



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

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

MATTER OF P-G- LLC

DATE: SEPT. 9, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a gemstones seller, seeks to extend the Beneficiary's temporary employment as its "executive operations" 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, Vermont Service Center, denied the petition. The Director concluded that the Petitioner had not established: (1) a qualifying relationship with the Beneficiary's claimed foreign employer; (2) that it was doing business; (3) that it had sufficient physical premises to accommodate its claimed employees; (4) that the Beneficiary had one continuous year of full-time employment with a qualifying foreign employer prior to his admission to the United States; and (5) that the Beneficiary will be employed in a managerial or executive capacity for the U.S. entity.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the evidence of record demonstrates by a preponderance of the evidence that the Petitioner and Beneficiary qualify under the pertinent regulations.<sup>1</sup>

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

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<sup>1</sup> The Petitioner submitted documentation to support the L-1A petition, including evidence regarding the proffered position, its proposed employees, and business operations as well as the foreign entity and its operations and employees. While we may not discuss every document submitted, we have reviewed and considered each one.

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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

## II. QUALIFYING RELATIONSHIP

The Director denied the petition, in part, based on a finding that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, a petitioner must show that a 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:

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

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(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.

(b)(6)

*Matter of P-G- LLC*

A. Evidence of Record

The Petitioner filed the Form I-129 on October 8, 2015. On the Form I-129, the Petitioner indicated that it has five current employees in the United States and a projected gross annual income of \$200,000. On the L Classification Supplement to Form I-129, the Petitioner identified its parent company as [REDACTED] a company organized in Thailand, and stated that it is a wholly-owned subsidiary of this foreign company. The Petitioner claimed the Beneficiary was employed at [REDACTED] from April 2009 to August 2012.

The initial evidence also included the Petitioner's business plan, which stated that the Petitioner is the wholly-owned subsidiary of the foreign entity. The record further included a list of the foreign entity's seven shareholders and the number of shares owned by each of the shareholders. This list identified five individual Thai shareholders holding a total of 20,400 shares and two individual foreigners holding a total of 19,600 shares. One of the individuals identified as a foreigner, [REDACTED] is shown owning 19,200 shares of the total 40,000 shares issued.

In response to the Director's request for evidence (RFE) on this issue, the Petitioner submitted a copy of the foreign entity's independent auditor's report, dated April 5, 2015. The report did not refer to the foreign entity's ownership of the Petitioner or provide any other information relevant to the claimed qualifying relationship.

Based on the lack of supporting evidence, the Director denied the petition concluding, in part, that the Petitioner had not established a qualifying relationship with the Beneficiary's foreign employer.

On appeal, the Petitioner asserts that its "Certificate of Formation" shows two managing members: (1) [REDACTED] who is a 49 percent shareholder in the U.S. entity; and (2) the Beneficiary who is a 51 percent shareholder in the U.S. entity. The Petitioner also submits its "Certificate of Filing" filed on May 12, 2014, and a "Certificate of Correction" filed on September 19, 2014, both filed with the Texas Secretary of State. The one-page Certificate of Filing does not identify the members of the Petitioner's limited liability company. The Certificate of Correction indicates that the registered agent and the registered office address are inaccurate and submits corrected information. The Certificate of Correction also adds [REDACTED] as a member, but does not identify the proportion of shares he holds in the Petitioner. The Certificate of Correction also deletes [REDACTED] as a member of the limited liability company. Finally, the Petitioner claims on appeal that [REDACTED] "is the 97% shareholder" of the foreign entity, [REDACTED]

B. 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 it has a qualifying relationship with the foreign entity.

(b)(6)

*Matter of P-G- LLC*

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. See *Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology Int'l*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or control of an LLC. LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting actual control of the entity. See *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986). Without full disclosure of all relevant documents, U.S. Citizenship and Immigration Services (USCIS) is unable to determine the elements of ownership and control.

Here, the Petitioner identifies itself as a limited liability company and provides conflicting and unsubstantiated information regarding its ownership.<sup>2</sup> The record does not include a copy of the initial certification of formation for the Petitioner, its operating agreement, or any record identifying the Petitioner's members and the proportion of their ownership claim. "[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)). Even if we considered the Petitioner's claim that the Beneficiary owns a 51 percent interest in the Petitioner, the record shows that he does not own any interest in the foreign entity. Thus, the Petitioner and the foreign entity are not affiliates through the Beneficiary's claimed interest in the Petitioner.

