



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

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

MATTER OF A-H-E-G- CORP.

DATE: OCT. 4, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a restaurant and management company, seeks to temporarily employ the Beneficiary as its president under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in an executive or managerial capacity.

The Director, California Service Center, denied the petition. The Director concluded that the Petitioner had not established that: (1) the Beneficiary will be employed in a managerial or executive capacity for the U.S. entity; (2) the Beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding his application for admission to the United States; and (3) it has a qualifying relationship with the Beneficiary's foreign employer.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred and that this petition should be granted as the Beneficiary is one of the major investors in the [REDACTED] and has invested millions of dollars from his company in China in the subsidiaries in the [REDACTED]

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 proposed 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. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The first issue before us is whether the Petitioner established that the Beneficiary will be employed in the United States 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

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- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

Further, “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.” *Id.*

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. Evidence of Record

The Petitioner filed the Form I-129 on November 13, 2015. On the Form I-129, the Petitioner claimed it had 24 current employees in the United States and a gross annual income of \$728,389. The Petitioner stated that its parent company is [REDACTED] located in China.

In a letter, dated November 10, 2015, submitted in support of the petition, the Petitioner stated that it was incorporated in the [REDACTED] in 2009. The Petitioner asserted that “[i]t is primarily engaged in the business of retail and wholesale of general merchandize [*sic*], bar and restaurant in the [REDACTED]” The Petitioner also asserted that it “is a company primarily engaged in the business of retail and wholesale of cosmetics products in the [REDACTED] and that through “corporate resolutions, [it] is the administrative holding company of four other companies owned and managed by Beneficiary: [REDACTED]

[REDACTED] and [REDACTED] The Petitioner stated that it is doing business as [REDACTED] a duty free market, and as [REDACTED] a restaurant. The claimed affiliated companies operate a supermarket, a souvenir store, a tour company, and a car rental agency, respectively.

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The Petitioner noted that the Beneficiary is its president and the president of these four additional companies and assumes overall executive responsibility for the companies. The Petitioner stated: “[i]n this capacity, Beneficiary is responsible for both the policy directions and overall operation of the business” and “[h]e directs the management of the business and establishes goals and policies for the companies.” The Petitioner submitted a document signed by its corporate secretary indicating that the Beneficiary will manage it and the four affiliated companies, as well as direct the management of the organization, establish the goals and policies of the organization, components, or function, exercise wide latitude in discretionary decision making, and receive and implement only general supervision or direction from the board of directors, or stockholders of the organization.

The initial record also included the Petitioner’s May 29, 2015, corporate resolution indicating that the Petitioner will serve as an administrative holding company to manage the administrative, payroll, and human resources functions of all [REDACTED] businesses owned by [REDACTED] the Beneficiary’s claimed foreign employer. The resolution lists the same four companies noted above, as the administrative holding company’s subsidiaries.

The Petitioner submitted 2014 IRS Forms 1120, U.S. Corporation Income Tax Return, for itself and the four affiliated companies. The record also included the Petitioner’s [REDACTED] Employer’s Quarterly Withholding Tax Return, for the first three quarters of 2015. These returns listed four employees, eleven employees, and twelve employees, respectively.

In response to the Director’s request for evidence (RFE) asking for further detail on the Beneficiary’s U.S. position, and the subordinate positions the Beneficiary directs, the Petitioner referenced an Exhibit “D” that the Director could not locate in the response.

On appeal, the Petitioner submits Exhibit “D” for our examination. The Petitioner lists the Beneficiary’s job duties in the position of “President” and the time allocated to those duties as:

- Establish and carry out company’s organizational goals, policies, and procedures. 40%
- Direct and oversee company’s financial and budgetary activities. 20%
- Consult with other executives, staff, and board members about general operations. 10%
- Negotiate or approve contracts and agreements. 10%
- Appoint, hire and fire managers. 10%
- Identify places to cut costs and to [i]mprove performance, policies, and programs. 10%

B. Analysis

Upon review of the petition and the evidence of record, including the evidence submitted on 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 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 a managerial or an executive capacity. *Id.*

The definitions of executive and managerial 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.

