U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-L- LLC

DATE: SEPT. 12, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, which imports and sells leather upholstery and flooring, seeks to permanently employ the Beneficiary as its general manager under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 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, Texas Service Center, denied the petition. The Director concluded that the evidence of record did not establish that: (1) the Beneficiary will be employed in the United States in an executive capacity; and (2) the Beneficiary has been employed abroad in an executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by misinterpreting the statute and regulations, and by overlooking a previously submitted document.

Upon *de novo* review, we will dismiss the appeal.

I. 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:
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> (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
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> (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.

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that: (1) the Beneficiary will be employed in an executive capacity; and (2) the Beneficiary has been employed abroad in an executive capacity. The Petitioner specifies that the Beneficiary will be and has been employed in an executive capacity, rather than a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary will be and has been employed in an executive capacity.

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

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

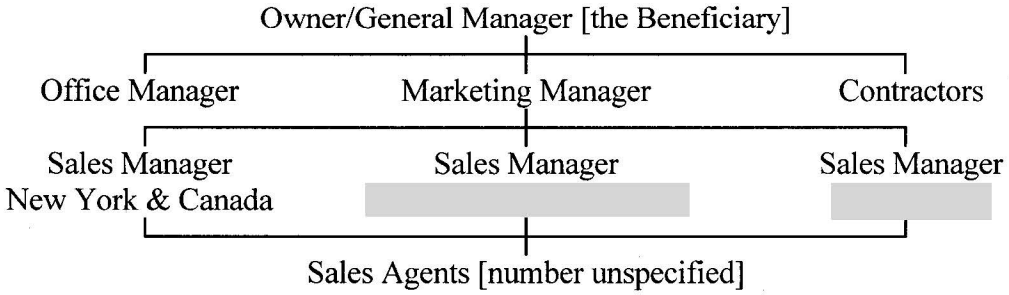
If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.[1]

A. U.S. Employment in an 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 December 8, 2014. On the Form I-140, the Petitioner indicated that it had five current employees in the United States. The Beneficiary is the sole member of the petitioning company.[2] The Petitioner's organizational chart showed the following structure:



[1] *See* section 101(a)(44)(C) of the Act.

[2] A second individual briefly held a 10% interest in the company during the last three months of 2012, but at all other times, the Beneficiary has been the sole owner and member of the petitioning limited liability company.

The Petitioner submitted copies of six IRS Forms W-2, Wage and Tax Statements for 2013, including the office manager, marketing manager, and sales managers named on the organizational chart and a sixth individual about whom the Petitioner provided no further information. The office manager earned $21,097.41, and the marketing manager earned $11,538.45. The remaining employees received less than $5000 each.

A payroll summary dated July 24, 2014, named seven employees, including the office manager, marketing manager, sales managers, and two not named on the organizational chart. Copies of IRS Forms 941, Employer's Quarterly Federal Tax Returns, consistently showed five employees in the fourth quarter of 2013 and the first half of 2014. The payroll summary indicated that the Petitioner's marketing manager earned $34,615.35 between January 1 and July 24, 2014; every other employee received between $2000 and $13,500 during the same period. The salaries and hours reported on the tax and payroll documents show that the Petitioner's three sales managers are part-time employees.

The Petitioner submitted the following documentation regarding the qualifications and credentials of four of the Beneficiary's subordinates:

SALES MANAGER, N.Y. & CANADA

- A certificate of completion for "Understanding the Basics of Ceramic Tile Online Course"

SALES MANAGER,

- A résumé that identified the individual as an upholsterer, and did not mention the petitioning company

SALES MANAGER,

- A résumé that identified the individual as the founder and operator of "a boutique concierge business," and did not mention the petitioning company

OFFICE MANAGER

- Translated diplomas showing bachelor's and master's degrees in music teaching and conducting
- A résumé that listed the Petitioner as the individual's current employer and indicated that the individual had "10 + years experience in performing administrative/clerical functions," "customer service," and "sales"

The Petitioner's initial submission did not include any description of the Beneficiary's specific job duties. The Director issued a request for evidence (RFE), asking the Petitioner to submit evidence, including a statement from the Petitioner, to establish that the Beneficiary will primarily perform executive duties for the Petitioner.

