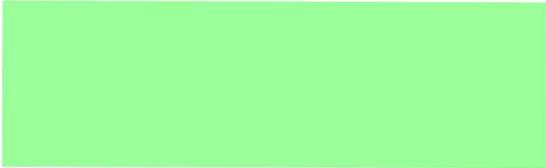
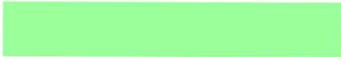


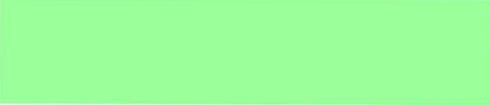


U.S. Citizenship  
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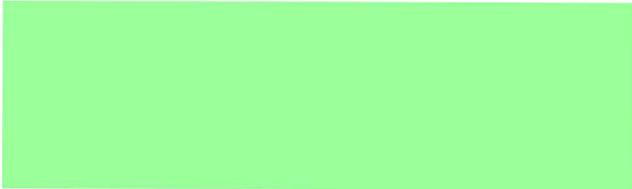


DATE: **FEB 19 2014** OFFICE: VERMONT SERVICE CENTER 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker under Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant visa petition seeking to extend the beneficiary's employment as an L-1A intracompany transferee employed pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act ("the Act"), U.S.C. § 1101(a)(15)(L). The petitioner, a Texas corporation, operates a project management training and consultancy company and seeks to extend the beneficiary's employment as its president/chief executive officer for an additional three years.

The director denied the petition, finding that the petitioner failed to establish that: (1) it had the required qualifying relationship with the claimed foreign parent; (2) it had secured sufficient physical premises to house the U.S. operation; (3) it was financially viable and had the ability to pay the beneficiary's salary; and (4) the beneficiary had been and would be employed in a primarily managerial or executive capacity. On appeal, counsel for the petitioner asserts that the director's decision was in error, noting that the director might have overlooked or misinterpreted the evidence of record. In support of this contention, counsel submits a brief and additional evidence.

#### I. The Law

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior

education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

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

- (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
  - (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
  - (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

\* \* \*

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

- (J) *Branch* means an operating division or office of the same organization housed in a different location.
- (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

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

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

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

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

**II. The Issues on Appeal**

**A. Qualifying Relationship**

The first issue before the AAO is whether the petitioner established that the beneficiary's foreign employer and the U.S. company are still qualifying organizations. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one organization with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner claims to be the subsidiary of [REDACTED] based in the United Kingdom. In support of the extension petition, which was filed on November 21, 2012, the petitioner submitted a copy of its Certificate of Formation dated July 9, 2009, which authorized the issuance of 1,000 shares of common stock at \$0.01 per share. The petitioner also submitted a copy of its stock ledger and stock certificate number one, demonstrating that [REDACTED] purchased all 1,000 shares of the petitioner's common stock for \$10.00.

The petitioner also submitted a document entitled "Business Summary and Overview," dated October 2012. On Page 3, the petitioner claimed that, contrary to the corporate documentation discussed above, the petitioner was owned as follows:

[REDACTED]	80%
[REDACTED]	20%

On November 30, 2012, the director issued a request for evidence (RFE). The director requested that the petitioner submit additional documentation to confirm that a qualifying relationship still existed between the petitioner and the beneficiary's foreign employer. In response to the RFE, the petitioner confirmed that the above breakdown of ownership is correct. Specifically, the petitioner claimed that it authorized the issuance and sale of 250 additional shares of common stock to the foreign entity in 2011 at the price of \$0.01 per share, who in turn sold those 250 shares to [REDACTED] for \$45,000.00. The petitioner submitted several documents in support of this contention. Specifically, the petitioner submitted: (1) a chart demonstrating the 80/20 ownership ratio discussed above; (2) a letter from the petitioner to the foreign entity, dated February 1, 2011, offering the foreign entity the opportunity to purchase an additional 250 shares of common stock in the petitioner at the price of \$0.01 per share; (3) a Stock Purchase Agreement dated March 3, 2011, in which [REDACTED] agrees to purchase 250 shares of stock from the foreign entity for \$45,000.00. Ownership of the petitioner is therefore as follows:

[REDACTED]	1,000 shares	80%
[REDACTED]	250 shares	20%

Upon review, counsel's assertions are persuasive. The petitioner has established that the U.S. company is a majority-owned subsidiary of the beneficiary's foreign employer, [REDACTED]

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of more than 50 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). The foreign entity's 80 percent ownership gives it de jure control over the United States company.

