 subordinate employees located in China demonstrate that they may relieve the Beneficiary from performing non-qualifying tasks related to providing a service or producing a product of the Petitioner, the Petitioner has not provided any documentation establishing the actual employment of those individuals or that the U.S. company pays their salaries. If the Petitioner intends to establish that the foreign employees qualify the Beneficiary for the benefit sought, such that they establish the Beneficiary supervises professional, supervisory, or managerial employees, it must demonstrate that they are employed by the U.S. company or that they are in some way compensated for their services, and that they perform duties directly related to the Beneficiary’s position in the United States, simply while located abroad. The Petitioner must further document the reporting structure and provide evidence of the Beneficiary’s authority over the foreign employees. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm’r 1972)). Absent such documentation, we cannot conclude that the Petitioner has sufficient staff to relieve the Beneficiary from performing non-qualifying duties or that the Beneficiary would supervise professional, supervisory, or managerial employees.

The Petitioner has also not established, in the alternative, that the Beneficiary is employed primarily as a “function manager.” The term “function manager” applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an “essential function” within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term “essential function” is not defined by statute or regulation. If

a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, a petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the Petitioner acknowledges on appeal that it "did not advance an argument" that the Beneficiary would work as a function manager. The Petitioner did not describe an essential function to be managed by the Beneficiary or provide a breakdown of the Beneficiary's job duties to support such a claim.

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

The Petitioner asserts that the Beneficiary will be employed in an executive capacity; however, the Beneficiary's position has not been shown to be primarily executive in nature, and 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. As noted above, the Petitioner did not submit a detailed description of the Beneficiary's position sufficient to establish that the Beneficiary's daily routine will consist of primarily executive duties, rather than on providing the services or producing the products of the organization. The Petitioner has not submitted evidence that it has staff that will relieve him from performing non-qualifying operational and administrative duties at the U.S. company. On appeal, the Petitioner refers to an unpublished decision in which we determined that the Beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification while continuing to manage or direct individuals at the foreign entity. The Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act,

unpublished decisions are not similarly binding. At this time, the Petitioner has not demonstrated by a preponderance of the evidence that the Beneficiary has subordinate employees (in the United States or abroad) that will relieve him from performing non-qualifying duties while employed at the U.S. company. Therefore, based on the deficiencies noted with the position description and the absence of evidence to substantiate the claim of subordinate employees, we find that the Petitioner has not established that the Beneficiary would be employed as an executive.

Based on the foregoing, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States. Accordingly, the appeal will be dismissed.

III. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of B-F-, Inc.*, ID# 15873 (AAO Mar. 31, 2016)