In response, the Petitioner submitted a letter from the Beneficiary, writing in his capacity as the Petitioner's owner and general manager. The Beneficiary listed the following responsibilities:

- Increase management's effectiveness by recruiting, selecting, orienting, training, coaching, counseling, and disciplining sales managers . . . ; communicating

values, strategies, and objectives; assigning accountabilities; planning, monitoring, and appraising job results; developing incentives; developing a climate for offering information and opinions; providing educational opportunities.

- Develop strategic plan by studying technological and financial opportunities; presenting assumptions; recommending objectives.
- Accomplish subsidiary objectives by establishing plans, budgets, and results measurements; allocating resources; reviewing progress.
- Coordinate efforts by establishing procurement, production, marketing, field and technical services policies and practices.
- Build company image by collaborating with customers, government, community organizations, and employees; enforcing ethical business practices.
- Maintain quality service by establishing and enforcing organization standards.
- Maintain professional and technical knowledge by attending educational workshops; reviewing professional publications; establishing personal networks; benchmarking state-of-the-art practices; participating in professional societies.
- Contribute to team effort by accomplishing related results as needed.

A daily schedule consisted mostly of meetings, along with "Analyzing Company's paper and looking over new marketing brochures" for 45 minutes, and "Evaluating details of potential customers" for an hour.

The Petitioner submitted a breakdown of the percentage of time that the Beneficiary devoted to various activities:

Increasing Management's Effectiveness	25%
Developing Strategic Plan	30%
Building Company Image	15%
Developing Professional Talent	10%
Coordinate Efforts	15%
Monitoring and Appraising job results	5%

Counsel for the Petitioner provided a two-page breakdown of the Beneficiary's "core responsibilities within the Petitioner's organization" into four categories, which match the four parts of the statutory definition of executive capacity.

The Beneficiary stated that the company "hired a staff [of] 5 employees," their names and titles corresponding with those shown on the organizational chart submitted previously. A separate, unsigned statement repeated this list, adding an unspecified number of unnamed "Sales Agents."

The Director denied the petition, concluding, in part, that the Petitioner did not establish that the Beneficiary will be employed in an executive capacity in the United States. In denying the petition, the Director found that the "the descriptions [of the Beneficiary's duties] met the plain language of

the first three criteria" but did not show that "he received any type of guidance from a higher level" as required by the fourth criterion.[3]

On appeal, the Petitioner states that the Beneficiary is the sole owner of the petitioning company and its highest-ranking official, and therefore there are no higher-level officials to whom he must report. The Petitioner states that the fourth element of the statutory definition of executive capacity "is a limitation of supervision or direction, not a requirement that an executive 'must' receive such 'general supervision or direction.'" The Petitioner states that the Director's reading of the definition would disqualify top-tier executives who do not report to any higher authority.

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 an executive capacity in the United States.

a. Employer-Employee Relationship

As a threshold matter, we find that the Director's four-prong analysis of the definition of executive capacity, while relevant to the issue of the Petitioner's eligibility, is secondary to a preliminary determination of whether the Petitioner meets the more basic statutory requirement that only individuals who were "employed" abroad and are coming to the United States "to continue to render services to the same employer or to an affiliate or subsidiary thereof" will merit classification as a multinational manager or executive.[4] Also, only an "employer desiring and intending to employ within the United States an alien" may file an immigrant petition seeking classification under section 203(b)(1)(C) of the Act.[5] This is in contrast to provisions in the Act, such as section 204(a)(1)(E) and (H), which permit the intending immigrant to self-petition.[6]

