



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

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

MATTER OF O-, INC.

DATE: MAY 18, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR NONIMMIGRANT WORKER

The Petitioner, a toy and nursery products design company, seeks to temporarily employ the Beneficiary as its chief executive officer (CEO) 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, Vermont Service Center, denied the petition. The Director concluded 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 matter is now before us on appeal. In its appeal, the Petitioner submits a legal brief and resubmits supporting materials. The Petitioner asserts that the Director erred in concluding that the Beneficiary does not perform executive duties. The Petitioner states that the Beneficiary will oversee the essential functions and the management of the company.

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 in the United States; 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

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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.

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 May 20, 2015. The Petitioner stated on Form I-129 that it is a toy and nursery products development company with five current U.S. employees.

In a letter dated April 30, 2015, [REDACTED] a member of the foreign entity's board of directors, provided the following list of duties the Beneficiary will perform as the Petitioner's CEO:

- i. Recruit and manage specialty sales rep agencies.
- ii. Establish relationships with major accounts such as [REDACTED] etc.
- iii. Actively explore the potential of private label development.
- iv. Plan and execute an online marketing strategy together with service providers such as Explore Consulting.
- v. Develop a new ecommerce platform and integrate it with NetSuite OneWorld.
- vi. Handle all finance and admin issues related to [the Petitioner].
- vii. Inventory Planning.
- viii. Work closely with the design team to develop products for U.S. consumers.

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- ix. Prepare monthly management accounts, and quarterly business report for the Board of Directors.

stated that the Beneficiary will have “wide latitude in discretionary decision-making with the Company and its customers,” that he will directly manage three employees, and that he will oversee the performance of four contractors.

The record shows that the Beneficiary’s foreign employer, the Petitioner’s Hong Kong-based parent company, is a designer and manufacturer of diaper bags, baby accessories, and toys. The Petitioner submitted a business plan describing the company’s history and current operations. The Petitioner was incorporated in and states that it commenced operations in the second quarter of 2013, initially as a seller on marketplace and through its own U.S. website. The Petitioner stated that its parent seeks to “continue investing in the subsidiary and move key staff to the US to research the requirements, develop US specific products and grow the business.”

The Petitioner indicated that it has recruited sales representative agencies to represent its products to U.S. retailers in assigned geographic regions. In addition, to the Beneficiary’s transfer, the Petitioner states that it intends to transfer its “Global Design Team” to the United States in order “to increase speed to market for U.S.-centric products.”

According to the business plan, the Petitioner plans to “utilize [Hong Kong] and German<sup>1</sup> resources as much as possible through cloud based ERP System NetSuite” to reduce its costs. The Petitioner noted that staff located in Hong Kong ( will handle order processing and U.S. accounting, although a part-time U.S. accounting clerk would later be hired to perform certain tasks. In addition, the Petitioner stated that it will increase the hours of its 1099 marketing and customer service consultant from “60 to 120 hours per week,” and hire a design assistant by early 2016.

The Petitioner submitted an organizational chart dated 2015, which shows the Beneficiary in the role of CEO overseeing four positions and three independent sales representatives . Specifically, the chart shows that the Beneficiary will oversee: a contracted “customer service/blogger relationships” employee an order processing employee based in Hong Kong ( an accounting clerk (vacant), and a design and product development manager ( who will eventually supervise a design assistant (vacant). The chart indicates that order processing responsibility will be moved to the United States when U.S. turnover reaches \$300,000.

The Petitioner stated that in 2016, it will hire an order processing clerk who will be responsible for data entry, coordinating packaging and delivery with the company’s New Jersey warehouse.

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<sup>1</sup> The Petitioner’s company materials indicate that it has an affiliate located in Germany but the record does not contain any additional information regarding this company, its operations or its staffing levels.

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reconciling inventory with warehouse system, assist in inventory demand planning, provide customer service to retail customers, and report to both the Beneficiary and [REDACTED] in Hong Kong. The Petitioner stated that the prospective assistant designer position would be filled by early 2016 and will be responsible for assisting with market research, providing general design assistance, working with mass market retailers on private label programs, coordinating product development with the Hong Kong-based design team, and graphic design assistance for the marketing team.

