



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

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

MATTER OF M-US, INC.

DATE: SEPT. 15, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129 PETITION FOR A NONIMMIGRANT WORKER

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

The Director, California Service Center, denied the petition. The Director concluded that the Petitioner did not establish that the Beneficiary was employed abroad by a qualifying organization for one continuous year of full-time employment within the three years preceding the application for admission to the United States.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director made errors of law and fact in concluding that the Beneficiary's contractual relationship with the foreign entity was not considered employment.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision.

I. LEGAL FRAMEWORK

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

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, shall be accompanied by:

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- (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. ONE YEAR OF CONTINUOUS FULL-TIME EMPLOYMENT ABROAD

The sole issue addressed by the Director is whether the Petitioner established that the Beneficiary was employed on a full-time basis by a qualifying foreign entity for one continuous year within the three-year period preceding the filing of the petition, pursuant to 8 C.F.R. § 214.2(1)(3)(iii).

A. Evidence of Record

The Petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on September 9, 2015. The Petitioner stated that the Beneficiary was employed abroad by its foreign affiliate, [REDACTED] in Poland as a program manager beginning on July 22, 2014. The Petitioner provided a copy of an organizational chart for the foreign entity that depicted the Beneficiary as "Senior Project Manager," overseeing three project managers and several project-based indirect reports. In a supporting statement, the Petitioner described the Beneficiary's foreign employment as follows (verbatim):

[The Beneficiary] is responsible for managing, supervising, and controlling the work of other professional and managerial [REDACTED] employees. [The Beneficiary] manages three direct reports who all occupy the role of Project Manager – these Project Managers are each professional, degreed [REDACTED] employees, and they supervise, manage, and control the work of their own subordinate employees who in turn support these individuals in delivering client projects. In addition, [the Beneficiary] is charged with managing and controlling the work of numerous [REDACTED] employees that are assigned to work under [the Beneficiary] on a project-by-project basis – these project teams are typically large and can be anywhere from 60-100 professional team leads, senior developers, quality assurance managers, and software developers of

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various seniority levels, and they all perform their roles in accordance with [the Beneficiary's] project vision, strategy, and managerial direction. [The Beneficiary] reports only to [redacted] Vice President of Mobile Delivery (who manages the entirety of [redacted]) and [the Beneficiary] represents the only Senior Project Manager in the Mobile Sector – he is therefore an immensely crucial manager of an essential function and of [redacted] professional personnel.

The Director issued a request for evidence (RFE) advising the Petitioner that the initial evidence was insufficient to establish that the foreign entity employed the Beneficiary in a managerial or executive capacity. The Director noted that the Petitioner indicated on both the Form I-129, L Classification Supplement, and in its supporting statement, that the Beneficiary was employed by the foreign entity, [redacted] since July 2014. However, the Director noted that the Beneficiary submitted a U.S. Department of State DS-160 visa application on December 5, 2014, indicating that he was “Self Employed.” The Director indicated that the Petitioner should submit additional evidence that the Beneficiary was employed abroad by the foreign entity for one continuous year in the past three years. The Director suggested that the Petitioner submit copies of the Beneficiary's pay records, personnel records, training records, and/or a letter from the Beneficiary's supervisor describing the Beneficiary's experience with the foreign entity.

In response to the RFE, the Petitioner submitted a letter stating the following (verbatim):

The information provided in [the Beneficiary's] DS-160 and the information provided in the I-129 are not in conflict – [the Beneficiary] has been working for [redacted] or “the foreign employer”; the Polish branch office of [redacted] (UK)) since July of 2014 through a business-to-business agreement for services entered into by [redacted] and a company called [redacted] a sole proprietorship wholly owned by and consisting solely of [the Beneficiary]. In other words, [the Beneficiary] is contracted staff for [redacted] via his sole proprietorship company. [The Beneficiary] is not payrolled as an individual by [redacted] in the traditional manner – hence the reason why he declared he was “Self Employed” in the DS-160 of December 2014.

.....