Further, the term "executive capacity" specifically applies solely to "the employee" of the "United States employer" filing the petition on behalf of a beneficiary.[7] Only upon establishing that the Petitioner and the Beneficiary meet this basic criteria, where the Petitioner is the employer and the Beneficiary is the employee on whose behalf the Petitioner files the Form I-140, would there be a need to conduct a further analysis of the given facts within the framework of the four-prong definition of executive capacity. If it is determined that an employer-employee relationship does not exist between

[3] The fourth criterion reads: "[r]eceives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization."
[4] Section 203(b)(1)(C) of the Act.
[5] Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F).
[6] Of particular note, Congress enacted sections 203(b)(5) and 204(a)(1)(H) of the Act to permit an alien entrepreneur "engaging in a new commercial enterprise" to immigrate to the United States provided certain requirements were met, including employment creation.
[7] *See* section 101(a)(44)(B) of the Act; 8 C.F.R. § 204.5(j)(1), (2).

the Petitioner and the Beneficiary, this deficiency, by itself, would serve as a sufficient basis for denying the petition.

Therefore, applying the above reasoning to the matter at hand, the first step in our analysis will be to determine whether the Petitioner and the Beneficiary have an employer-employee relationship. As indicated above, section 203(b)(1)(C) of the Act requires the Beneficiary to have been "employed" abroad and to be coming to the United States for the purpose of rendering his services to the same or a related "employer" in the United States in a managerial or executive capacity.[8] The statute defines both managerial and executive capacity as an assignment within an organization in which an "employee" performs certain enumerated qualifying duties.[9] 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."[10] 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."[11]

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*."[12]

In *Clackamas*, the Supreme Court articulated the following factors to be weighed in determining whether an individual with an ownership interest is an employee:

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[8] We note there is existing precedent case law, namely *Matter of Allen Gee, Inc.*, 17 I&N Dec. 296 (Comm'r 1979), and *Matter of Aphrodite*, 17 I&N Dec. 530 (Reg'l Comm'r 1980), that is relevant to the issue discussed here in this matter. In *Matter of Allen Gee, Inc.*, the Regional Commissioner determined that, as the petitioning corporation "is a legal entity distinct from its sole stockholder," it may "petition for the beneficiary's services." Similarly, in *Matter of Aphrodite*, 17 I&N Dec. at 531, the Commissioner focused on the corporation's separate legal existence from that of its shareholder and pointed out that the term "employee" was not used in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). However, both decisions were issued prior to the Immigration Act of 1990 ("IMMACT90"), which codified the definitions for managerial and executive capacity. *See* Pub. L. No. 101-649, § 123, 104 Stat. 4978, § 123 (1990). It is critical to note that both definitions in the Act now incorporate the term "employee" in referring to the beneficiary as one who assumes an assignment with an organization in a managerial or executive capacity. *Id.*; section 101(a)(44) of the Act. Therefore, while the holdings in *Matter of Allen Gee, Inc.* and *Matter of Aphrodite* were in line with the statutory provisions that were in effect at the time those decisions were issued, the changes that resulted from the enactment of IMMACT 90 indicate that our current contemplation of the term "employee" within the scope of an employer-employee relationship between the Petitioner and the Beneficiary is inherent to determining whether the Petitioner meets the current eligibility criteria. That said, these prior precedent decisions remain instructive as to whether a petitioner may seek classification for a beneficiary who has a substantial ownership interest in the organization; they were only superseded by statute to the extent they held or implied that such a beneficiary need not be an "employee" of the petitioning organization to qualify as a multinational manager or executive.

[9] *See* section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44).

[10] *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.*)).

[11] *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).

[12] *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)) (emphasis added).

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.[13]

These factors are not exhaustive.[14] Not all of the listed criteria need be met; however, the fact finder must weigh its assessment of the 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 relationship.[15] "[T]he answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'"[16]

As indicated above, it is critical to consider not only the factor of ownership, but also the factor of control when making this determination, as neither factor, by itself is sufficient to determine whether an employer-employee relationship exists between any given petitioner and beneficiary.