The Petitioner submitted copies of IRS Form W-9, Request for Taxpayer Identification Number and Certification, completed by the above-referenced independent sales representatives, a copy of its commission-based sales agreement with [REDACTED] and an IT Consulting Agreement and related estimates for digital marketing support submitted by [REDACTED]

The Director issued a request for evidence (RFE) asking the Petitioner to provide a more detailed job description that outlines the specific duties that the Beneficiary will perform and the percentage of time he will spend on each individual duty, along with an explanation of who is a member of the Beneficiary's team, division or department, and additional evidence of employees or contractors to be overseen by the Beneficiary.

In response to the RFE, the Petitioner submitted a letter from the foreign entity dated June 23, 2015, which included the list of duties previously provided for the Beneficiary. The new letter added that the Beneficiary will also: "direct the work of other professionals and managers and will have authority to hire and fire" and "report directly to the Board of Directors of the Parent company." The Petitioner did not list the percentages of time the Beneficiary would spend on each duty.

In addition, the letter stated that the Beneficiary will "establish the footprint of the Company in the U.S." and perform the following duties "on a daily basis":

- Provide guidelines for recruiting new accounts, either in direct sales or through independent sales reps;
- Establish parameters to optimize new ecommerce platforms;
- Invest in IT to optimize business process, with a strong focus on integration of the internal ERP platform NetSuite with Third party vendors such as [REDACTED]
- Decide on range planning inventory purchases for Spring 2016;
- Choose the best approach to marketing and advertising media;
- Utilize resources of the Parent Company to reduce startup costs and free up cash for business expansion.

The Petitioner stated that, as of the date of the RFE response, it had secured agreements with a total of seven independent sales representatives with different geographic responsibilities, and relied on an independent contractor, [REDACTED] to maintain its social media presence.

The Petitioner also submitted copies of several commission-based sales agreements entered into with independent sales representatives for marketing and sales of its products, along with proposed job

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duties for the positions of accounting clerk/bookkeeper, order processing clerk, design and product development manager, and assistant designer.

The Director denied the petition on July 13, 2015, finding that the evidence submitted did not establish that the Beneficiary will be employed in a managerial or executive capacity. The Director determined that the Beneficiary's duties would be mostly non-qualifying tasks related to the company's 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 indicates that the Beneficiary will have first-line supervisory duties over non-professional employees.

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 states that the company's business is the design, production and sale of its products. As such, the Petitioner emphasizes that design, production, and sales are all essential functions of the company that the Beneficiary is tasked with overseeing, and he will be supervising the establishment of these central functions in the United States. Further, the Petitioner asserts that the Beneficiary will be responsible for overseeing the establishment of the initial relationships with third party providers, sales and marketing consultants in the United States.

## 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 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). 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, Inc. v. INS*, 940 F.2d 1533.

Here, while the Beneficiary's duty description and the record as a whole, show that he will have the required level of authority over the business, it also indicates that he will perform a number of operational tasks that may would fall outside of the statutory definitions of managerial and executive capacity. Specifically, the Petitioner states that the Beneficiary will be required to: "Establish relationships with major accounts such as [REDACTED]" "Actively

explore the potential of private label development,” “handle all finance and administration issues,” and, “Develop a new ecommerce platform and integrate it with NetSuite OneWorld.” These duties are poorly defined and do not provide insight into the specific managerial or executive tasks that the Beneficiary would perform or who, if anyone, would assist him with these functions. Furthermore, several of the Beneficiary’s remaining duties do not appear to be managerial or executive in nature. For example, the Petitioner asserts that the Beneficiary will be responsible for inventory planning, preparing monthly and quarterly business reports, and working with the design team on product development, but does not provide sufficient explanation to establish how these tasks qualify as managerial or executive.