While the Petitioner continues to assert on appeal that it is a wholly-owned subsidiary of the Beneficiary's foreign employer, it submits a certificate of correction which adds [REDACTED]

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<sup>2</sup> On appeal, the Petitioner claims that the foreign parent company and the Beneficiary are each 50 percent shareholders of the Petitioner and also asserts that two individuals, [REDACTED] and the Beneficiary, own 49 percent and 51 percent, respectively of the Petitioner. The Petitioner does not resolve this inconsistency with independent, objective evidence pointing to where the truth lies. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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an individual, as a member with an unspecified ownership share. The Petitioner also incorrectly states that this claimed minority shareholder is the majority shareholder of the foreign entity. The record, however, shows that [REDACTED] is a minority shareholder in the foreign entity, owning 48 percent, or 19,200 shares out of 40,000 shares, of the foreign entity. Accordingly, [REDACTED] does not own a controlling share of the foreign entity and the Petitioner has not substantiated that he owns a 49 percent interest in the Petitioner. The Petitioner has not established that [REDACTED] owns and controls the Petitioner or the foreign entity; the Petitioner has not established that it and the foreign entity are affiliates through the minority ownership of [REDACTED]

The record does not include evidence that the Petitioner is one of two subsidiaries, both of which are owned and controlled by the same parent or individual. Even if the Beneficiary and [REDACTED] are the only two owners of the Petitioner, this same two-person group does not own and control the foreign entity. The Petitioner has not provided evidence establishing that the Petitioner and the foreign entity are affiliates owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Likewise, the Petitioner has not corroborated its claim that it is a wholly-owned subsidiary of the foreign entity. The record does not include corroborating documentary evidence that the Beneficiary's claimed foreign employer owns, directly or indirectly, more than half of the Petitioner and also controls the Petitioner.

As the Petitioner emphasized on appeal, it must establish by a preponderance of evidence that it and the Beneficiary are qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). In evaluating the evidence, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Id.* The Petitioner has not submitted consistent, probative evidence establishing that it has a qualifying relationship with the Beneficiary's foreign employer.

### III. NEW OFFICE EXTENSION

#### A. Doing Business

The Director denied the petition, in part, based on a finding that the Petitioner did not establish that it was doing business.

The Petitioner here is seeking an extension of its new office petition.<sup>3</sup> Accordingly, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United

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<sup>3</sup> The Petitioner received approval for a new office petition granting the Beneficiary L-1A status on October 9, 2014, to October 8, 2015.

States and abroad.” 8 C.F.R. § 214.2(l)(1)(ii)(H). There is no provision in the regulations allowing for the extension of this one-year period. If the business is not sufficiently operational after one year, a petitioner is ineligible for an extension by regulation.

The Petitioner claimed that it did not start its business until November 2014, when the Beneficiary arrived in the United States. To establish that it had been doing business since that time, the Petitioner submitted copies of four receipts for funds it claimed were received in February and March 2015, ten purchase orders/invoices for orders during the February through August 2015 time frame, and bank statements for the time period between May and August 2015. The Petitioner also submitted an unsigned copy of a Texas Franchise Tax No Tax Information Report for the 2014 year (Texas Franchise Tax form) and an accountant’s compilation report with the Petitioner’s statement of income and expenses, balance sheet, and a copy of the Petitioner’s five-page single-entry handwritten ledger attached. The record does not include evidence that the Texas Franchise Tax form was filed with the appropriate government agency and the accountant’s compilation report specifically states that the attached financial statements were not audited or reviewed.

The Director determined that the receipts and invoices submitted did not correspond with the Petitioner’s bank statements and that the unsigned Texas Franchise Tax form and the accountant’s compilation report were insufficient to establish that the Petitioner was doing business.

On appeal, the Petitioner submits some of the same information and a copy of a photograph of the Petitioner’s booth at an exhibition. The Petitioner did not address the deficiencies in the record pointed out by the Director but asserts that the sales and receipts of sale establish that it is doing business.