After reviewing these factors of control under the common law of agency as articulated in *Darden* and *Clackamas* and applying them to the evidence presented in this matter, we find that the Petitioner has not established that it will be a "United States employer" having an employer-employee relationship with the Beneficiary as an "employee" who would be employed by the Petitioner in an executive capacity. According to the Petitioner's documentation, the Beneficiary is the sole member of the petitioning limited liability company, and the Petitioner acknowledges that the Beneficiary is the "top-tier executive" who does not report to any higher authority. We note also that there is no evidence that the Petitioner has paid the Beneficiary a salary. Instead, the Petitioner has stated that the Beneficiary received distributions of partnership income.

The Petitioner maintains that the Beneficiary both owns and controls the petitioning entity wherein he will assume a role as the Petitioner's top-most official and will not be subordinate to or controlled by

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[13] *Clackamas*, 538 U.S. at 449-450 (deferring to the factors enumerated in the Equal Employment Opportunity Commission's *Compliance Manual* § 605:0009 (EEOC 2000) (currently cited as § 2-III(A)(1)(d)) for determining "whether [a partner, officer, member of a board of directors, or major shareholder] acts independently and participates in managing the organization, or whether the individual is subject to the organization's control," and accordingly whether the individual qualifies as an employee).

[14] *Clackamas*, 538 U.S. at 450 n.10 (citing *Darden*, 503 U.S. at 324).

[15] *See id.* at 448-449.

[16] *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

any other individual(s) or managing board of directors. There is no evidence that anyone other than the Beneficiary himself is in a position to exercise any control over the work he will perform or that the Beneficiary was hired or is subject to firing by another individual or board. Although it appears that the Petitioner may intend for the Beneficiary to be an employee, the Beneficiary does not report to any higher authority. Further and absent evidence to the contrary, the beneficiary will greatly influence the organization as the final and ultimate decision maker and will be the only person sharing in the profits, losses, and liabilities of the Petitioner. As such and for all practical purposes, the record does not establish that the Beneficiary, who will control the organization, set the rules governing his work, and share in all profits and losses, will be an "employee" of the Petitioner.

For these reasons, we conclude that the Beneficiary is not an employee and does not have an employer-employee relationship with the Petitioner. Therefore, the Petitioner has not established that the Beneficiary meets the basic statutory criteria discussed at sections 101(a)(44) and 203(b)(1)(C) of the Act. Therefore, the Petitioner has not established that the Beneficiary is eligible for the immigrant classification it seeks on his behalf.

b. Analysis of Executive Capacity Criteria

Notwithstanding the above conclusion, which effectively bars the Beneficiary from further consideration under the immigrant visa classification as a multinational executive given the facts as they existed at the time of filing,[17] we will address the Director's analysis of the four-prong statutory definition of executive capacity. Specifically, we will address the Director's finding that the petition must be denied because the evidence of record did not satisfy the fourth prong of the definition, which requires that the Beneficiary, in his capacity as the Petitioner's employee, receive only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.[18]

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.[19] 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 the owner or sole "executive" or "managerial" employee. A beneficiary must also exercise "wide latitude

[17] The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). This provision does not preclude or prejudice the Petitioner from refiling another petition on behalf of the Beneficiary if the facts change such that eligibility is established by a preponderance of the evidence.

[18] *See* section 101(a)(44)(B)(iv) of the Act.