[The Beneficiary's] relationship to [redacted] has all the characteristics of a traditional employer-employee relationship: his work is totally ordered, directed, and controlled by his supervisor, managers, and executives at [redacted] he shows up to work at [redacted] corporate office, uses [redacted] tools, instrumentalities, and technologies (some of it proprietary to the [redacted] company) in carrying out his duties, and develops products released under the [redacted] brand for [redacted] clients; he is subject to the same internal controls, policies, rules and regulations of the [redacted] company; he is given a [redacted] job title and is located within [redacted] organizational structure managing and

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reporting to other individually-hired [redacted] employees; and he is eligible for promotion, demotion, and termination according to the same career paths and rules of other [redacted] employees. Additionally, since July 2014, [the Beneficiary] has not worked for any other company except [redacted]. The only difference between [the Beneficiary] and a [redacted] employee who is directly on payroll is the way in which taxable income is declared and taxed. This arrangement is truly for personal financial reasons – that is all.

The contract between [redacted] and [redacted] is enclosed – it confirms the following conditions and terms of [the Beneficiary's] services for the company: the right of control by [redacted] over the work of [the Beneficiary] is clearly spelled out, in that [the Beneficiary] is controlled by [redacted] in the performance of his work; [the Beneficiary] is obligated to honor a non-compete agreement for 12 months after his termination, or, in other words, [the Beneficiary] cannot work for any [redacted] clients for that amount of time, which is a significantly restrictive agreement; per the contract [the Beneficiary] performs his work with tools provided directly by [redacted] [the Beneficiary] is obligated to give notice of his resignation in accordance with [redacted] policies; and, work-related expenses are paid similar to the way a traditional employee's would be. It is also important to note that this is an open ended contract – it continues indefinitely until one party terminates it.

The Petitioner further stated that, “based on its own guidance, and that of the U.S. Supreme Court, [United States Citizenship and Immigration Services (USCIS)] determines whether an employer-employee relationship exists based on the amount of control the Petitioner has over the Beneficiary's work -- i.e., when, where, and how the Beneficiary performs his job.” The Petitioner cited a USCIS memorandum issued by Donald Neufeld, Associate Director, Service Center Operations, USCIS, dated January 8, 2010,¹ claiming that the essential element in determining the existence of the employer-employee relationship is the right of control, that is, the right of the employer to order and control the employee in the performance of his or her work.²

The Petitioner's statement was accompanied by a copy of the “General Agreement on Supplying of Service” dated July 11, 2014, between [redacted] and [redacted] which described the terms of the Beneficiary's relationship with the foreign entity.

¹ USCIS memoranda merely articulate internal guidelines for INS personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines “neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.” *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)).

² Petitioner also cited the Foreign Affairs Manual (FAM) as an authority supporting the petitioner's argument. It must be noted that the FAM is not binding upon USCIS. See *Avena v. INS*, 989 F. Supp. 1, 8 (D.D.C. 1997); *Matter of Bosuego*, 17 I&N Dec. 125, 128 n.3 (BIA 1979). The FAM provides guidance to employees of the Department of State in carrying out their official duties, such as the adjudication of visa applications abroad. The FAM is not relevant to this proceeding.

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The Petitioner also submitted an affidavit signed by [redacted] Vice President of Human Resources of [redacted]. In the affidavit, [redacted] stated the following (verbatim):

[The Beneficiary] has been a member of the [redacted] team since starting on July 22, 2014 on a contracted staff basis. [The Beneficiary] did not sign an offer of employment nor was added to our payroll strictly as an individual – instead, [the Beneficiary] signed an agreement on behalf of his company, [redacted] with [redacted] to work exclusively for [redacted]. [redacted] is a one-person company, and that person is [the Beneficiary] – the company and [the Beneficiary] are therefore one and the same. This business-to-business arrangement was made strictly for financial and tax purposes and no other reason. With the exception of how he receives payment for his services he is otherwise treated as any other [redacted] employee. Further, if we had intended for him to interact with our company as more of an external vendor, or developer for hire, we would not have had him involved in managing other management professionals or managing any of the other software professionals who report through his managers. We have allowed for this contractual arrangement because it is permitted under Polish law and allows us to attract some highly talented professionals who appreciate the tax benefits that exist for these types of hiring arrangements.