Upon review of the totality of the evidence in the record, we do not find sufficient probative evidence demonstrating that the Petitioner is engaged in the regular, systematic, and continuous provision of goods and/or services. First, the Petitioner did not submit any evidence or explanation regarding its bank statements and why the bank statements do not reflect the Petitioner’s claimed receipt of funds for its goods. The Petitioner did not submit a copy of its Texas Franchise Tax form showing that it was filed with the appropriate Texas agency. The photograph of the Petitioner’s booth at an exhibition is not accompanied by the name of the exhibition event, the date of the exhibition, a catalogue showing the Petitioner’s participation at the event, or any other information corroborating the Petitioner’s attendance. Even when considering the Petitioner’s receipts, purchase orders, and invoices, the limited number of these documents over a one-year period establishes at best that the Petitioner operates on an intermittent basis. We note, for example, that the Petitioner submits the same limited number of receipts, purchase orders, and invoices in support of the petition, in response to the Director’s RFE, and on appeal. Upon review of the totality of the record, the Petitioner has not established that it is doing business in a regular, systematic, and continuous manner.

**B. Physical Premises**

The Director also denied the petition, in part, based on a finding that the evidence of record did not establish that the Petitioner maintained sufficient physical premises to operate its business.

The Petitioner initially submitted a one-year lease for an office of undetermined size expiring on July 31, 2015, and an amendment to the lease extending the expiration date to July 31, 2016. The lease indicates that rent for the office space is \$400 per month. In response to the Director's RFE, requesting information on the size of the office, the Petitioner resubmitted the lease with a handwritten note indicating the square footage of the office is 225 feet. The record also included copies of handwritten receipts for rent paid. Some of the receipts are illegible, however it appears the Petitioner paid a total of \$6,400 in rent.<sup>4</sup>

Upon review of the totality of the evidence of record, the Director found that the record did not include any information from the landlord confirming the Petitioner's handwritten notation regarding the square footage of the rented office. The Director recognized that the Petitioner had submitted receipts showing payment of rent but found that the record did not include any supporting evidence showing that a monetary transaction had occurred, such as bank statements, processed checks, or a statement from the landlord. The Director also determined that the photographs submitted did not establish that the office space could support the Petitioner's five claimed current employees or the 18 employees listed on the Petitioner's organizational chart.

The Petitioner does not address these deficiencies on appeal, and resubmits copies of the lease, the amendment to the lease, and the same rental receipts.

A petitioner is not absolved of the requirement to maintain "sufficient physical premises" simply because it has been in existence for more than one year. In order to be considered a qualifying organization, a petitioner must be doing business in a regular, systematic, and continuous manner. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (H). Inherent to that requirement, a petitioner must possess sufficient physical premises to conduct business.

In this case, the Petitioner does not address the insufficiency of its claimed office space to accommodate its number of current or proposed employees. The Petitioner does not explain the lack of evidence corroborating the handwritten rental receipts, such as its bank statements, processed checks, or a statement from the landlord on letterhead. Additionally, the information on the receipts that is legible does not include all the months the Petitioner claims to have occupied the premises. Upon review, the record does not include sufficient probative evidence substantiating that the Petitioner has sufficient physical premises to conduct its business.

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<sup>4</sup> It is not possible to determine the time period covered by the rent paid as the receipts are not all legible and appear to include duplicate months.

#### IV. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition, in part, based on a finding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity under the extended petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term “managerial capacity” as “an assignment within an organization in which the employee primarily”:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor’s supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term “executive capacity” as “an assignment within an organization in which the employee primarily”:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in

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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 states on the Form I-129 that it is in the business of manufacturing, selling, and finishing diamonds and gemstones. The Petitioner claims that it employs five individuals in the United States. A letter signed by [REDACTED] managing director of the foreign entity, provided a list of the Beneficiary's duties as "executive operations" for the Petitioner as follows:

- Directs the execution [*sic*] of the organization, and oversee[s] the overall operations of the corporation involved in the sales, marketing, customer relation[s], distribution, and wholesale operations.
- Involvement in the expansion of the product offering and efforts in expansion of additional future venture.
- Establishes the goals and policies of the organization, component, or function. Involvement in the expansion of the product offering and efforts in expansion of future ventures.
- Exercises wide latitude in discretionary decision-making about the business deals.
- Will be coordinating across organization and with external entities, to support the president in its [*sic*] endeavors to interface with professional experts to accurately reflect the fine deals.
- Further, in this capacity, you will ensure availability of funds for expansion of the business.
- You will be directly dealing with the banks and financial institutes, and intermediaries for establishing business line of credit, and smooth financial operations of the company.
- Will be involved in the corporate representation by attending meetings, seminars, visits, and participation in other industry events.
- Will be in direct coordination with the management team to handle challenges of the business.
- Will be providing logistic and analytic support to improve the operational efficiency in terms of working capital, and overall cost of the business.