[19] *See* section 101(a)(44)(B) of the Act.

in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization."[20]

After reviewing the record and the evidence pertaining to the Beneficiary's proposed position, the Director determined that the Beneficiary meets the first three prongs of the statutory definition of executive capacity in that he (1) directs the management of the company, (2) establishes the goals and policies of the company, and (3) exercises wide latitude in discretionary decision-making for the company. In reviewing the Director's underlying analysis, it appears that the primary basis for these findings was the Beneficiary's top-most leadership role as head of the petitioning organization. The Director noted that the Beneficiary's proposed duties "generally...met the plain language of the first three criteria," but noted that position descriptions for the Beneficiary's claimed subordinate employees were note provided. There is no indication that the Director considered the complexity of the Petitioner's organizational hierarchy prior to determining that the Beneficiary would allocate his time primarily to executive job duties that involve directing the management of the organization, establishing the organization's goals and policies, or making discretionary business decisions on a daily basis.

While we agree that the Beneficiary's ownership and control of the petitioning entity and his top-most placement within the Petitioner's organizational hierarchy make it likely that he will direct the management of the organization, establish its goals and policies, and have the authority to make discretionary business decisions at all times, the record does not establish that the underlying job duties that the Beneficiary has and would continue to perform on a daily basis will be primarily executive in nature. As stated above, the Beneficiary will not be deemed an executive based solely on his executive title or his authority to "direct" the enterprise as its owner or sole "executive" or "manager." Instead, the Petitioner must establish that the daily duties the Beneficiary will primarily perform will be of an executive capacity as defined by the Act and its implementing regulations.

When examining the executive capacity of a given beneficiary, we must consider the petitioner's description of the job duties.[21] 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 an executive capacity.[22]

The list of the Beneficiary's proposed responsibilities is vague, with elements that do not appear to relate to the Petitioner or its business activities. The list referred to "collaborating with . . . government [and] community organizations," and "attending educational workshops; reviewing professional publications . . . [and] participating in professional societies." The record does not show that the Beneficiary has performed any of these activities, or that the importation and sale of leather goods would require him to perform them in the future. This list of duties also does not show the proportion of time that the Beneficiary devotes to each task.

[20] *Id.*
[21] *See* 8 C.F.R. § 204.5(j)(5).
[22] *Id.*

The percentage breakdown is, likewise, very general, containing no specifics whatsoever to explain, for example, what tasks the Beneficiary performs to increase management's effectiveness, build the company's image, or develop professional talent. The list does not show how subordinate employees support the Beneficiary in performing the general duties listed. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations.[23] The actual duties themselves reveal the true nature of the employment.[24] Therefore, reciting a beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties.

Counsel's two-page breakdown, too long to reproduce here in full, is longer than the description that the Beneficiary provided, but does not contain many more specific details. The breakdown referred to weekly meetings "with managers, professionals, and staff," but the Petitioner has not established that it has an organizational hierarchy sufficient to support the Beneficiary in a primarily executive role. Counsel's statement also indicated that the Beneficiary delegated certain functions to "subordinate executives," but the record does not show that the Petitioner employs any subordinate executives.

Also, the unsupported assertions of counsel do not constitute evidence.[25] Counsel cited no evidence to support counsel's version of the job description except for a list of the distributions that the Beneficiary received as owner of the company. But distributions only establish ownership, not that the owner serves in a primarily executive capacity.

We also consider the proposed position in light of the nature of the Petitioner's business, its organizational structure, and the availability of staff to carry out the Petitioner's daily operational tasks. 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."[26] 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.[27]

Noting the Petitioner's "limited number of employees," the Director concluded that the Beneficiary would spend more time performing non-qualifying operational or administrative tasks than executive duties. The Petitioner claims to employ four managers – three regional sales managers and a marketing

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[23] *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).
[24] *Id.*
[25] *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).
[26] *Family, Inc. v. U.S. Citizenship and Immigration Services*, 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).
[27] *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

manager. The Petitioner has not provided job descriptions for these individuals, and none of them has any identified or documented subordinates. The word "sales agents" appears in the record, but the Petitioner has provided no further information about who they are, how many there are, or what they do.

Because the Petitioner has not established the functions performed by the Beneficiary's subordinates, the record does not show that those employees will relieve the Beneficiary from having to perform primarily administrative and/or operational duties.