The Petitioner here has submitted a broad overview of the Beneficiary's duties. The Petitioner does not include detail regarding the actual tasks the Beneficiary will perform. For example, the Petitioner asserts that the Beneficiary will spend 40 percent of his time establishing and carrying out the company's organizational goals, policies, and procedures and an additional 20 percent of his time directing and overseeing the company's financial and budgetary activities. This description does not convey an understanding of the Beneficiary's day-to-day duties but rather recites vague job responsibilities and broadly-cast business objectives. The actual duties themselves will 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). 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. *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.), citing *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Further, the Petitioner states that the Beneficiary will spend an additional 30 percent of his time negotiating or approving contracts, appointing, hiring, and firing managers, and identifying costs to cut to improve the performance, policies, and programs of its business. We cannot ascertain if these generally described duties are primarily managerial or executive duties or whether they comprise the necessary and routine first-line supervisory tasks and other operational and administrative tasks of owning and operating a business.

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. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act. While the Beneficiary may exercise discretion over the

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Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, the position descriptions alone are insufficient to establish that his actual duties are 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.

Here, the Petitioner does not include probative evidence of its number of employees, their positions within the Petitioner's restaurant/nightclub and retail shop, and the Beneficiary's interactions with them. The Petitioner stated on the Form I-129 that it has 24 employees, but submitted evidence that it employed as few as 4 employees, and not more than 12 employees, during the first three quarters of 2015. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). While the Petitioner submits tax information demonstrating that it pays employees, the record does not include an organizational chart, or evidence of the Beneficiary's subordinates' job titles, duties, and their hours worked. We cannot determine from the record provided whether the Beneficiary will be performing supervisory, administrative, and budgetary tasks or whether the Petitioner employs individuals or firms to perform these duties. The Petitioner does not disclose who will be responsible for performing any of the operational and administrative tasks, including the bookkeeping, customer service, and marketing of its business.

We acknowledge the Petitioner's claim that the Beneficiary's authority as president extends to four additional companies also owned by its claimed Chinese parent. We have reviewed the Petitioner's corporate resolution wherein it states it will be responsible for managing the administrative, payroll, and human resources functions of all the foreign entity's-owned business in the [REDACTED]. The record also includes four of these businesses' 2014 IRS tax returns, with each tax return identifying the type of business and showing salaries paid to employees. The record does not include additional detail regarding the nature of each business. Additionally, the record includes no information regarding the number of employees working for any of these companies or the positions the employees hold within each company's organizational structure. Moreover, the Petitioner does not submit any management agreements or documentary evidence establishing its management relationship with the other companies, other than the corporate resolution. While we acknowledge the Petitioner's claim that the Beneficiary controls all of these businesses, through his claimed majority ownership of the foreign entity, a corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Inv. Ltd.*, 17 I&N Dec. 530 (Comm'r 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm'r 1980). Thus, the Petitioner must provide some evidence that the companies interact at arms-length and have legitimate agreements detailing the rights, responsibilities, and obligations of each company including the compensation for any services performed.

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.*

As discussed, the record does not include the Petitioner’s organizational chart or position descriptions for its claimed employees, nor does it support the Petitioner’s claim that its two businesses employed 24 workers when the petition was filed. Further, the record does not include sufficient evidence to establish that the Beneficiary is responsible for directing the employees of the four affiliated companies. Even if considering the Beneficiary’s claimed management of these other entities, the record does not include evidence of the number of positions and the role each position plays in performing the operations of those separate companies. Upon review, the Petitioner has not provided a probative, detailed description of the Beneficiary’s duties demonstrating that he will perform tasks primarily in an executive capacity nor has it identified direct or subordinate employees to perform the day-to-day operational tasks of the petitioning company or the affiliated businesses. The record does not demonstrate that the Beneficiary will primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the company and the affiliated enterprises.

Although the Petitioner does not assert that the Beneficiary will be employed in a managerial capacity, we will address this component of the L-1A classification. 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.”<sup>1</sup> Section 101(a)(44)(A) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(4). If a beneficiary directly

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<sup>1</sup> In evaluating whether the Beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining “profession” to mean “any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation”). Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that “[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” Here, there is no evidence that the positions subordinate to the Beneficiary are professional positions.

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. See 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Again, we refer to the lack of evidence in the record regarding the Petitioner's employees and the employees of the affiliated companies. Without this basic evidence, the Petitioner cannot establish that any of the Beneficiary's subordinates hold supervisory, managerial, or professional positions. The record does not include sufficient evidence to establish that the Beneficiary would be relieved from performing non-qualifying operational, administrative, and first-line supervisory duties of non-professional employees. Upon review of the totality of the information in the record, the Petitioner has not established that the Beneficiary would be primarily supervising and controlling the work of other supervisory, professional, or managerial employees.