Although the Director advised the Petitioner that the initial position description was insufficient and provided the Petitioner with an opportunity to correct this deficiency, the Petitioner’s reply to the RFE was not responsive to the Director’s request for information regarding the specific tasks the Beneficiary will perform and the amount of time he will allocate to each duty. The Petitioner lists the Beneficiary’s duties as including both managerial and administrative or operational tasks, but fails to quantify the time the Beneficiary will spend on them. This omission is important because several of the Beneficiary’s daily tasks, as discussed, do not fall directly under traditional managerial duties as defined in the statute. 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)). Without the requested percentages of time to be allocated to specific tasks, we cannot determine whether the Beneficiary would primarily perform managerial or executive duties. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990). While performing non-qualifying tasks 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. Therefore, the fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. While the Beneficiary may exercise discretion over the Petitioner’s day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, the Petitioner’s description of the Beneficiary’s duties is insufficient to establish that his actual duties, as of the date of filing, 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 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).

The Petitioner stated on the Form I-129 that it has five current employees, but the Petitioner has not submitted evidence to support this statement. Rather, the record shows that at the time of filing, the Petitioner had several commissioned sales representatives, a contracted social media marketing employee, and an IT consultant. In addition, the Petitioner stated that it initially plans to rely on employees located in Hong Kong for accounting and order processing. While the organizational chart and company statements indicate that the Petitioner employs a design and product development manager, the Petitioner has not provided evidence of the employment or engagement of this subordinate and it appears that she is also currently employed by the Hong Kong entity.

The Petitioner has not adequately explained the nature of the duties to be performed for the U.S. office by the foreign entity’s employees or to what extent they will be able to relieve the U.S. office from accounting, order processing and product design functions, particularly in light of the foreign entity’s own limited staffing levels. Although the Petitioner’s U.S. operations are in a preliminary stage of development, it must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg’l Comm’r 1978). For this reason, we will not consider the U.S.-based order processing employee, design assistant or accounting clerk who are to be hired at a later time. The Petitioner has not established that the Beneficiary would oversee any U.S.-based managers, supervisors or professionals as of the date of filing. Without any current regular employees in the United States, and without additional information regarding the nature of the reporting relationship or the amount of time the Beneficiary will spend overseeing the Hong Kong-based staff, the record does not establish that he will qualify as a personnel manager.

The Petitioner has not established, in the alternative, that the Beneficiary will be employed 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 managed 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.

Here, the Petitioner states that design, production and sales of its products are the company's essential functions and that the Beneficiary is responsible for "overseeing and supervising the establishment of these central functions in the United States." However, the Petitioner does not explain how the Beneficiary's specific day-to-day duties will relate to the management of one or more essential functions within the scope of the Petitioner's business, and, as discussed above, the Petitioner's description of the Beneficiary's duties was not sufficiently detailed to establish his eligibility as a manager. The fact that the Beneficiary has managerial control over all aspects or functions of the business does not establish that he 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 is 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 his duties are "primarily" managerial. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Further, 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 he will manage. For example, the Petitioner has assigned sales representatives to sell its products to retailers within assigned geographic areas of responsibility, but the Petitioner does not indicate that its sales activities are limited to selling to retailers in these geographic areas. Rather, it states that the Beneficiary himself will be responsible for securing accounts with larger retailers as well as executing marketing campaigns, "explor[ing] the potential of private label development," and performing other marketing duties. With respect to production, we note that neither the Petitioner nor the foreign entity claims to have staff assigned to this function and none of the Beneficiary's duties relate to this function. Finally, the record shows that the foreign entity employed a design team with only two people at the time of filing, the Petitioner employed no design staff, and the Petitioner has indicated that the Beneficiary will "work closely with design team to develop products for U.S. consumers," rather than managing the design function. For these reasons, the evidence submitted is insufficient to establish that the Beneficiary will primarily manage an essential function of the organization.

Finally, the Petitioner indicates that the Beneficiary will be 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 chief executive officer is evidence of his 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 will primarily focus 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 U.S. entity; however, as noted above, this alone is not sufficient to establish that he will be *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 it 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 will be 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 (9<sup>th</sup> 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 five employees on the Form I-129, the record shows that the Petitioner currently has no employees, but rather relies on the services of commission-based sales

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representatives and independent contractors. The record does not contain evidence of payments to these outside staff or establish how they, or the foreign entity's accounting, order processing and design employees, would relieve the Beneficiary from significant involvement in the day-to-day operations of the U.S. company. While the Petitioner states that the Beneficiary would be responsible for establishing the "footprint" of the company and hiring staff, it must establish that he would perform primarily managerial or executive duties at the time the petition was filed.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary would be employed in a managerial or executive capacity in the United States.