The evidence of record is sufficient to establish a parent-subsidary relationship based on majority ownership. Based on the foregoing, the director's determination that the U.S. and foreign entities do not have a qualifying relationship will be withdrawn.

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

Next, the AAO will address the question of whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 18, 2012 seeking to extend the beneficiary's employment as its president and chief executive officer. In a letter of support accompanying the petition, the petitioner indicated that it was "one of the leading specialist providers of Project Management Learning and development solutions." The petitioner also indicated that the company was established in 2009, and indicated on the Form I-129 that it currently had two employees.

Regarding the duties of the beneficiary, the petitioner claimed that it requires the executive and managerial services of the beneficiary in the position of Chief Executive Officer (CEO) and president to oversee its U.S. operations. Specifically, the petitioner stated:

The primary function of the Chief Executive Officer (CEO) is to plan, direct, manage, monitor, coordinate, control and continuously evaluate the operations of the business. The position encompasses a wide range of responsibilities, aiming to develop and put in place strategic operating plans and budgets for each of the business units including all financial/accounting areas, as well as all administrative areas of the company. The person in this position oversees long and short term financial planning, budget development and performance analysis in order to maximize the company's financial position and viability by providing leadership and direction to the executive post.

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<sup>1</sup> On appeal, counsel for the petitioner asserts that 1,500 shares of common stock, not 1,250 shares, are outstanding, with 1,250 owned by the foreign parent and 250 owned by [REDACTED]. However, the AAO's review of the evidence submitted in response to the RFE, including the stock ledger evidencing the transfer of 250 shares of stock from the foreign entity to [REDACTED] sufficiently demonstrates that 1,250 shares, not 1,500 shares, were outstanding at the time of filing. Counsel's assertions on appeal appear to be harmless errors in calculations.

The CEO determines and formulates policies and provide[s] the overall direction within the guidelines set up by the company governing body. The successful executive provides the leadership and direction for the overall operation of the company. He plans, directs and coordinates operational activities at the highest level of management with the help of subordinate executives and staff managers. The CEO, President ensures compliance with applicable laws and regulations.

[The beneficiary] has the following specific job duties:

**Managerial responsibilities**

- Oversee the day-to-day activities of company functional groups in Operations, which will include Services, Technical Support and Customer Support; and Marketing Research & Development;
- Ensure appropriate and satisfactory systems are in place for monitoring performance against plans and budgets;
- Put in place an effective system of controls, including nonfinancial as well as financial controls;
- Ensure that operating objectives and standards of performance are not only understood but owned by management and employees;
- Ensure compliance with all applicable legal and regulatory requirements and, where appropriate, best practice;
- Identify key areas of need outside the scope of accounting and budget efforts;
- Manage all levels of employees in accordance with current laws and regulations; hire and fire personnel;
- Assume budgetary and performance accountability;
- Work closely with retail and corporate clients;
- Oversee and coordinate the development of new customer products and services;
- Apply knowledge of technology to drive efficient processes and services to customers;
- Day-to-day management budgetary control;

**Executive Responsibilities**

- Run the company and drive growth and profitability based on in-depth industry and local market knowledge;
- Develop long term strategic planning based on competition, market changes and new technologies;
- Serve as the primary spokesperson and representative of the company;
- Maintain and continuously improve the company business systems and processes[;]
- Conduct strategic planning and development;
- Oversee and direct the organization's financial goals, objectives, and budgets;
- Manage cash flow, and help set the executive strategies to ensure continued growth;

- Establish prioritized operational objectives that will allow the business to achieve corporate strategic initiatives;
- Coordinate annual planning to assure integration and consistency with the operational objectives and corporate strategic initiatives;
- Ensure that a system is in place for effective communication with the executive management team and other employees;
- Responsible for ensuring proper enforcement of policies and procedures;
- Review, interpret and analyze financial and statistical data, coordinate and prepare for year-end audit and preparation of annual audit report;
- Establish internal controls on spending;
- Establish long term business plans by modeling future growth and expense structures;
- Monitor corporate target achievement.

