



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

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

MATTER OF J-USA, INC.

DATE: SEPT. 8, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, which distributes and services road repair equipment, seeks to permanently employ the Beneficiary as its general manager<sup>1</sup> under the first preference immigrant classification for multinational executives or managers. See Immigration and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director, Nebraska Service Center, denied the petition. The Director concluded that the evidence of record did not establish that: (1) the Beneficiary will be employed in a managerial or executive capacity; (2) the Beneficiary has been employed abroad in a managerial or executive capacity; and (3) the Petitioner has a qualifying relationship with the Beneficiary's foreign employer.

We summarily dismissed the Petitioner's subsequent appeal because the record at the time of adjudication did not show that the Petitioner had submitted a brief or otherwise identified an erroneous conclusion of law or statement of fact in the Director's decision. The matter is now before us on a combined motion to reopen and motion to reconsider. On motion, the Petitioner provides evidence that it submitted a timely brief in support of its appeal.

Upon *de novo* review, we will reopen the matter for the purpose of considering the appellate brief and the merits of the appeal. However, as the Petitioner has not overcome the original grounds for denial, we will deny the combined motion.

## I. MOTION REQUIREMENTS

### A. Overarching Requirement for Motions by a Petitioner

The regulations state that "the official having jurisdiction may, for proper cause shown, reopen the proceeding."<sup>2</sup> This provision limits our authority to reopen the proceeding to instances where

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<sup>1</sup> The record also lists several other titles, including responsible managing employee and operations manager.

<sup>2</sup> 8 C.F.R. § 103.5(a)(1)(i).

“proper cause” has been shown for such action. Thus, to merit reopening, the submission must not only meet the formal requirements for filing, but the petitioner must also show proper cause for granting the motion.

#### B. Requirements for Motions to Reopen

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.<sup>3</sup> Also, the new facts must possess such significance that, “if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case.”<sup>4</sup>

#### C. Requirements for Motions to Reconsider

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.<sup>5</sup> A motion to reconsider contests the correctness of the prior decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new facts.<sup>6</sup>

## II. DISCUSSION

The Petitioner submitted no brief or evidence in support of its appeal, but stated on the Form I-290B, Notice of Appeal or Motion, that it would submit those materials within 30 days. When we reviewed the record of proceeding several months later, it did not include any supplement to the appeal. As a result, we summarily dismissed the appeal, because the appeal, as presented to us, did not identify any erroneous conclusion of law or statement of fact in the Director’s denial of the petition.<sup>7</sup>

On motion, the Petitioner submits a copy of an appellate brief with supporting exhibits. The Petitioner had timely submitted these materials to supplement the appeal but, for reasons the record does not explain, they did not reach the record of proceeding.

We will deny the motion to reconsider, because the Petitioner has not shown that the summary dismissal was incorrect based on the evidence of record at the time of the initial decision. The

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<sup>3</sup> 8 C.F.R. § 103.5(a)(2).

<sup>4</sup> *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); see also *Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

<sup>5</sup> 8 C.F.R. § 103.5(a)(3).

<sup>6</sup> Compare 8 C.F.R. § 103.5(a)(3) and 8 C.F.R. § 103.5(a)(2).

<sup>7</sup> See 8 C.F.R. § 103.3(a)(1)(v).

evidence of record, at that time, did not include any supplement to the appeal. Given the state of the record at the time, summary dismissal was consistent with USCIS regulations and policy.

We will grant the motion to reopen in part, because the recovered supplement to the appeal comprises new facts that were not available to us at the time of our prior decision. While the evidence of record does not establish that the petition is approvable, the Petitioner's timely submission of substantive appellate materials entitles the Petitioner to a decision on the merits.

### III. LEGAL FRAMEWORK

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. – Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

....

- (C) *Certain multinational executives and managers.* An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file Form I-140, Immigrant Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. A labor certification is not required for this classification.