At [redacted] we employ workers on one of two bases: we either employ them directly and put them on our payroll, or we enter into an agreement with the worker's sole proprietorship business, as is the case with [the Beneficiary]. We employ many of our workers in the same way as [the Beneficiary] and there is no distinction whatsoever between the two types of employees as to how they are treated as members of the [redacted] workforce: in both cases, [redacted] orders the work and tasks that the person carries out and controls the person in the performance of his or her work; they are both subject to the same internal controls and workplace policies and rule; they both work along the same career paths and within the same organizational structure, and are promoted/demoted in the same way; and they are both required to give notice based on the same period. Additionally, we supply a phone, laptop, and any additional tools and support that [the Beneficiary] needs to adequately perform his job, and he works from our [redacted] offices with the exception of time he spends meeting with clients. And, unlike ordinary vendors, [the Beneficiary] takes no ownership in [redacted] work product, and he is covered under insurance provided by the company. And in addition to his management of [redacted] employees, [the Beneficiary] is able to make personnel-related decisions regarding those employees, such as termination. The only difference between one group of workers and the other is the way in which they are treated for tax purposes.

The Petitioner submitted a record of invoices and payments from [redacted] to the Beneficiary monthly from July 2014 through August 2015, along with payroll records, resumes, and job descriptions for the Beneficiary's three claimed subordinates.

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On November 11, 2015, the Director denied the petition finding that the Petitioner did not establish that the Beneficiary was employed abroad by a qualifying organization for one continuous year of full-time employment within the three years preceding the application for admission into the United States. The Director stated that “the term ‘employment’ is defined at Title 20, Code of Federal Regulations § 656.3 as permanent full-time work by an employee for an employer other than oneself.” The Director stated that the Beneficiary was employed by [REDACTED] and, therefore, he was not an employee of the foreign entity as claimed.

Subsequently, the Petitioner filed a Form I-290B, Motion to Reopen and Reconsider. In support of its motion, the Petitioner submitted a supporting statement as follows (verbatim):

[The Beneficiary] was employed by the recognized foreign affiliate through a contract with his personal services company . . . the Service applied an incorrect definition of “employment” and entirely ignored all of the relevant precedent materials that confirm that common law principles are to be applied to the term “employed” or “employment” in the INA and CFR, respectively, as there is no specific definition in the Statute or Regulations. Further, the Service compounded the error by relying on a definition of “employment” found in an unrelated Department of Labor regulation – 20 CFR 656.3. Such an application is contrary to laws of statutory construction as the Department of Homeland Security cannot choose to borrow language from the regulations of other agencies or departments and instead should promulgate its own regulatory definition. As there is no regulatory or statutory definition in the INA or its CFRs the Service must follow the Supreme Court’s instruction and accept the common law jurisprudence in this area. The decision in this case is simply wrong and the Service owes the public and its clients an obligation to get it right.

The Petitioner also submitted a statement of opinion from a Polish employment lawyer, [REDACTED] who stated that despite being officially considered an employee of [REDACTED] the foreign entity directed and controlled the Beneficiary’s work and such an arrangement is common in Poland utilized by individuals for advantageous tax purposes.

In its brief supporting the motion, the Petitioner asserted the following:

In order to determine whether an individual is “employed” for L-1 purposes, the focus is one the power of control over the employee’s activity. This is confirmed in the U.S. Supreme Court’s interpretation of the common law, “under which the key determinant is the putative employer’s right to control the means and manner in which the work is performed.” *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968). Specifically, power of control includes the employer’s right to order and control the individual’s performance of work and to direct the manner in which the work is done. *See Matter of Pozzoli*, 14 I&N Dec. 569 (Reg. Comm’r 1974).