Along with the petition, the petitioner submitted a copy of its Business Summary and Overview dated October 2012. In this document, the petitioner restated the above list of duties of the beneficiary, and also provided a list of duties for its vice president of business development and its vice president of operations. An organizational chart included in this document demonstrated that the beneficiary, in his role as president, would directly oversee an office assistant, [REDACTED] an independent financial contractor that would perform the petitioner's payroll and accounting services. The chart also demonstrated that he would directly supervise the vice president of operations, [REDACTED], who in turn would oversee a marketing manager, [REDACTED] and a sales manager yet to be hired. In addition, the chart demonstrated that the beneficiary would ultimately oversee a vice president of operations, who in turn would directly supervise a senior facilitator and two facilitators. The petitioner indicated that [REDACTED] would commence employment as its vice president of operations in January 2013; however, none of these positions were filled at the time the petition was filed. It is noted that the organizational chart submitted directly contradicts the petitioner's claim on the Form I-129 petition that it has two employees.

The petitioner also submitted copies of its federal employer quarterly tax returns which indicated that it employed one person, [REDACTED], during the first two quarters of 2012. The returns indicated that Mr. [REDACTED] earned \$26,250.00 per quarter.

On November 30, 2012, the director issued an RFE, instructing the petitioner to provide additional evidence to establish that the beneficiary's employment in the United States would be primarily managerial or executive in nature. The director requested, *inter alia*: (1) a more detailed description of the beneficiary's day-to-day duties including the percentage of time allocated to managerial or executive duties; (2) a line and block organization chart for the U.S. entity showing the company's current organizational hierarchy and staffing levels; (3) the names, job titles, summary of duties, educational level, and salary for all employees; (4) a copy of the employer's quarterly tax returns for the third quarter of 2012; and (5) copies of paystubs for all employees from January 1, 2012 through the date of the request.

In response to the RFE, the petitioner submitted its quarterly tax return for the third quarter of 2012, which again, contrary to the claims on the petition and the original organizational chart, demonstrated that the petitioner employed only one person, [REDACTED]. The petitioner also submitted copies of [REDACTED]

paystubs corroborating his employment by the petitioner. Additionally, the petitioner submitted a document entitled "Staffing Report," dated December 2012, which provided a revised statement regarding the staffing of the U.S. entity. Specifically, on page three of this document, the petitioner stated that at present, the petitioner had two full-time members of staff within the U.S. office in Houston: the beneficiary and Tim [REDACTED] vice president of business development and secretary. This document also confirmed that the beneficiary's annual salary of approximately \$160,000 was paid by the UK parent company.<sup>2</sup>

The petitioner also reprinted its organizational chart on page six of this document, and in a paragraph above the chart it explained that the marketing manager, [REDACTED] are both UK-based and not present in the United States. The chart again identifies [REDACTED] as the office assistant, and claims her duties include providing "all office support functions including telephone enquiries, printing and copying and supporting the company's operations."

The petitioner also resubmitted a list of the beneficiary's duties in chart form, which identified the amount of hours per week the beneficiary spent on each duties. The majority of his time, according to this chart, was spent on the following:

- Oversee the day-to-day activities of company functional groups in Operations, which will include Services, Technical Support and Customer Support and Marketing Research & Development (6 hours per week); and
- Run the company and drive growth and profitability based on in-depth industry and local market knowledge (6 hours per week).

The director ultimately denied the petition concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive position. Neither the petitioner nor counsel address this issue on appeal.

As a preliminary matter, the AAO notes that when denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). The director, however, did not state the specific reasons for the denial under this criterion; instead, the director merely noted that the petitioner had failed to submit an organizational chart for the U.S. entity as requested. Contrary to the director's findings, the petitioner did in fact submit an organizational chart for the U.S. entity both in support of the initial petition and again in response to the RFE. Although the director's actions and conclusions in addressing this criterion are vague and misplaced, they ultimately are harmless since the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO reviewed the record in its entirety with regard to this issue.