Furthermore, the salaries and work hours reported on the payroll summaries indicate that the sales managers work part-time. Two sales managers each worked 364 hours from January 1st through July 24, 2014; a third worked 260 hours. The Petitioner has not explained who performs their duties when they are not present. With no documented sales staff and no full-time sales managers, at least some of the Petitioner's sales activity would appear to devolve onto the Beneficiary himself, which would reduce the amount of time available for him to perform qualifying executive (or managerial) functions. Also, the Petitioner has not shown that, with only one or two evident full-time subordinates, the company has the organizational complexity to realistically require executive-level leadership.

In light of the numerous documentary deficiencies discussed above, we disagree with the Director's finding that the Petitioner meets the first three prongs of the statutory definition of executive capacity, as we find that the record does not support the conclusion that the Beneficiary would allocate his time primarily to (1) directing the management of the company, (2) establishing the goals and policies of the company, and (3) exercising wide latitude in discretionary decision-making for the company.

Despite finding that the Director erred in his conclusion with regard to the first three prongs of the definition of executive capacity, we agree with the Director's finding and analysis with regard to the fourth prong of the definition, which requires that the Beneficiary receive only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization. Specifically, the Director pointed out that based on the evidence of record, there is no indication that the Beneficiary would receive any guidance from a higher level. In other words, the Beneficiary will not receive supervision or direction from anyone.

Taken out of context, a finding that the Beneficiary will receive no supervision or direction may appear on its face to satisfy this statutory requirement at section 101(a)(44)(B)(iv) of the Act. But while the fourth prong indicates that supervision over the Beneficiary should be limited, such that the Beneficiary can maintain the requisite level of authority to meet the criteria of the first three prongs, inherent to this fourth criterion is also a requirement that the Beneficiary, as an "employee," will receive some degree of supervision or direction from higher level executives, a board of directors, or stockholders of the organization. Therefore, as the Beneficiary does not report to any higher authority and is not subject to supervision from another individual or board of directors, the Petitioner has not established that it has satisfied section 101(a)(44)(B)(iv) of the Act.[28]

[28] This conclusion is further supported by our primary finding above that the Petitioner does not have an employer-employee relationship with the Beneficiary and therefore does not meet the basic statutory criterion that the Beneficiary

For the reasons discussed above, the Petitioner has not established that the Beneficiary will be employed in an executive capacity in the United States.

B. Foreign Employment in an 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

The Petitioner asserts that the Beneficiary owns 100% of the petitioning U.S. company; 99% of in Italy; and 100% of also in Italy. in turn, owns 99% of in Russia. Although the Beneficiary resided in Italy throughout the three years preceding his entry, and claims to own three Italian companies, the record contains no evidence regarding his work as a manager or executive for any company in Italy. Instead, the Petitioner has focused on in Russia.

The Petitioner did not document the structure of the Italian companies or show that they have any employees. The company in Russia is larger and more complex than the petitioning U.S. employer. The Petitioner listed the following staff at

- President-General Manager (the Beneficiary)
- Director-Vice President
- Finance Director
- Accountant
- Assistant Accountant
- Quality Control Engineer
- Logistics Manager
- Warehouse Manager
- Warehouse Clerk/Porter
- Sales Director
- Three Area Sales Managers
- Storekeeper

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be an "employee" of the petitioning entity. *See* section 101(a)(44)(A) and (B); 8 C.F.R. § 204.5(j)(2) (defining executive capacity as an assignment in which an "employee" primarily performs certain duties).

[29] The record contains several variant spellings of such as particularly in translated documents.

At the same time the Petitioner filed its petition, the Beneficiary filed Form I-485, Application to Register Permanent Residence or Adjust Status. That application package included Form G-325A, Biographic Information. On the latter form, when asked to list his employment over the past five years, the Beneficiary stated that he had worked for [redacted] from October 1983 to April 2003. The Beneficiary listed no other foreign employment on Form G-325A. Also on Form G-325A, the Beneficiary stated that he lived at the same address in Italy from 1975 until he moved to the United States in 2012.