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The Petitioner also cited *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1981), stating that the mere fact that a person has a particular title (partner, director, or vice president) should not necessarily be used to determine whether he or she is an employee or a proprietor. The Petitioner submitted copies of *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, (1992) and *Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538 U.S. 440, (2003) in support of its assertion that the determination of whether an individual is employed for L-1 purposes depends upon the power of control that the putative employer has over the employee's activity.³

Finally, the Petitioner explained that, "the Service applied both the wrong definition and the wrong statute/regulation, and failed to investigate the common law aspects of this relationship, the Service erred in both applying the law, and applying the proper law to relevant facts introduced at the time of filing."

On February 11, 2016, the Director denied the Motion to Reopen and Reconsider restating that the Petitioner had not established that the Beneficiary was employed abroad by the foreign entity for the requisite period. Specifically, the Director pointed to the "General Agreement on Supplying of Service" dated July 11, 2014, between [REDACTED] and [REDACTED]

The Director indicated that in Section 3 of this agreement, entitled "Contractor's Responsibilities," it states that the Beneficiary is to perform the services ordered by the foreign company "independently, without being subject to the direction and supervision" of the foreign company. Therefore, the Director concluded that, "USCIS is unable to establish that the Beneficiary is a full time employee of the foreign company if the foreign company has a contract with the Beneficiary's sole proprietorship which stipulates that the beneficiary is to complete his work 'independently, without being subject to the direction and supervision of the foreign company.'" The Director found the evidence of record insufficient to establish that the Beneficiary has been employed abroad by a qualifying organization for one continuous year of full-time employment within the three years preceding the application for admission to the United States.

B. Analysis

Upon review, the Petitioner's assertions are persuasive, in part, and we will withdraw the Director's decision dated February 11, 2015. We find that the Director should have applied the common law principles to the terms "employed" and "employment" as articulated below.

In order to establish eligibility for the classification requested, the Petitioner must establish that the Beneficiary was "employed" abroad by a qualifying organization for one continuous year in the three years preceding the filing of the petition. The employment abroad must have been in a managerial or executive capacity. 8 C.F.R. § 214.2(l)(3)(iii), (iv).

³ The Petitioner further refers to unpublished decisions in which we determined that the issue of whether an individual is an employee should be evaluated on a case-by-case basis, assessing and weighing the incidents of each relationship with no one factor being decisive. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44), defines both managerial and executive capacity as an assignment within an organization in which an “employee” performs certain enumerated qualifying duties. Further, the terms “managerial capacity” and “executive capacity,” which has been codified and incorporated into the regulations at 8 C.F.R. § 214.2(l)(ii)(B), (C), specifically applies solely to “the employee.” Neither the former Immigration and Naturalization Service (INS) nor USCIS defined the term “employed” or “employee” by regulation for purposes of the L-1 visa classification.

The Supreme Court has determined that where the applicable federal law does not define “employee,” the term should be construed as “intend[ing] to describe the conventional master-servant relationship as understood by common-law agency doctrine.” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (“*Darden*”) (quoting *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) (“*C.C.N.V.*”). The Court stated:

“In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.”

Darden, 503 U.S. at 323-324 (quoting *C.C.N.V.*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538 U.S. 440, 445, 447 & n.5 (2003). As the common-law test contains “no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)) (emphasis added).

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the “conventional master-servant relationship as understood by common-law agency doctrine” and the *Darden* construction test apply to understanding of the term “employee” used in Section 101(a)(44) of the Act.

Therefore, in considering whether or not one was an “employee” for purposes of L-1 nonimmigrant petitions, USCIS must focus on the common-law touchstone of “control.” *Clackamas*, 538 U.S. at 450. The factors indicating that a worker is or will be an “employee” of an “employer” are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-24; *Clackamas*, 538 U.S. at 445; see also *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker’s relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work

performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also* EEOC Compl. Man. at § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-49; EEOC Compl. Man. at § 2-III(A)(1).

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-24. For example, while the assignment of additional projects is dependent on who has the *right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, and not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323.

Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

As such, this issue will be remanded to the Director and she should request additional evidence to clarify whether the Beneficiary was employed by a qualifying organization for one continuous year of full-time employment within the three years preceding the application for admission to the United States based upon the factors and analysis noted above.