When examining the executive or managerial capacity of the beneficiary, the AAO looks first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the

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<sup>2</sup> The petitioner claims on the Form I-129 that the beneficiary's annual salary is \$120,000.

job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions.

The petitioner in this matter does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Although the petitioner provided an extensive description of the beneficiary’s job duties in support of the petition and again in response to the RFE, the petitioner specifically divided the list of duties into two categories: managerial and executive. Moreover, the list of duties submitted in response to the RFE, which included the hours per week the beneficiary would devote to each duty, demonstrates that his time would be divided almost equally among managerial and executive tasks. As noted above, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In addition to its attempt to rely on partial sections of the statutory definitions, the petitioner's overview of the beneficiary's duties is likewise ambiguous. Reciting the 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. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The description of the beneficiary's duties does not specifically identify the exact nature of the beneficiary's day-to-day tasks, which is particularly relevant in this case since the petitioner's business is a consulting business and the manner in which the beneficiary functions in a qualifying capacity within this context is unclear. 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. *Id.*

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 petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The AAO finds that the claims regarding the beneficiary's employment situation in the U.S. are questionable. With the petition, the petitioner submitted a Business Summary and Overview, which indicated that the beneficiary directly oversaw three vice presidents and an officer manager, and indirectly supervised a marketing manager. The record also demonstrated that he would ultimately indirectly supervise a sales manager, a senior facilitator and two additional facilitators.

However, upon review of additional payroll records and statements submitted in response to the RFE, it was established that the only employee on the petitioner's payroll at the time of filing was the vice president of business development, [REDACTED]. The petitioner clarified that the vice president of operations, [REDACTED], would commence his employment in 2013, whereas the marketing manager and vice president were based in the UK office. Although [REDACTED] has continuously been identified as the office manager who performs all administrative functions for the petitioner, there are no payroll records or wage reports identifying her as an employee of the petitioner, nor does the petitioner claim that she is employed out of the UK office as it claimed with regard to the marketing manager and the vice president. Most importantly, the petitioner stated that the UK parent company, not the U.S. petitioner, pays the beneficiary's salary.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9<sup>th</sup> 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) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). 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. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

Additionally, the statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the 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 managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

In 2009, USCIS approved the new office petition filed by the petitioner on behalf of the beneficiary, and a two-year extension of the initial new office petition was subsequently granted in 2010. The U.S. petitioner, therefore, had been operational for three years at the time of the filing of this second extension request. In

the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. The petitioner's evidence generally claims that it develops project management solutions based on client needs, and ultimately provides project management training and implementation of these solutions through facilitators. As discussed above, the facilitator positions have not yet been filled; however, the petitioner has submitted numerous copies of contracts and services agreements for project management services in support of the contention that it is doing business. Moreover, despite identifying an office manager on the organizational charts, the petitioner has provided no evidence confirming her employment. The beneficiary and the vice president of business development are the only confirmed employees of the petitioner, thus logically suggesting that these claimed executives are actually the one performing the consulting services and administrative tasks of the company. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). Absent evidence to the contrary, this is the only conclusion that can be drawn regarding the current business operations within the petitioner.

The petitioner has not demonstrated that the beneficiary would spend the majority of his time focused on the broad goals of the organization. The petitioner has not established that it has the subordinate staff in place to relieve the beneficiary from many day-to-day non-managerial tasks associated with operating the business. Instead, many of the tasks attributed to the beneficiary, as discussed above, indicate that he is involved in the day-to-day operations of the company. The fact that the beneficiary manages 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)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

In the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. As discussed above, the petitioner has been operational for three years and has failed to establish that it has sufficient staffing after one year to relieve the beneficiary from performing non-qualifying duties.

Moreover, the petitioner contends that its business operations have not expanded as fully as originally intended due to factors such as the general economic downturn, the oil spill in the Gulf of Mexico, and the beneficiary's ongoing health concerns. The petitioner claims that its business operations have improved in the course of the past year, and as a result the petitioner indicates that it plans to hire additional managers and employees in the future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or

beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

### C. Sufficient Physical Premises/Doing Business

The director also found that the petitioner failed to demonstrate that it maintains sufficient physical premises in order to establish that it is doing business in the United States. 8 C.F.R. § 214.2(l)(1)(ii)(G) requires an organization to be "doing business" in order to be considered a "qualifying organization." 8 C.F.R. § 214.2(l)(1)(ii)(H) defines the term "doing business" as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad."