The regulation at 8 C.F.R. § 204.5(j)(3) states:

- (3) Initial evidence—

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

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

The Director denied the petition based in part on a finding that the Petitioner did not establish that: (1) the Beneficiary will be employed in a managerial or executive capacity; and (2) the Beneficiary has been employed abroad in a managerial or executive capacity. The Petitioner does not claim that the Beneficiary was employed abroad in an executive capacity. Therefore, we restrict our analysis of the Beneficiary's foreign employment 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;
- (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.

(b)(6)

*Matter of J-USA, Inc.*

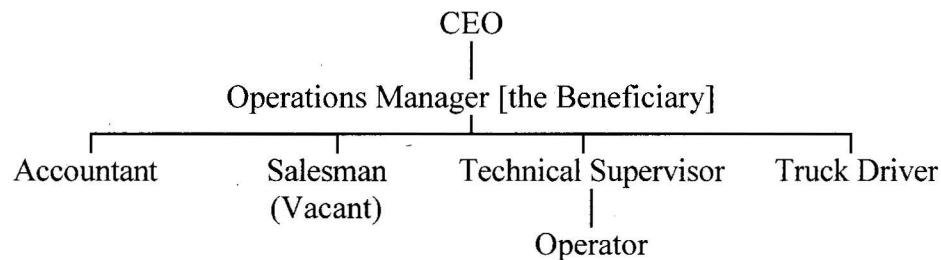
If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.<sup>8</sup>

#### A. U.S. Employment in a Managerial or Executive Capacity

The regulation at 8 C.F.R. § 204.5(j)(5) requires the Petitioner to submit a statement which indicates that the Beneficiary is to be employed in the United States in a managerial or executive capacity. The statement must clearly describe the duties to be performed by the Beneficiary.

##### 1. Evidence of Record

The Petitioner filed Form I-140 on October 9, 2014. On that form, the Petitioner indicated that it had five U.S. employees at the time of filing. The initial submission included an organizational chart showing the following structure:



An IRS Form 941, Employer's Quarterly Federal Tax Return, for the third quarter of 2014 indicated that the Petitioner had four employees on its payroll as of September 12, 2014, less than a month before the petition's filing date.

In an accompanying letter, [REDACTED] the Petitioner's president and chief executive officer (CEO), described the Beneficiary's duties and the approximate percentage of time assigned to each:

1. Directly managing four subordinate employees . . . and . . . exercising full discretion regarding personnel decisions, such as hiring, firing and leaves of absence; (30%)
  - Managing and increasing the effectiveness and efficiency of each employee through improvements to each function as well as coordinating and communicating between support and business functions;

<sup>8</sup> See section 101(a)(44)(C) of the Act.

- Supervising work in progress on a daily basis;
  - Making personnel decisions, regarding hiring, firing and leave of absence.
2. Developing and overseeing all the company's operational, administrative, logistics, financial and marketing strategies and drive initiatives in the management team and organizationally that contribute to long-term operational excellence; (30%)
- Overseeing short and long-term financial and managerial reporting;
  - Managing day to day processing of accounts receivable and payable and producing reports as requested.
  - Reconciling monthly activity, generating year-end reports, and fulfilling tax related requirements.
  - Managing grantor contracts and reimbursement requests.
  - Administering payroll and employee benefits and organizational insurance.
  - Ensuring that Accounting Department requests are resolved and communicated in a timely manner to internal and external parties.
  - Developing long-range forecasts and maintain long-range financial plans.
3. Exercising full budgetary authority for the company, including contract negotiation, costs, and operations; (20%)
- Directing the annual budgeting and planning process for the organization;
  - Develop and manage annual budget;
  - Oversee monthly and quarterly assessments and forecasts of organization's financial performance against budget, financial and operational goals;
  - Prepare annual audit and serving as a liaison with all outside vendors;
4. Communicating daily with the Technical Supervisor and . . . Machine Operator, as well as the City Supervisors of the various cities with which [the Petitioner] has contracts . . . to ensure compliance with contractual, safety and regulatory standards; (20%)
- Improving the operational systems, processes and policies in support of organization's mission;
  - Playing a significant role in long-term planning, including an initiative toward operational excellence;
  - Ensuring that the machinery and equipment used have the ability to provide services for the client at an acceptable standard;
  - Ensuring that services meet an acceptable standard and generates positive feedback from clients.