III. FOREIGN EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

Although the Director's decision will be withdrawn, the record as presently constituted does not establish that the Beneficiary was employed abroad in a primarily managerial capacity. The Petitioner does not claim that the Beneficiary has been employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary has been employed in a managerial 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;

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- (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.

A. Evidence of Record

The Petitioner stated that the Beneficiary was employed abroad by its foreign affiliate, [REDACTED] in Poland as a program manager beginning in July 22, 2014. The Petitioner has stated throughout the record that the Beneficiary was responsible for overseeing three project managers and several project-based indirect reports.

The Petitioner submitted a list of the Beneficiary's duties as follows (verbatim):

- 50% of total time – Managing, delegating, and evaluating the day-to-day tasks and functions of his numerous (60-100) project-based development team members, including daily goal setting, performance analysis, and personnel-related matters;
- 20% of total time – Managing the day-to-day tasks and performance of his 3 direct reports (Project Managers), including the delegation of daily tasks and duties, conducting performance analysis, and making personnel-related decisions including hiring and firing;
- 20% of total time – Managing crucial mobile delivery accounts and directing business development efforts, including the management of direct client communication, consultation with clients regarding deliverable solutions and requirements, and overseeing launch and delivery efforts to ensure customer satisfaction; and
- 10% of total time – Managing, coaching, and mentoring lateral [REDACTED] stakeholders, including employees from [REDACTED] Market Sector.

The Petitioner also described the Beneficiary's foreign employment as described above in the Evidence of Record subsection in the previous section of this decision.

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The Petitioner submitted organizational charts depicting the Beneficiary overseeing subordinate project managers along with resumes, job descriptions, and payroll records for the claimed subordinate employees. In its supporting statement, the Petitioner stated that, “[the Beneficiary] supervises and controls the work of three (3) other professional and managerial employees on a daily basis. In addition, he is charged with managing and controlling the work of project teams that are comprised of 60+ professional team leaders, senior developers, quality assurance managers, team leads, and developers of various seniority levels—these reports are indirect and [the Beneficiary] manages their daily tasks on a project-by-project basis. He also manages an essential function of the company by designing, developing, and delivering mobile solutions for some of [REDACTED] largest clients such as [REDACTED] and [REDACTED].”

B. Analysis

When examining the managerial or executive capacity of the Beneficiary, we will look first to the Petitioner’s description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The Petitioner’s description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial or executive capacity. *Id.*

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

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

The statutory definition of “managerial capacity” allows for both “personnel managers” and “function managers.” See sections 101(a)(44)(A)(i) and (ii) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. The statute plainly states that a “first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor’s supervisory duties unless the employees supervised are professional.” Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(4). If a petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act; 8 C.F.R. §§ 214.2(l)(1)(ii)(B)(2)-(3).

We acknowledge the Petitioner's assertions regarding the Beneficiary's role as a personnel and function manager with the foreign entity. However, the Petitioner has not submitted sufficient evidence of the Beneficiary's supervision of employees or his duties managing and controlling an essential function of the organization. Specifically, the Petitioner has not submitted evidence that the Beneficiary managed or controlled the work of subordinate professionals, that he had the authority to make personnel decisions including hiring and firing, that he oversaw indirectly 60+ professional team leaders on a project basis, or that he had authority over the foreign entity's clients or contracts. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Accordingly, we will remand the matter to the Director, who should request any additional evidence deemed warranted to address the deficiencies noted with respect to determining whether the Beneficiary was employed primarily as either a function manager or a personnel manager with the foreign entity.

IV. CONCLUSION

Based on the foregoing discussion, although the Director's decision will be withdrawn, the evidence of record as presently constituted does not establish the Beneficiary's eligibility for the benefit sought. Accordingly, we will remand this matter to the Director for further action and entry of a new decision.

ORDER: The decision of the Director, California Service Center, is withdrawn. The matter is remanded to the Director, California Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of M-US, Inc.*, ID# 18246 (AAO Sept. 15, 2016)