The Petitioner submitted a proposed organizational chart identifying the Beneficiary in the position of Executive Operations and depicting the positions of sales manager, marketing manager, accountant, office manager, shipment supervisor, and exhibition coordinator reporting directly to the Beneficiary. The chart also showed three salespersons reporting to the sales manager and marketing manager positions, as well as seven staff persons reporting to the office manager, shipment supervisor, and exhibition coordinator. The Beneficiary was the only individual identified by name on the chart. The Petitioner also submitted copies of the driver's licenses of four individuals and identified them as subcontractors.

In response to the Director's RFE on this issue, the Petitioner submitted four undated commission agreements signed by four individuals to represent the Petitioner in selling goods.<sup>5</sup> The Petitioner also updated its organizational chart to show these four individuals as the salespersons reporting to the Petitioner's sales manager.

Upon review of the record, the Director determined that the Petitioner had not provided a detailed description of the Beneficiary's proposed duties for the Petitioner, had not substantiated the employment of any of the employees claimed on the organizational chart, and had not submitted evidence that it had paid any of the individuals identified as subcontractors.

On appeal, the Petitioner emphasizes that the Beneficiary is performing in an executive capacity and asserts that the Director erred when determining that it had not submitted a detailed job description. The Petitioner contends that the Director ignored the documents submitted and resubmits the commission contracts and its updated organizational chart.

## B. Analysis

Upon review of the petition and the evidence of record, including the Petitioner's assertions on appeal, we conclude that the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity under the extended petition.

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(1)(3)(ii). The Petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial or executive capacity. *Id.*

The definitions of managerial and executive capacity each have two parts. First, the Petitioner must show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The Petitioner here has submitted a broad overview of the Beneficiary's duties. For example, the Petitioner indicated that the Beneficiary would direct the organization and oversee the operations of the company, establish the goals and policies of the organization, component, or function, and exercise wide latitude in discretionary decision making about business deals. This portion of the description does not convey the actual tasks the Beneficiary will perform but rather paraphrases the regulations. 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

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<sup>5</sup> The four individuals who signed the commission agreements appear to be the same individuals whose driver's licenses were initially submitted and identified as subcontractors.

matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The Petitioner continues by indicating that the Beneficiary will attend meetings, seminars, and participate in industry events, will direct the coordination of the management team, and will be involved in product expansion and future ventures. The Petitioner, however, does not describe what the Beneficiary will be doing when carrying out these vague job responsibilities and broadly-cast business objectives. We cannot ascertain if these duties encompass primarily managerial or executive duties or whether they are ordinary operational tasks to continue the Petitioner's routine operations. The actual duties themselves reveal the true nature of the employment. *Id.*

The Petitioner also stated that the Beneficiary will ensure the availability of funds for business expansion and reiterates that the Beneficiary will deal directly with banks to establish lines of credit and the smooth operations of the company. Again, however the Petitioner does not describe the Beneficiary's daily tasks associated with banking, with expanding the business, or what he will be doing to ensure the smooth operations of the company. The Petitioner also claims that the Beneficiary "[w]ill be coordinating across organization and with external entities, to support the president in its [*sic*] endeavors to interface with professional experts to accurately reflect the fine deals." It is not clear who the Beneficiary will be coordinating with, what president he will be supporting, or the Beneficiary's involvement in accurately reflecting fine deals. Again, it is not possible to ascertain the tangible duties that will engage the Beneficiary from the general description provided. There is insufficient detail and supporting documentation to conclude that he will primarily perform executive or managerial duties.

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 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.