The AAO observes that the "physical premises" requirement, which applies to new offices, serves as a safeguard to ensure that a newly established business will immediately commence doing business so that it will support a managerial or executive position within one year. *See* 52 FR 5738, 5740 (February 26, 1987). However, a petitioner is not absolved of the requirement to maintain sufficient physical premises simply because it has been in existence for more than one year. In order to be considered a qualifying organization, a petitioner must be doing business in a regular, systematic and continuous manner. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (H). Inherent to that requirement, the petitioner must possess sufficient physical premises to conduct business.

The petitioner provided a commercial sublease agreement for space in a Houston office building. The lease, which commenced in July of 2012, indicates that the petitioner has rented a 109 square foot office at a monthly rate of \$725, and shares a common reception area, conference room, and break room with other tenants according to a letter from the petitioner's sub lessor dated December 3, 2012. According to this letter, the petitioner has use of an aggregate total of 466 square feet of office space. While the premises is small, the evidence of record as discussed above indicates that currently, the petitioner employs only two persons. Therefore, the petitioner has provided evidence that it maintained sufficient physical premises to conduct business in a regular, systematic, and continuous manner based on its current staffing levels. The director's finding regarding this issue will be withdrawn.

### D. Financial Status of the U.S. Operation

The final issue the AAO will address is whether the petitioner provided evidence of the financial status of the United States operation necessary for the extension of a "new office" petition, as required by 8 C.F.R. § 214.2(l)(14)(ii)(E). The director found that the petitioner failed to establish that it had sufficient funds to pay the beneficiary's salary.

It is noted that a petitioner's ability to pay the proffered wage of a beneficiary is not relevant to a determination of eligibility in nonimmigrant petitions. The director's determination to this extent was

misplaced. With regard to the financial status of the U.S. entity, however, the petitioner submitted a copy of the first page of the petitioner's IRS Form 1120, Corporate Income Tax Return from 2011, as well as an unaudited financial statement for the first 11 months of 2011, copies of bank statements, invoices, and employer's quarterly tax returns. The AAO finds that this evidence is sufficient to meet the requirements under 8 C.F.R. § 214.2(l)(14)(ii)(E), and consequently the director's indirect findings regarding this issue are withdrawn.<sup>3</sup>

### III. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). With respect to the issues of whether the petitioner has a qualifying relationship with the foreign employer, the petitioner has sustained its burden. With respect to the director's findings regarding sufficient physical premises and the financial status of the U.S. entity, the petitioner has also sustained its burden. Accordingly, the director's decision is withdrawn in part. With respect to the question of whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity, the petitioner has failed to meet its burden. The appeal will be dismissed for this reason.

**ORDER:** The appeal is dismissed.

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<sup>3</sup> As touched upon by the director, however, discrepancies regarding the financial status of the U.S. entity cast further doubt on the continued viability of the petitioner's business and its ability to support the beneficiary in a primarily managerial or executive capacity. As discussed above, the petitioner affirmed that the foreign entity, not the U.S. entity, pays the beneficiary's salary. The petitioner's IRS Form 1120, Corporate Income Tax Return from 2011, shows gross receipts of approximately \$145,000, salaries and wages paid (to [REDACTED] in the exact amount of \$100,484, and an ultimate net income of just over \$4,000. Although eligibility in this matter is not determined by the profitability, or lack thereof, of the petitioner, inconsistencies in the record, such as lack of sufficient funds and financial viability to pay the salaries and wages of the proposed staff that would ultimately relieve the beneficiary from performing non-qualifying duties, is nonetheless relevant to the AAO's determination in this matter. The lack of evidence demonstrating that the petitioner has the financial ability to employ sufficient subordinate employees to permit the beneficiary to exclusively perform managerial or executive duties further supports the AAO's finding that the beneficiary is not employed in a primarily managerial or executive capacity. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).