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 attributed 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 does not identify a specific function that the Beneficiary will manage. Additionally, the general description of the Beneficiary's duties does not include sufficient information regarding what the Beneficiary will actually do, such that we may conclude that the Beneficiary will manage a specific function. The actual duties themselves will reveal the true nature of the employment. See *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

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 (9th Cir. 2006); *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 does not believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15.

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Here, the Petitioner claimed to employ 24 workers and documented its employment of no more than 12 employees in 2015. Upon close review of the descriptions of duties set out in the record and the lack of substantive information regarding the Beneficiary's and the claimed subordinates' actual roles in the business, the record does not include sufficient probative details demonstrating that the Petitioner's organization is sufficiently developed to support a managerial or executive position as statutorily defined. Based on the deficiencies and inconsistencies as discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity.

### III. ONE YEAR FOREIGN EMPLOYMENT REQUIREMENT

The next issue before us is whether the Petitioner established that the Beneficiary had one year of continuous full-time employment with the foreign entity during the relevant three-year time period.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) defines "intracompany transferee" as:

An alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge. Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.

#### A. Evidence of Record

On the Form I-129, the Petitioner stated that the Beneficiary has been employed as the president, director, and majority shareholder of [REDACTED] since 1999. The Petitioner stated that the Beneficiary has been "mainly" in the [REDACTED] since 2010.

The Petitioner submitted a copy of the Beneficiary's Form I-797A, Approval Notice, indicating that it had filed a Form I-129 requesting E-2 [REDACTED] Investor (E2C) classification on December 27, 2011, which USCIS approved for the period August 4, 2014, to December 31, 2014. The Petitioner also provided evidence that it had timely filed for an extension of the Beneficiary's E2C status, which remained pending at the time this petition was filed. On the Form I-129, the Petitioner stated that the Beneficiary "was admitted under umbrella permit on November 28, 2009, when USCIS extended US immigration laws to the [REDACTED] through the Consolidated Natural Resources Act of 2008 (CNRA)" as he had previously been "accorded investor's status by [REDACTED] government prior to CNRA."

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In its initial letter in support of the petition, dated November 10, 2015, the Petitioner noted that the Beneficiary founded the foreign entity in China in 1999, and assumed the position of its Chairman of Board and President until 2010, when the Beneficiary began to reside primarily in [REDACTED]. The initial record also included the Petitioner's initial and annual corporation reports filed with the [REDACTED] Treasurer identifying the Beneficiary's immigration status in the [REDACTED] as [REDACTED] in the company's initial report filed on May 2009, as [REDACTED] in 2010 and 2011, and as E2C in 2012, 2013, and 2014.

In an RFE, the Director noted that USCIS records show that the Beneficiary was admitted into the United States on August 4, 2014, the date the Beneficiary's Form I-129 petition for E2C immigration status was approved.<sup>2</sup> To comply with the L-1A regulatory requirements, regarding foreign employment, the Director requested evidence that the Beneficiary was employed continuously for one year during the period from August 4, 2011, to August 4, 2014, in a managerial or executive capacity for the foreign entity.

In response to the Director's RFE, the Petitioner asserted that the Beneficiary was a long-term [REDACTED] investor prior to November 28, 2009, and that he began to invest in the [REDACTED] in 2008, as supported by evidence submitted with the petition. The Petitioner emphasized that the Beneficiary was the foreign entity's chairman of the board and president until 2010, when he became president of the [REDACTED] companies. The Petitioner also claimed that the Beneficiary had employment authorization before he was accorded E2C visa status on August 4, 2014.<sup>3</sup> The Petitioner maintained that the Beneficiary's admission into the United States occurred on November 28, 2009, and thus the Petitioner must establish the Beneficiary's continuous year of foreign employment occurred between November 28, 2006, and November 28, 2009.

Upon review, the Director determined that the Beneficiary's admission date into the United States was August 4, 2014, the date his E2C immigration status was approved, and thus, the Petitioner must establish the Beneficiary's foreign employment for one continuous year between August 2011 and August 2014.