The Petitioner claims that the Beneficiary will perform primarily in an executive capacity. 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. *See* 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.*

A review of the totality of the record reveals that the Beneficiary does not have a subordinate level of managerial employees to direct. We have reviewed the Petitioner's organizational chart and note that it includes three managers, a supervisor, a coordinator, and an accountant all reporting directly to the Beneficiary. However, the record does not include probative evidence that the Petitioner employs individuals in any of these positions.<sup>6</sup> As there are no other employees in these or other proposed departments, it is reasonable that the Beneficiary is the individual performing the marketing, banking, operational, first-line supervisory duties, and the administrative tasks of the business. If the Petitioner is still in the process of developing a management team, the Beneficiary is not yet managing or directing management employees.

Upon review, the Petitioner has not provided a detailed description of the Beneficiary's duties demonstrating that he will perform tasks primarily in an executive capacity. The Petitioner has not credibly identified a subordinate level of managerial employees for the Beneficiary to direct. 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 enterprise

Although the Petitioner does not claim that the Beneficiary will perform primarily in a managerial capacity, we will review the record on this issue. 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).

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<sup>6</sup> The Petitioner also claims to employ four salespersons, individuals previously identified as commissioned subcontractors.

To determine whether the Beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining “profession” to mean “any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation”). Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that “[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.”

Here, the Petitioner has not submitted probative evidence demonstrating that it employs anyone. The record does not include evidence that wages have been paid. We have reviewed the four undated commission agreements and find that these documents do not establish that the Petitioner employs these individuals. While these individuals may work as commissioned subcontractors, the record does not include evidence of when these individuals began to sell gems on the Petitioner’s behalf, if they have actually sold any gems and if so in what capacity, or if they are continuing to do so. The record does not include evidence that commissions or salaries were ever paid. The Petitioner has not established that it has any employees or subcontractors subordinate to the Beneficiary’s position. The record does not include sufficient probative evidence to establish that the Beneficiary is 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 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’s general descriptions of the Beneficiary’s duties do 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 Petitioner does not articulate the specific function the Beneficiary will manage and how it relates to the Petitioner’s gem sales. Of most significance is the lack of evidence in the record regarding who will perform any duties necessary to implement the Petitioner’s objectives regarding its marketing, shipping, and expansion other than the Beneficiary. The Petitioner has not provided an allocation of the Beneficiary’s time to daily duties attributed to managing an essential function. Based on the current record, the Petitioner has not submitted a detailed description of the duties and the time the Beneficiary spends on those specific defined duties. Thus, we cannot ascertain what proportion of duties would be managerial and

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non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Accordingly, we cannot conclude that the Beneficiary primarily performs managerial duties.

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.<sup>7</sup> *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g., Family Inc.*, 469 F.3d 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity under the extended petition.

## V. FOREIGN EMPLOYMENT

The Director denied the petition, in part, based on a finding that the Petitioner did not establish that the Beneficiary had one continuous year of full-time employment with a qualifying foreign employer prior to his admission to the United States.

### A. Evidence of Record

On the Form I-129, the Petitioner claimed the Beneficiary was employed at [REDACTED] in Thailand from April 2009 to August 2012. In a letter signed by the managing director of the foreign entity, [REDACTED] stated that the Beneficiary spent 35 percent of his time directing the sales management of the organization, 35 percent of his time establishing goals and policies of the organization in the sales sector, and 30 percent of his time exercising wide latitude in discretionary decision-making. [REDACTED] provided a narrative of the Beneficiary's duties associated with each of these responsibilities. [REDACTED] noted that the Beneficiary, in the position of "Sales Executive," was independent in making decisions, setting goals for the company, staff selection, correspondence with customers and retail clients to expand the business, and received

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<sup>7</sup> We acknowledge the Petitioner's reference to *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989), when asserting that the Director erroneously focused on the size of the Petitioner in reviewing the petition and reaching her decision. While we concur that USCIS should not limit its review to the size of a petitioner and must consider the actual responsibilities of the proffered position, we find that it is reasonable to assume that the size of an employer's business has or could have an impact on the claimed duties of a particular position. *See EG Enters., Inc. v. Dep't of Homeland Sec.*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). In this matter, the record includes a generic job description for the Beneficiary, an organizational chart that depicts potential employees, and insufficient evidence that the Petitioner employs anyone to carry out the operational and administrative duties of the operation relieving the Beneficiary from performing primarily non-qualifying duties.