(b)(6)

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The Beneficiary's name appears on correspondence and contracts relating to services that the Petitioner provided to various cities near ██████████ California. This evidence identifies the Beneficiary as the Petitioner's point of contact with its clients.

The Director issued a request for evidence (RFE), stating that "the duties . . . to be performed by the beneficiary are generalized descriptions and do not clearly describe the beneficiary's actual job duties." The Director asked the Petitioner to submit a more detailed job description from an authorized official of the company that identified "[t]he specific daily tasks that are . . . involved with the completion of each duty." The Director also requested additional information about the Beneficiary's subordinates.

In response, the Petitioner stated: "At the time of the submission of this RFE response, [the Beneficiary] has eight employees directly under his supervision":

- Salesman
- Bookkeeper
- Accountant
- Technical Supervisor
- Driver/Operator
- Operator
- Two Helpers

The Petitioner stated that the operators and helpers report to the technical supervisor; the other employees report directly to the Beneficiary.

The Petitioner did not submit a new job description from an authorized company official, as instructed. Instead, counsel provided a nine-item list of responsibilities:

1. Determines short term and long term goals, prepare[s] realistic plans to achieve objective using a combination of technology, available manpower and financial resources.
2. Plans weekly and monthly projects to be undertaken by the company based on the contracted jobs. . . .
3. Prepares budget for each project illustrating all required elements and specifications. . . .
4. Accountable for legal matters, contract preparation, processing of licensing and insurance requirements, obtaining permits and other regulatory compliance. . . .
5. Directs the preparation of bid documents, costing, logistics, manpower and supplies requirements.
6. Acts as representative of the owner in government meetings, bidding, trade fairs and exhibits, and other industry association gatherings.
7. Responsible for hiring and firing employees, monitors work products and report of each employee, conducts performance evaluations, and manages personnel-related issues.

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8. Responsible for timely submission of all tax-related compliance reports and payments, audit schedules, and all administrative affairs of the company.
9. Provides managerial oversight on procurements of materials, import transactions, and coordination with concern individuals locally and overseas.

Counsel stated that “the above described duties are not quantifiable and can not be measured in terms of percentage . . . or hours spent on each responsibility.”

On his own résumé, the Beneficiary described his position as follows:

Responsible for planning, and directing the overall operations of the company to ensure goals are met, including administration, accounting and financial operations, sales and marketing. Provides managerial oversight to eight (8) employees, assigns individual tasks, manages performance, and monitors production. Acts as company representative in various business-related activities and meetings including representation with government and private organizations to expand business opportunities, participates in bidding, and international and local trade fairs and exhibits. Responsible for overseeing the preparation of contracts, managing projects and monitoring of all activities relating to contracted obligations of the companies. Manages the import transactions to purchase machines and equipment from New Zealand which are distributed across the United States and overseas.

The Director denied the petition based, in part, on a finding that the Petitioner had not established that the Beneficiary would serve in a managerial or executive capacity. The Director found that “the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary . . . will do on a day-to-day basis.” The Director also found that the Petitioner had not shown that any of the Beneficiary’s subordinate employees “is truly a supervisory, managerial, or professional employee. . . . [I]t appears that the Beneficiary was and will primarily be a first-line supervisor of non-professional workers, the provider of actual services, or a combination of both.”

On appeal, the Petitioner submits an appellate brief, including a job description that is largely similar to the version in [REDACTED] earlier introductory letter.

## 2. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States.



When examining the executive or managerial capacity of a given beneficiary, we will look first to the petitioner's description of the job duties.<sup>9</sup> 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.<sup>10</sup>

In the denial notice, the Director found the Beneficiary's job description to lack detail. The Petitioner, on appeal, does not address this specific finding. The Petitioner has identified broad areas of responsibility, subdivided into elements, but many of these elements are not worded in a way that identifies the Beneficiary's actual tasks. Some of these vaguely-worded elements are:

- Managing and increasing the effectiveness and efficiency of each employee through improvements to each function as well as coordinating and communicating between support and business functions
- Ensuring that Accounting Department requests are resolved and communicated in a timely manner to internal and external parties.
- Improving the operational systems, processes and policies in support of organization's mission.
- Playing a significant role in long-term planning, including an initiative toward operational excellence.