On appeal, the Petitioner asserts that the Beneficiary's admission into the United States occurred on November 28, 2009, the transition date for the extension of U.S. immigration law to the [REDACTED]. The Petitioner asserts that all [REDACTED] residents at that time were paroled in place into the United States

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<sup>2</sup> Public Law 110-229, the Consolidated Natural Resources Act of 2008 (CNRA), amended the covenant between the United States and the [REDACTED] by extending U.S. immigration law to the [REDACTED] beginning on November 28, 2009 (the transition date). Specifically, the CNRA provided for classifying an alien as a [REDACTED] only nonimmigrant (under the E2C visa) if the alien had been admitted to the [REDACTED] in long-term investor status under the [REDACTED] immigration laws prior to the transition date, had continuously maintained residence in the [REDACTED] under long-term investor status, is otherwise admissible, and maintains the investment or investments that formed the basis of the investor status. The statutory sunset date for this nonimmigrant visa has been extended to December 31, 2019.

<sup>3</sup> As noted, the Petitioner filed a Form I-129 petition on behalf of the Beneficiary on December 22, 2011 ([REDACTED]) requesting his E2C immigration status. The Form I-129 was approved for a validity period beginning August 4, 2014, and ending on December 31, 2014.

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and were considered in the United States as an act of law. The Petitioner cites the Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS, HQ 70/10.10, *Effect of the CNRA, Title VII of Public Law 110-229, Classification of Aliens under Section 101(a)(15)(L) and 203(b)(1)(C)*, (Nov. 23, 2009). The Petitioner asserts that the Beneficiary was a long-term [REDACTED] investor prior to November 28, 2009, and concludes that as such the Beneficiary was automatically admitted into the United States on November 28, 2009.

B. Analysis

Upon review of the Petition, including the evidence submitted in support of the appeal, the record is insufficient to establish that the Beneficiary had one year of continuous full-time employment with the foreign entity.

In this matter, the Director found that the Beneficiary was admitted into the United States on August 4, 2014, the date USCIS approved the Petitioner's E2C petition filed on behalf of the Beneficiary. The Director concluded that the record did not establish that the Beneficiary had one year of foreign employment in the three years preceding that date. We withdraw the Director's determination that August 4, 2014, is the Beneficiary's admission date and that the Petitioner must establish that his one year of foreign employment occurred between August 2011 and August 2014.

However, we do not find sufficient evidence in the record to support the Petitioner's assertion that the Beneficiary was admitted into the United States on November 28, 2009, the transition date for the extension of U.S. immigration law to the [REDACTED]

Contrary to the Petitioner's assertions, the record does not include evidence of the Beneficiary's employment or immigration status under [REDACTED] law as of November 28, 2009. We note that the Petitioner identified the Beneficiary as a short-term business permit holder on its May 2009 initial report filed with the [REDACTED] Registrar of Corporations. We also note that the Petitioner identifies the Beneficiary as a [REDACTED] long-term investor on its annual reports filed with the [REDACTED] Registrar of Corporations in February 2010 and February 2011. However, the record before us does not include supporting evidence establishing that the Beneficiary had been admitted to the [REDACTED] in long-term investor status as of November 28, 2009, and that the Beneficiary had continuously maintained residence in the [REDACTED] prior to or subsequent to November 2009.<sup>4</sup> Such evidence is necessary when the Petitioner has submitted statements indicating that the Beneficiary did not begin to reside in the [REDACTED] until 2010, and there is no evidence in the record of his actual residence or the continuous nature of that residence during the transition period. Further, the record does not include any documentary evidence establishing that the Beneficiary was paroled into the United States on November 28, 2009.

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<sup>4</sup> While evidence of the Beneficiary's long-term investor status may have been submitted with the Beneficiary's E2C petition that record of proceeding is not before us. Each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii).

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We acknowledge that employment prior to November 28, 2009, inside the [REDACTED] is considered overseas employment for L1A visa adjudication purposes. However, in this matter, we reiterate that this record does not include supporting evidence that the Beneficiary was employed in the [REDACTED] prior to November 28, 2009.