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only general supervision from the board of directors. [REDACTED] stated that during the Beneficiary's stay in the United States, his responsibilities would be handled by the heads of the management team and that upon his completion of duties in the United States would resume his responsibilities as a sales executive with [REDACTED]

The Director, in an RFE to the Petitioner, noted that the Beneficiary had submitted an online nonimmigrant visa application to the U.S. Department of State on September 17, 2012. And that in the visa application, the Beneficiary listed his present employer as "Self-Employed," and described his employment as: "I am commission agent for precious stones buyers from other countries. My primary object is to fulfill their orders." The Beneficiary also responded "no" to the question regarding any previous employment. The Director pointed out that the information on the Beneficiary's visa application conflicted with the Petitioner's claim regarding the Beneficiary's foreign employment. In the RFE, the Director instructed the Petitioner to provide an explanation for the conflict and corroborating evidence, such as copies of the Beneficiary's foreign pay records, personnel records, training records, and tax records, to corroborate his claimed employment with [REDACTED]

In response to the RFE, the Petitioner claimed that when the Beneficiary applied for his nonimmigrant visa, on September 17, 2012, he was no longer employed with [REDACTED] and that he had been engaged by [REDACTED] the company who paid for his trip, as a gem consultant. The Petitioner claimed further that the Beneficiary understood the previous employment question on the visa application to pertain to previous employment with [REDACTED] and because he had not been previously employed by this company, responded in the negative.

The Director acknowledged the Petitioner's explanation, but found that the Petitioner had not submitted any corroborating evidence to establish the Beneficiary's employment with [REDACTED]. The Director determined that the significant discrepancy in the record had not been resolved and concluded that the Petitioner had not established that the Beneficiary had at least one year of full-time employment abroad with a qualifying organization.

On appeal, the Petitioner reiterated its previous explanation and asserts that the Beneficiary was employed by the foreign company for more than one year within the last three years preceding his application for admission.

**B. Analysis**

Upon review of the petition and the evidence of record, including the Petitioner's assertions on appeal, we conclude that the Petitioner has not established that the Beneficiary was employed by a qualifying organization abroad.

The Petitioner's explanation that the Beneficiary was no longer employed at the foreign entity when he applied for his nonimmigrant visa conflicts with the foreign entity's initial letter describing the

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Beneficiary's duties while working at the foreign entity. The managing director stated specifically that the Beneficiary's "job responsibilities will be temporarily be [*sic*] handled by the heads of the management team" and that the Beneficiary upon completion of his duties for the Petitioner in the United States "will return to Thailand and will resume his job responsibilities, as Sales Executive in [REDACTED] It is unclear why the managing director would arrange for someone to handle the Beneficiary's responsibilities temporarily, if the Beneficiary was no longer employed at the foreign entity. It is also unclear why the managing director would indicate that the Beneficiary would "resume his job responsibilities" at the foreign entity if he was no longer employed there.

With the inconsistencies in the record regarding the Beneficiary's foreign employment, the Director properly requested corroborating evidence of the Beneficiary's employment with [REDACTED] [REDACTED] The regulation at 8 C.F.R. § 214.2(l)(3)(viii) states that the Director may request additional evidence in appropriate cases. The Petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Although specifically and clearly requested by the Director, the Petitioner declined to provide any corroborating evidence of the Beneficiary's foreign employment. The Beneficiary's foreign payroll records would assist in confirming the Beneficiary's employment, especially if these records corresponded to the Beneficiary's Thai tax returns and/or bank statements. The Petitioner's inability to submit these documents, without explanation, leaves material questions as to whether the Beneficiary actually worked for the foreign entity as claimed. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

As the Petitioner has not established that the Beneficiary was employed by [REDACTED] [REDACTED] it is unnecessary to review the foreign entity's descriptions of the Beneficiary's claimed duties. Accordingly, we will not further address the nature of the Beneficiary's claimed foreign position, or whether the claimed position was in a managerial or executive capacity.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary had one continuous year of full-time employment with a qualifying foreign employer prior to his admission to the United States.

## VI. 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. The burden is on the Petitioner to show 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 P-G- LLC*, ID# 18145 (AAO Sept. 9, 2016)