Terms such as "increasing . . . effectiveness," "ensuring . . . requests are resolved" and "playing a significant role" do not illustrate the nature of the actual tasks performed.

A number of other duties appear to be operational in nature. "Reconciling monthly activity, generating year-end reports, and fulfilling tax related requirements" and "Administering payroll and employee benefits and organizational insurance" appear to refer to administrative tasks. Other tasks refer to equipment inspection ("Ensuring that the machinery and equipment used have the ability to provide services for the client at an acceptable standard") and quality control ("Ensuring that services meet an acceptable standard and generates positive feedback from clients").

The definitions of executive and managerial capacity have two parts. First, the Petitioner must show that the beneficiary will perform certain high-level responsibilities.<sup>11</sup> 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.<sup>12</sup>

Whether the Beneficiary is a managerial or executive employee turns on whether the Petitioner has sustained its burden of proving that her/his duties are "primarily" managerial or executive.<sup>13</sup> Here,

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<sup>9</sup> See 8 C.F.R. § 204.5(j)(5).

<sup>10</sup> *Id.*

<sup>11</sup> *Champion World, Inc. v. INS*, 940 F.2d 1533 (9<sup>th</sup> Cir. 1991)(unpublished table decision).

<sup>12</sup> See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9<sup>th</sup> Cir. 2006); *Champion World, Inc. v. INS*, 940 F.2d 1533.

<sup>13</sup> See sections 101(a)(44)(A) and (B) of the Act.

the Petitioner has not documented the proportion of the Beneficiary's duties that would be managerial or executive. The Petitioner lists the Beneficiary's duties as including both managerial and administrative or operational tasks, but does not quantify the time the Beneficiary spends on each of them. For this reason, we cannot determine whether the Beneficiary would be primarily performing the duties of a manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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's RFE response included IRS Forms W-2, Wage and Tax Statements, for eight employees, and a revised organizational chart identifying 10 employees. But the evidence at the time of filing indicated that the Beneficiary had four subordinates. The other employees were hired later. The Petitioner must establish eligibility as of the petition's filing date.<sup>14</sup> The company's subsequent growth cannot establish that the Petitioner was already eligible as of the filing date.

The Petitioner did not have any sales or marketing staff at the time of filing, and therefore it did not establish who would handle those non-qualifying functions. If the Beneficiary is ultimately responsible for sales and marketing, and had no subordinate sales or marketing staff, then it appears that the Beneficiary himself would have had to perform sales and marketing functions at the time of filing. The Petitioner reinforces this impression on appeal, stating that the Beneficiary would arrange for product demonstrations in order to secure municipal clients. This is a non-qualifying marketing function.

Federal courts have generally agreed that, in reviewing the relevance of the number of employees a Petitioner has, USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager."<sup>15</sup> Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner.<sup>16</sup>

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<sup>14</sup> See 8 C.F.R. § 103.2(b)(1). Subsequent developments cannot make a petition approvable if it was not approvable at the time of filing. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

<sup>15</sup> *Family, Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003).

<sup>16</sup> See, e.g., *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The Petitioner's growing organizational complexity may, over time, create a realistic need for a primarily managerial position within the organization, but the Petitioner has not shown that this need existed when it filed the petition.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers."<sup>17</sup> 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>18</sup> If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions.<sup>19</sup>

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.<sup>20</sup>

At the time of filing, one of the Beneficiary's three direct subordinates was a supervisor. The Petitioner did not show that any of the Beneficiary's subordinates were professionals or managers. His authority over one supervisor does not establish that he is primarily a personnel manager. Instead, the Petitioner contends that the Beneficiary is a function manager, by virtue of his control over the company.