We have reviewed a copy of the Beneficiary's current ten-year Chinese passport issued August 22, 2012, which includes: the Beneficiary's U.S. B1/B2 nonimmigrant visa issued May 21, 2012, which is valid until May 20, 2012; a Chinese exit stamp dated September 5, 2012; and a U.S. parole stamp dated September 6, 2012, for the Beneficiary's entry to the United States which is valid to September 30, 2012. However, as the passport was issued in August 2012, it does not include information that establishes the Beneficiary's [REDACTED] employment or immigration status prior to or during the CNRA transition period. Moreover, upon review of the totality of the record, the record does not include any evidence of the Beneficiary's foreign salary, his tax returns, or any Chinese work documents establishing his work for the foreign entity or in the [REDACTED] during any time period. "[G]oing 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 Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The record does not include probative evidence establishing the Beneficiary's [REDACTED] employment or immigration status prior to or during the CNRA transition period or supporting evidence to confirm his actual dates of residence and employment in China and [REDACTED]. While we will withdraw the Director's determination that August 4, 2014, is the Beneficiary's admission date, the record before us does not include sufficient evidence to allow us to determine the Beneficiary's admission date, and therefore we cannot determine whether he had one year of employment with the foreign entity during any relevant three-year time period. Accordingly, the evidence of record does not establish that the Beneficiary has met the one year of foreign employment requirement.

#### IV. QUALIFYING RELATIONSHIP

The next issue to be discussed in the present matter is whether the Petitioner has established that it has a qualifying relationship with the Beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

- (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

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(I) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (I)(1)(ii) of this section;

.....

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

A. Evidence of Record

The Form I-129 identifies the Petitioner as the 100 percent subsidiary of the foreign entity. The Petitioner's Articles of Incorporation, dated May 16, 2009, shows that the Petitioner had a total capitalization of \$150,000 and had issued 150,000 shares at one dollar per share to the Beneficiary.

The Petitioner's annual reports filed with the [REDACTED] Treasurer show that changes in ownership occurred in subsequent years. The shareholders are identified as: the Beneficiary with 120,000 shares and [REDACTED] with 30,000 shares in 2010 and 2011; the Beneficiary with 500,000 shares in 2012 and 2013; and the foreign entity with 870,000 of the issued and outstanding stock in 2014. The Petitioner's 2014 IRS Form 1120, shows the value of the Petitioner's common stock issued at the beginning of the year as \$150,000 and at the end of the year as \$870,000.

In response to the Director's RFE requesting evidence of the foreign entity's contribution to the Petitioner to demonstrate ownership and control, the Petitioner claimed that the foreign entity had made contributions in the form of wire transfers and credit card payments for expenses incurred by the [REDACTED] companies. The Petitioner submitted a list of 23 wire transfers dated between March

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2011 and October 28, 2014, and copies of its bank statements showing the deposit of funds from the various wire transfers. The record also included copies of what the Petitioner claimed were credit card payments made by the foreign entity for its expenses. The Petitioner asserted that these documents demonstrated “that [the foreign entity] has been a *de facto* owner of the [redacted] companies whether through [the Beneficiary] or directly.”

The Director noted that the record did not identify the source of the wire transfers credited to the Petitioner’s account, nor did the foreign entity’s statements indicate that it had transferred funds to the Petitioner. The Director determined that the Petitioner had not established a qualifying relationship between the two entities.

On appeal, the Petitioner claims that the Beneficiary has always been the majority owner of the foreign entity and was the majority shareholder of the Petitioner until the end of 2014. The Petitioner asserts that even though the foreign entity did not make a lump sum payment of \$870,000 for the Petitioner’s shares, it has shown that the foreign company’s investment in the Petitioner greatly exceeded \$870,000. The Petitioner notes that its bank statements showed it had received almost \$1.4 million in wire transfers. The Petitioner notes further that expenses accrued by the Petitioner and the other subsidiaries had been paid through a credit card issued to the Beneficiary on the foreign entity’s account.

B. Analysis

Upon review, we find that the record does not establish that the Petitioner has a qualifying relationship with the Beneficiary’s foreign employer.

In this matter, the record does not include sufficient probative evidence supporting the Petitioner’s claim that it is wholly-owned by the Chinese foreign entity. While the record indicates that the Petitioner received numerous wire transfers, the record does not include evidence of the source of those funds. We note, for example, that the Petitioner does not claim that the Beneficiary, the former owner of the Petitioner’s outstanding shares, received payment for his interest. Rather, the Petitioner seems to claim that the foreign entity directly capitalized the Petitioner. The Petitioner also seems to assert that the capitalization was initiated in March 2011, even though the foreign entity does not appear as an owner of the Petitioner’s outstanding shares until 2014.<sup>5</sup> Here, we must see evidence that the foreign entity transferred funds or services in exchange for its ownership of the Petitioner and that the Petitioner or the Beneficiary properly transferred a controlling number of shares to the foreign entity.<sup>6</sup> We must also see evidence of the cancellation of any shares issued to

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<sup>5</sup> While the Petitioner claims that the Beneficiary owns the foreign entity, the foreign entity’s audited financial reports for the 2012, 2013, and 2014 years show that the Beneficiary has no ownership of the company but rather that the foreign entity is 95 percent owned by [redacted] and five percent owned by [redacted].