## B. Foreign Employment in a Managerial or Executive Capacity

### 1. Evidence of Record

On the Form I-129, the Petitioner identified the Beneficiary's foreign employer as [REDACTED] located in Hong Kong. The record contains a letter dated April 30, 2015 from a representative of the foreign entity that describes the Beneficiary's job duties as follows:

1. Establish the formulation of corporate management policies, business objectives and business plans according to the resolution of the board of directors and oversee the implementation of company policy, objectives and plans in all departments (15% of the Beneficiary's time)
2. Manage and take charge of the formulation and implementation of the various rules and regulations, reform proposals, and reform measures of the company (15% of the Beneficiary's time)
3. Define quality control procedures (10% of the Beneficiary's time)
4. Provide guidelines to design team on product categories (10% of the Beneficiary's time);
5. Oversee and manage product inventory and selects and approves vendors (10% of the Beneficiary's time)
6. Oversee and manage the company's selection of investment projects in foreign countries (10% of the Beneficiary's time);
7. Oversee and manage the examination and approval of payments related to operating costs of the company (10% of the Beneficiary's time);
8. Determine the employment and dismissal of personnel for each department; oversee and manage for the economic efficiency of the company, as well as command operation and allocation of resources of the company (15% of the Beneficiary's time)
9. Any other matters of overall importance to the Company. (5% of the Beneficiary's time).

The foreign entity indicated that the Beneficiary managed a team of six professional employees and submitted the Beneficiary's employment agreement and payroll records for 2014. The Petitioner submitted the foreign entity's organizational chart, which shows the Beneficiary as general manager

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overseeing an order processing/customer service manager [REDACTED], a finance and administration employee ([REDACTED]) and a design and development product manager [REDACTED]. The chart depicts a design assistant who reports to [REDACTED] and the design department shows vacant positions for a design assistant and graphic designer as of March 31, 2015.

The Petitioner also provided a copy of the Beneficiary's resume which identifies him as the foreign entity's CEO and founder. The Beneficiary emphasizes his "hands on experience in product design, global marketing and sales, manufacturing, QC procedures," "good IT knowledge" including "setup of the NetSuite ERP system and multiple online shops," and the company's "excellent global sales network," with products sold in 60 countries.

In the RFE, the Director requested additional evidence that the Beneficiary performed in a managerial or executive role 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.

In response, the Petitioner provided a revised description of the Beneficiary's duties with the foreign entity that was similar to the list provided at the time of filing. The Petitioner listed nine duties instead of eight duties, and added that the Beneficiary allocates 25% of his time to "manage and take charge of sales and marketing activities in Asia and Europe." The Petitioner changed the percentage of time he allocates to other duties in order to accommodate this addition and the new duties as a whole added up to 105% of the Beneficiary's time.

The Petitioner also resubmitted the foreign entity's organizational chart dated March 31, 2015, which shows the subordinate positions of finance and administration, order processing and customer service manager, design and product development manager, and design assistant. The Petitioner provided a document titled "Job descriptions [REDACTED]" which listed the duties and requirements for the positions of accountant, "sales admin," chief of design, assistant designer and junior graphic designer. We note these job titles do not match with those provided on the foreign entity's organizational chart. The foreign entity lists a "university degree" requirement for all but one of the positions and does not include any employee names. The Petitioner included resumes for [REDACTED] (finance & admin), [REDACTED] (design & production manager), and [REDACTED] (design assistant), and an employment agreement between the foreign entity and [REDACTED].

The Director denied the petition concluding that the RFE response included "no evidence of the beneficiary's position in the foreign entity." The Director further found that the Petitioner did not provide evidence that the Beneficiary's subordinates are professionals and determined that the Beneficiary is acting as a first-line supervisor of non-professional personnel.