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's managerial role arises not from supervising or controlling the work of a subordinate staff but instead from responsibility for managing an "essential function" within the organization.<sup>21</sup> The statute and regulations do not define the term "essential function." If a petitioner claims that a beneficiary will manage an essential function, that 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 the beneficiary's daily duties dedicated to managing the essential function.<sup>22</sup> 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.

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<sup>17</sup> See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii).

<sup>18</sup> Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 204.5(j)(4)(i).

<sup>19</sup> 8 C.F.R. § 204.5(j)(2).

<sup>20</sup> 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."

<sup>21</sup> See section 101(a)(44)(A)(ii) of the Act.

<sup>22</sup> See 8 C.F.R. § 204.5(j)(5).

As we have discussed above, the description of the Beneficiary's duties does not establish that he will work primarily as a function manager or otherwise perform primarily managerial duties.

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.<sup>23</sup> 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."<sup>24</sup>

The Petitioner states that the Beneficiary's "daily high-level responsibilities . . . are executed in the capacity of both manager and executive." The Petitioner submits a printout from the Department of Labor's O\*NET OnLine listing the tasks performed by chief executives.<sup>25</sup> To establish eligibility, it cannot suffice for the Petitioner to submit a general list of duties that compares favorably to a generic template (or tailor the list to match that template). Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge, otherwise meeting the definitions would simply be a matter of reiterating the regulations.<sup>26</sup>

The fact that the Beneficiary manages or directs 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.<sup>27</sup> While the Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, the position description alone is insufficient to establish that his actual duties, as of the date of filing, would be primarily managerial or executive in nature.

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

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<sup>23</sup> Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B).

<sup>24</sup> *Id.*

<sup>25</sup> Available at <http://www.onetonline.org/link/details/11-1011.00>

<sup>26</sup> *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41.

<sup>27</sup> Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B).

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

If the Beneficiary is already in the United States working for the foreign employer or its subsidiary or affiliate, then the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) requires the Petitioner to submit a statement from an authorized official of the petitioning United States employer which demonstrates that, in the three years preceding entry as a nonimmigrant, the Beneficiary was employed by the entity abroad for at least one year in a managerial or executive capacity.

**1. Evidence of Record**

In his introductory letter, [REDACTED] stated:

Prior to his admission to the United States in E-2 status in April 2009, [the Beneficiary] was employed at [REDACTED] from December 2005 until April 2009 in the managerial position of Technology Manager. . . .

. . . .

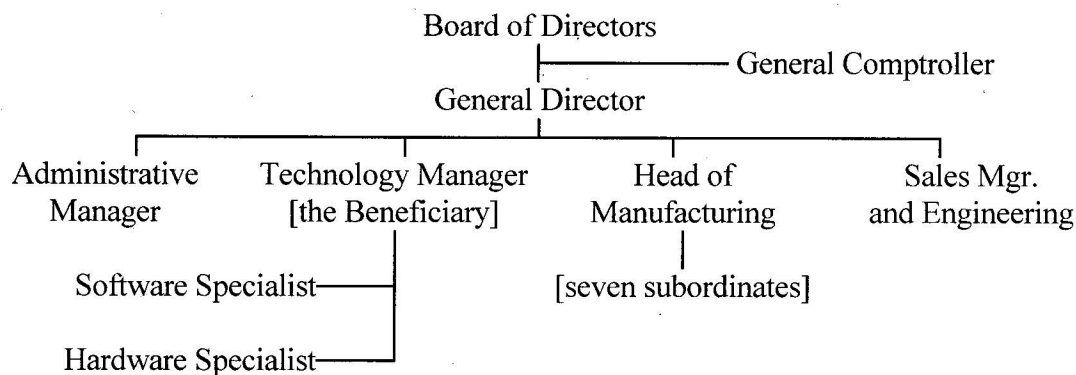
In December 2005, [the Beneficiary] joined [REDACTED] in [REDACTED] as Technology Manager, reporting directly to the General Director. . . . In this managerial position, [the Beneficiary] was responsible for:

1. Directly managing the day-to-day activities of the Software Engineering Specialist and the Hardware Engineering Specialist, and exercising discretion regarding hiring, firing and other personnel decisions (40%);
2. Exercising budgetary authority . . . for the purchase and maintenance of computer equipment and peripherals; (20%)
3. Managing all technology solutions in the areas of computers, networking, IP, cameras, routers, GPS, among others; (20%)
4. Analyzing requirements and developing technological solutions, manuals, training seminars and demonstrations for trade shows and expos; (15%)
5. Managing the training of interface solutions with field technicians. (5%)

[REDACTED] general director and corporate secretary of [REDACTED] repeated the same job description.

[REDACTED] organizational chart showed 15 positions below the board of directors. This excerpt shows the Beneficiary's place in the organization:

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In the RFE, the Director stated that the “generalized descriptions” of the Beneficiary’s duties were not sufficient to establish eligibility. The Director requested a more detailed job description from an authorized official of the foreign company. In response, counsel stated that the Beneficiary’s “managerial level duties” for [redacted] and its affiliates in Mexico included the following:

- (a) Part of the management team, responsible for policy formulation, preparation of plans, formulation of annual budgets, and drafting business strategies to realize short and long term goals of the umbrella organization.
- (b) Developed the computer systems of the four companies, drafted the training procedures and managed the training of all employees to provide them with well-rounded technical know-how on the automation processes.
- (c) Identified potential areas for market expansion of [licensed] technology and products. . . .
- (d) Directed the hiring of new employees, and trained staff on various aspects of business, systems designs, and computer technology with emphasis on the application of information technology and customer service.
- (e) Provided managerial oversight in the design and development of systems utilized for monitoring and surveillance of police cars in Mexico and IP cameras.
- (f) Designed and developed the smog-check remote control systems for the Mexican police authorities to track down violators of vehicular emission standards. Trained users on the proper administration, maintenance and management of the system.
- (g) Developed, implemented, and trained personnel engaged in accounting and finance operations of the four companies to automate the processing of . . . accounting reports.
- (h) Formulated systems and implemented the application of standard operating procedures to be followed in processing . . . business transactions. Provided managerial oversight and control measures to avoid duplication of work and errors.
- (i) Acted as the company’s representative in various local and international trade fairs and exhibits, industry associations, and liaised with concerned government

(b)(6)

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and private associations to maximize the organization's exposure in the industry and tap new markets.

██████████ stated that he owns four businesses in Mexico, and that the Beneficiary

played a very important role in this group of companies. . . . [D]uring the start-up of each firm, [the Beneficiary] had been involved in planning and goal setting. He formulated short and long term plans. . . . He is not only my Technical Advisor, but also the Officer who directs the implementation of the organizational objectives. . . . He has been responsible for hiring employees, designing the operations and managing performance, and takes active participation in all decision making processes.

The Petitioner submitted new translations of letters written in 2009 by officials of ██████████ other companies. ██████████ an attorney for ██████████

██████████ one of ██████████ affiliates, stated:

[F]rom 2007-2008 [the Beneficiary], Manager of Technology [at ██████████ was assigned to ██████████ as chief technology and operations officer; administrating, supervising and managing all business matters of the company. . . .

The ██████████ were manufactured by the ██████████ company under the technical supervision and technical direction of [the Beneficiary]. . . .

Thus, [the Beneficiary] in addition to providing a high level technical support for the sale of the ██████████ also was in charge of the field operations, both technically, administratively and for efficient use of the budget and staff serving government entities that purchased the ecological patrol cars.

The specific roles held by [the Beneficiary] amongst other things were:

- Administration and Management of the day to day activities of software and hardware engineering (under his direction at ██████████ for the adjustment and upgrading of software and hardware installed on the ██████████
- Manage at his discretion the hiring, firing and other personnel decisions
- Exercise the budget . . . .
- Management and administration of Care and analysis of customer requirements and the development of technology solution manuals, training seminars and demonstrations in expos and sale shows.