In the RFE, the Director asked for "a definitive statement from the foreign company which describes the beneficiary's job duties." In response, the Petitioner submitted a translation of an Italian document, identifying the Beneficiary as the "sole director" of [redacted]

The Petitioner also submitted the Beneficiary's description of his former job at [redacted] This description is essentially identical to the description he provided for his present work at the petitioning company.

The Director also requested evidence to show the dates of the Beneficiary's employment abroad. In response, counsel stated that the Beneficiary "is 99% Owner of [redacted] in Russia and served the company . . . as President and General Manager from September 12, 2010, until September 12, 2012." To support this assertion, the Petitioner submitted a translated Russian letter, initially described as a "[d]ocument issued by the [redacted] attesting that [the Beneficiary] was employed until September 2012."

The translation reads, in part:

[redacted]

. . .

26 October 2012

Reference

This reference is given to [the Beneficiary] and confirms that he works as Director of company [redacted] since 12 september 2010.

The income of [the Beneficiary] amounts to
$198500 in 2010
$235050 in 2011
$270000 in 2012 till September

General Director

[redacted]

The Director denied the petition, in part because the Petitioner had not established the dates of the Beneficiary's employment abroad. The Director noted counsel's statement that the Beneficiary worked from September 12, 2010, to September 12, 2012, but the Director found that "no other evidence could be located to support this claim." The Director noted that "[t]he beneficiary's G-325a . . . indicated his last foreign employment was from October, 1983 to April, 2003."

On appeal, the Petitioner submits a new translation of letter. The previous translation omitted the letterhead identifying its source.

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 abroad in an executive capacity.

On appeal, counsel states: "The Director may not have understood where letter was coming from since it was not from the Russian affiliated company but was from an independent The letter is not from an authorized official of the petitioning employer or The Petitioner did not establish authority to attest to the Beneficiary's past employment or explain how the letter meets the evidentiary requirements at 8 C.F.R. § 204.5(j)(3)(i).[30]

Furthermore, although counsel had stated that the letter attested to the Beneficiary's employment "from September 12, 2010, until September 12, 2012," the letter from does not stated that the Beneficiary left the company on September 12, 2012. Rather, the letter (or at least its English translation) refers to the Beneficiary's employment at in the present tense, and reports his 2012 earnings "till September," which was the last full month before the date of the letter (October 26, 2012). The Beneficiary, however, arrived in the United States in July 2012, and has not directly claimed to have continued working for Italtex after that date.

The Petitioner also submits translated Russian "certificates of personal income" for 2011 and 2012, indicating that the Beneficiary worked for Italtex. The certificates also, however, show the Beneficiary's "place of residence in the Russian Federation" as an address on in As noted above, the Beneficiary claimed to have lived in Italy from 1975 to 2012.

We cannot ignore that the Beneficiary did not mention or its parent entity, as former employers on Form G-325. Instead, he named his former employer as about which the Petitioner has provided minimal information.

[30] *See also* 8 C.F.R. § 204.5(g)(1), which requires evidence relating to qualifying experience to be in the form of letter(s) from current or former employer(s), and to include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary.

The Beneficiary's own description of his duties at is the same as his description of his work in the United States, and therefore it is deficient for the same reasons. Further, as explained above, the evidence leads to the same conclusion that the Beneficiary was not an "employee."

The Beneficiary stated that his daily work schedule at Italtex included "[a]ttending a meeting with Managers." and its workers are in Russia, but the Beneficiary does not claim ever to have lived or worked in Russia.

The record establishes the Beneficiary's ownership of two Italian entities, but the evidence of record is not sufficient to show that he primarily served in an executive capacity for the Russian company for at least one year during the three years preceding his 2012 entry into the United States.

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.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner.[31] Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of M-L- LLC*, ID# 18316 (AAO Sept. 12, 2016)

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