## 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 was 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.

Here, the Petitioner has stated that the Beneficiary is the general manager or CEO of the foreign entity with responsibility for the overall operation of the company. While the record shows that the Beneficiary is the founder and senior employee within the company, the Petitioner described the Beneficiary's duties in broad and general terms that offer little insight into what he does on a day-to-day basis. For example, the Beneficiary's stated duties included: "establish the formulation of corporate management policies, business objectives and business plans according to the resolution of the board of directors and oversee the implementation of company policy, objectives and plans in all departments," "manage and take charge of sales and marketing activities in Asia and Europe," "overseeing and managing product inventory," and, "providing guidelines to design team." These are general statements that do not reveal the Beneficiary's actual tasks. 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. at 1108.

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).

While we disagree with the Director's finding that the Petitioner submitted "no evidence" of the Beneficiary's position in the foreign entity, we do find insufficient evidence to establish how the foreign entity supports the Beneficiary in a position in which he performs 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 supervises a team of six professionals, the foreign entity's organizational chart and position descriptions suggest that he supervised a total of four employees at the time of filing, as two positions on the foreign entity's organizational chart had vacancies. Based on the job descriptions, educational requirements and resumes submitted, we find sufficient evidence to establish that three of these employees are professionals. Therefore, the record establishes that the Beneficiary performs qualifying duties related to the supervision of professional employees. However, the record does not establish that he is primarily engaged in the supervision of these employees or that he otherwise performs primarily qualifying duties, as the record does not show how this staff of four people performs all of the operational functions of a company which acts as the headquarters for a product brand that is claimed to be sold in 60 countries and on at least four continents. The Beneficiary's subordinates are involved in design, accounting, and order entry and processing, but the company has only one employee assigned to two of these three departments or functions and has not shown that the company's reasonable needs are limited to the activities assigned to these four employees.

For example, the Petitioner states that the Beneficiary spends 25 percent of his time on "tak[ing] charge of sales and marketing activities in Asia and Europe." The record does not show that the foreign entity has any sales or marketing staff to assist the Beneficiary with this responsibility and the Petitioner has not explained how its manufacturing, sales, marketing and distribution are carried out given the staffing levels of the company. If the Beneficiary is the sole employee responsible for sales and marketing, it is also reasonable to question whether such duties require only 25% of his time. We are not discounting the possibility that such tasks are performed by contractors, commissioned representatives or otherwise outsourced; however, it is the Petitioner's burden to establish that employees or outside staff are available to relieve the Beneficiary from significant involvement in the day-to-day operations of the company.

The record also suggests that the parent company coordinates some activities with a German affiliate or subsidiary, but, again the Petitioner has not established how that work is distributed or what tasks may be assigned to the German company and its employees. Here, the Petitioner emphasizes that Beneficiary's role as general manager as evidence of his performance of qualifying executive duties. As discussed, the Petitioner's description of the Beneficiary's duties, considered within the totality of the evidence, does not support a finding that the Beneficiary primarily focused on the broad goals and policies of the organization rather than on its day-to-day operations. As stated above, the Petitioner has not established that it employs a sales or marketing staff to accomplish the day-to-day responsibilities of these functions, while its administration, design and order processing departments are minimally staffed.

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Again, we acknowledge 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).

For the reasons discussed, there is a noted absence of evidence of employees who would perform several of the non-managerial and non-executive operations of the foreign entity, such as its sales and marketing functions that the Beneficiary is charged with overseeing. Moreover, the Petitioner has not established how the foreign entity's staff of four employees is able to perform most of the day-to-day functions of the company, such that the Beneficiary is free to perform primarily managerial or executive functions. 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. To qualify as an executive, a beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise.

Here, given the overly broad breakdown of the Beneficiary's duties, and the lack of evidence of subordinate staff to perform some of the essential day-to-day functions of the company, the Petitioner has not established that the Beneficiary has been employed abroad in a managerial or executive capacity.

### 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, 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, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of O-, Inc.*, ID# 16634 (AAO May 18, 2016)