On his résumé, the Beneficiary described his work with ██████████ group of companies:

Acted as **Technology Manager** of the umbrella organization responsible for formulation, application, and support of new systems and procedures. . . . Trained and

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supervised employees of the four companies, acted as companies' representatives in various international and local trade fairs and exhibits on computer-related events as well as in . . . development activities to promote the services and applications of the [asphalt repair] machines. . . . Set-up and implemented technologies for networking, IP cameras, surveillance solutions and [redacted] for police authorities. Developed the software for mobile patrols smog check monitoring and remote controls of the technicians and police authorities. . . . Conducted research designed to determine the requirements for the successful organization of the [petitioning U.S. company]. Studied the technical licensing requirements and obtained the knowledge to take the licensure examination, and eventually obtained the License to operate in the United States [as an earthwork and paving contractor]. Spearheaded the set-up of [the petitioning company], responsible for market development, hiring of employees, purchasing of equipment and machineries for local use, and provided the technological and systems requirements for the successful start-up company.

The Beneficiary also stated that he "designed, developed and made the implementation of a[n] internet-remote monitoring surveillance solution to be mounted in the [redacted] [cars]."

The Director denied the petition in part because the Petitioner had not established that the Beneficiary had worked abroad in a managerial or executive capacity. The Director found the Beneficiary's job description lacking in detail, and stated that "it appears that the beneficiary was . . . primarily . . . a first-line supervisor of non-professional workers, the provider of actual services, or a combination of both."

On appeal, the Petitioner submits copies of previously submitted materials and maintains that the Beneficiary "was employed in a primarily managerial capacity" at [redacted] and its related companies.

## 2. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that the Beneficiary was employed in a managerial or executive capacity in Mexico.

The Petitioner states that "the detailed employment letter by [redacted] refutes the finding that the Beneficiary "primarily engaged in performing tasks necessary to produce a product or to provide services." The letters, however, are not consistent in their description of the Beneficiary's duties. In his letter submitted with the petition, [redacted] stated that the Beneficiary was [redacted] technology manager, with two subordinates. This statement is consistent with the organizational chart in the record.

Later, however, the Petitioner submitted letters from individuals in Mexico, indicating that the Beneficiary had worked for several related organizations in addition to [redacted]. The Beneficiary stated that he was the "**Technology Manager** of the umbrella organization" rather than of [redacted] alone, as previously claimed. The Beneficiary claimed to have "[t]rained and supervised employees of the four



companies,” whereas the previously submitted organizational chart identified only two subordinates (a software specialist and a hardware specialist), about whom the Petitioner has provided no further information.

Because the Petitioner has provided multiple different versions of the Beneficiary’s foreign job description, the Petitioner has not established the actual nature of the Beneficiary’s former position or positions in Mexico.

Furthermore, in the “umbrella organization” version, the Petitioner and company officials in Mexico indicated that the Beneficiary developed software, offered sales support, and performed other non-qualifying operational duties.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary was employed in a managerial or executive capacity abroad.

## V. QUALIFYING RELATIONSHIP

The Director denied the petition based in part 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 the beneficiary’s foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a “parent and subsidiary” or as “affiliates.”<sup>28</sup>

The pertinent regulations at 8 C.F.R. § 204.5(j)(2) define the relevant terms. Generally, the term “affiliate” means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual; [or]
- (B) 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. . . .

The same regulation defines a “subsidiary” as:

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.

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<sup>28</sup> See generally section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(3)(i)(C).

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A. Evidence of Record

In his introductory letter, [REDACTED] stated: [REDACTED] and [the Petitioner] are related through common ownership by the undersigned President and CEO of [the petitioning company],” and that [REDACTED] . . . is owned 50% by the undersigned and 50% by [REDACTED]”

The Petitioner submitted copies of several documents relating to the petitioning corporation, all dated December 6, 2011:

- Articles of incorporation, authorizing the Petitioner to issue one million shares of common stock
- Action of the Directors by Unanimous Written Consent in Lieu of Organizational Meeting, issuing 500 shares each to [REDACTED] and [REDACTED]
- Stock certificate #1, showing that [REDACTED] owns 500 shares
- Stock certificate #2, showing that [REDACTED] owns 500 shares