<sup>6</sup> Evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest. The corporate stock certificate ledger and stock certificate registry,

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the Beneficiary and other parties, or, if the shares are still outstanding, that those shareholders' interest has been diluted so that the foreign entity was the majority shareholder when the petition was filed.

To reiterate, the Petitioner has not provided a documentary trail establishing that the foreign entity owns all of its outstanding shares, and actually controls the Petitioner through its ownership. The record does not include probative evidence showing the source of funds for the Petitioner's capitalization. In addition, to the lack of evidence establishing the Petitioner's ownership, we also note an inconsistency in the record regarding the Petitioner's outstanding shares in the beginning of 2014. The Petitioner's annual report for 2014 shows that the Petitioner had 500,000 outstanding shares, while the Petitioner's 2014 IRS Form 1120 indicates only 150,000 outstanding shares at the beginning of 2014. There is no explanation for this discrepancy.

We also note that the Petitioner indicates that the foreign entity pays for the expenses of all of the [REDACTED] subsidiaries. However, there is insufficient evidence in the record to identify expenses particular to the Petitioner as opposed to the other [REDACTED] entities. Again, these incorporated entities are separate entities.

We cannot determine from the record here that the Beneficiary's claimed foreign employer owns a controlling interest in the Petitioner. Accordingly we cannot conclude that the Petitioner is a subsidiary of the Beneficiary's foreign employer. The Petitioner has not established a qualifying relationship between the two entities as defined by the regulations.

#### V. FOREIGN EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

Although the Director did not address this issue, we also find that even if the Beneficiary was employed abroad full-time by the foreign entity for one continuous year in the three years prior to his admission into the United States, the record does not include probative evidence of his actual duties for the foreign employer. We acknowledge the Petitioner's claim that the Beneficiary in the position of president, chairman of the board, and majority shareholder was responsible for the overall goals and policies of the company. However, the Petitioner's reliance on the Beneficiary's position as the president and a shareholder is misguided. An individual will not be deemed an executive under the statute simply because he has an executive title or because he "directs" the enterprise as the owner or sole managerial employee. The record does not include additional information on his day-to-day duties.

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must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

We have reviewed the information submitted regarding the foreign employer. We note that the record contains an inconsistency regarding the enterprise and its number of branches or retail stores. The Petitioner is also inconsistent regarding the number of the foreign entity's employees, stating that the foreign entity has approximately 400 staff and 50 managers or that it has over 200 employees. We have also reviewed the foreign entity's business license valid to November 2017, for hairdressing and to November 2015, for medical cosmetology, as well as its annual audits from 2011 to 2014. This information is insufficient, however, to ascertain the Beneficiary's actual duties in regard to the foreign entity. Again, the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Upon review, the record does not include documentary evidence supporting the Petitioner's claim that the Beneficiary was employed in an executive or managerial capacity for the foreign entity. The record does not include evidence of payroll, or the identity of specific employees and their positions within the company. Moreover, the record does not include sufficient context identifying the nature of the foreign entity's "branches," the positions of the employees, and their duties for the foreign entity. The submitted organizational chart does not depict the foreign entity owning 22 branches of the enterprise but rather divides the foreign enterprise into seven general departments. Neither the Petitioner, nor the foreign entity, has submitted sufficient probative evidence describing the nature of the foreign entity, its specific departments, the existence of branch stores, or the Beneficiary's actual duties in relation to the foreign enterprise or its employees, other than as a claimed investor.

Without probative evidence, including a detailed description of the Beneficiary's actual duties, the duties of his claimed subordinates, and consistent information supporting the nature of the foreign entity, we cannot conclude that the Beneficiary performed duties in a managerial or executive capacity for the foreign entity during any time period prior to entering the United States. The record is deficient in this regard. For this additional reason, the petition may not be approved.

## VI. CONCLUSION

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

**ORDER:** The appeal is dismissed.

Cite as *Matter of A-H-E-G- Corp.*, ID# 8844 (AAO Oct. 4, 2016)