The Petitioner submitted a summary translation of [REDACTED] articles of incorporation, showing the issuance of 250 shares to [REDACTED] and 250 shares to [REDACTED]

The Director denied the petition, finding that the Petitioner and [REDACTED] are not owned and controlled by the same individual or group of individuals.<sup>29</sup>

On appeal, the Petitioner submits a copy of the minutes of an annual meeting of the petitioning company, dated January 30, 2015, reporting that [REDACTED] [made the] decision to transfer his 50% Membership interest [i]n the corporation to [REDACTED] effective immediately” and “without consideration” (i.e., without payment).

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 Beneficiary’s foreign employer.

The regulation and case law confirm that ownership and control are the factors that determine whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification.<sup>30</sup> 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.

<sup>29</sup> Before denying the petition, the Director issued a request for evidence (RFE), but did not raise the issue of the qualifying relationship between the Petitioner and [REDACTED] in that notice.

<sup>30</sup> 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).

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The Director's decision appeared to be based on a finding that the Petitioner and the foreign entity do not have common ownership because the Director determined that [REDACTED] and [REDACTED] are not the same person. The Petitioner has submitted evidence on appeal establishing that both names refer to the same individual, and the record shows that this individual owned 50% of both the petitioning entity and [REDACTED] at the time of filing, and that he later acquired full ownership of the petitioning company.

However, while the evidence indicates that the Petitioner has an affiliate relationship with [REDACTED] we cannot find that [REDACTED] was the Beneficiary's employer for at least one year during the relevant three-year time period preceding his admission as an E-2 nonimmigrant. We note that the Petitioner stated in response to the RFE and on appeal that the Beneficiary also worked for [REDACTED] of which [REDACTED] owns only 38%, and other Mexican companies under the same "umbrella" for which no ownership information has been provided. The assertion that [REDACTED] and these other companies fall under the same "umbrella" does not establish a qualifying relationship between all umbrella entities, or between each foreign entity and the petitioning U.S. employer. As the record does not contain sufficient information regarding the specific dates and nature of the Beneficiary's employment with the various Mexican companies claimed to be under the same "umbrella," we cannot determine whether the Beneficiary had a full year of employment with a qualifying foreign entity prior to his transfer to the United States in E-2 status.

Based on the deficiencies discussed above, the Petitioner has not established that it has a qualifying relationship with the Beneficiary's multiple foreign employers.

## VI. ONE YEAR OF EMPLOYMENT ABROAD

The regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) states that the Petitioner must establish that "[i]f the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity."

Although not addressed by the Director, we note that U.S. Department of State records indicate that the Beneficiary was issued an E-2 visa to work for [REDACTED] and not for the petitioning company. The statutory provisions at section 203(b)(1)(C) of the Act make it clear that more than two years cannot have elapsed between the Beneficiary's employment with a qualifying entity abroad and the Beneficiary's assumption of a nonimmigrant status that would permit him to work for the Petitioner or a related employer in the United States. Therefore, the Petitioner would need to establish that it has a qualifying relationship the Beneficiary's E-2 employer.

At the time the Beneficiary applied for his E-2 visa in July 2009, he also indicated that he had been employed by [REDACTED] not [REDACTED] for two years. While we are not making an adverse determination based on this information obtained from the U.S. Department of State, the Petitioner may need to address the Beneficiary's statements regarding his foreign employment, and

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provide evidence of the ownership of [REDACTED] in any future petition filed by the Petitioner on his behalf.

## VII. CONCLUSION

The petition will remain denied for the above stated 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 entirely with the petitioner.<sup>31</sup> Here, that burden has not been met.

**ORDER:** The motion to reopen is granted in part and denied in part.

**FURTHER ORDER:** The motion to reconsider is denied.

Cite as *Matter of J-USA, Inc.*, ID# 18392 (AAO Sept. 8, 2016)

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<sup>31</sup> Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013).