



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

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

MATTER OF K-G-USA, INC.

DATE: DEC. 7, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner intends to operate an import-export company and seeks to temporarily employ the Beneficiary as the executive director of its new office under the L-1A nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Director, Vermont Service Center denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

**I. ISSUES**

The issues before us are whether the evidence of record establishes: (1) that the Beneficiary would be employed in the United States in a qualifying managerial or executive capacity within one year of the approval of the petition; (2) that the Petitioner has secured sufficient physical premises to house the new office; and (3) that the Beneficiary was employed abroad in a qualifying managerial or executive capacity.

**II. 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) provides 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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
  - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
  - (3) The organizational structure of the foreign entity.

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

The first issue before us is whether the Petitioner established that the Beneficiary would be employed in a qualifying managerial or executive capacity within one year of approval of the

Petition and whether the new office would support a qualifying managerial or executive position within one year.

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

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

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

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

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

(b)(6)

*Matter of K-G-USA, Inc.*

A. Facts

The Petitioner filed the Form I-129 on September 23, 2014 and indicated that it will operate an import and export company. The Petitioner provided evidence that it was established as a New York corporation on June 23, 2014.

The Petitioner provided a letter dated August 8, 2014 from its president, [REDACTED] who stated that the Beneficiary will be employed as executive director and “will lead, manage, coordinate and supervise the company business in accordance with international trade standards.” Ms. [REDACTED] further described the Beneficiary’s proposed duties as follows:

- Direct, oversee, and manage the U.S. subsidiary operations in accordance with the general company development plans;
- Set goals, establish long term strategic goals and short term policies as applied to the general company’s expansion plans;
- Maintain contact with top management of the foreign parent entity and ensure compliance with the parent company direction regarding the U.S. subsidiary and its business activities;
- Initiate, establish and continuously maintain contacts with the U.S. engineering organizations and government agencies to ensure compliance to existing industry regulations;
- Supervise the U.S. subsidiary company’s spending and budget, make determinations as to expenses accordingly;
- Oversee negotiations and execution of contracts with new clients, customers, contractors, and subcontractors.

Ms. [REDACTED] further explained:

To perform these duties, the chief executive officer must have specific knowledge of the company’s products and services that constitute the core of the company’s offerings as well as well as [sic] the technical aspects thereof. The effective execution of internal management of the company requires intimate knowledge of the import-export operations and procedures, customs regulations as well as import export taxations issues. To be responsible for the day to day operations of the U.S. entity and coordination of the company’s business activities on the multinational level, without such experience and expertise would be impossible.

The Petitioner submitted copies of its bank statements showing that it had approximately \$10,000 in its checking account as of August 31, 2014. The Petitioner also provided bank statements for an account owned by Ms. [REDACTED] and the Beneficiary which had a balance of nearly \$200,000 in August 2014. The Petitioner did not provide a business plan or any additional information regarding the intended nature and scope of the new office, its anticipated organizational structure, or its financial goals. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(I).

On October 17, 2014, the Director issued a request for evidence advising the Petitioner that the initial evidence did not establish how the company would grow to support the Beneficiary in a qualifying managerial or executive position within one year of approval of the petition. The Director requested additional information regarding the nature of the new office, the anticipated scope of the entity, its proposed organizational structure and its financial goals, such as a business plan for the first year of operations or detailed information from the foreign entity regarding its plans for the new office. The Director also advised the Petitioner that it should provide information regarding the size of the U.S. investment and the financial ability of the foreign entity to remunerate the Beneficiary and commence doing business in the United States.

In response, the Petitioner submitted a letter dated December 18, 2014. The Petitioner described the Beneficiary as a valuable asset and a “proven specialist in running a company on a day to day basis.” The Petitioner further explained as follows:

To the present, the beneficiary has been primarily planning, coordinating, and supervising the early organizational stage of the U.S. subsidiary.

Specifically:

- Beneficiary has been conducting extensive research of the local business environment and infrastructure, to identify new broad opportunities for the company’s perspective growth and development. Further in his research the beneficiary concentrated on the analysis of wholesale markets of foodstuffs, popular consumer products, and novelties, items much desired in Russia and other countries of the former USSR.
- Based on the information obtained as a result of his research and analysis, beneficiary concluded it would be extremely practical to secure viable commercial ties with the U.S., gradually establish meaningful business presence in New York, and eventually set off a rewarding import-export operation between two countries.
- Beneficiary consulted with experts to obtain business, financial, and legal advice to facilitate the establishment of the company’s presence in the U.S., ensure compliance with pertinent laws and regulations, and maintain conformity with local business customs and practices. Beneficiary continues research and analysis of the new business opportunities, forms independent opinions and makes discretionary decisions on behalf of the company based on newly acquired information, knowledge and advice.
- Beneficiary produced a comprehensive start-up plan setting in motion the company’s organizational effort where he outlined steps required for establishing legitimate business presence in the U.S. He defined the goals and set time frame

(b)(6)

*Matter of K-G-USA, Inc.*

for the preliminary initiation period prior to the company's formation. Consequently (the beneficiary) conferred with partners and secured approval of the expansion plan by the Board of Directors of the foreign parent company. Thus, the formation of the U.S. subsidiary company entered its practical stage.

- Beneficiary obtained professional advice and assistance in preparation of requisite applications and registration documents, including filing of the Certificate of Incorporation with the NYS Department of State, the IRS and NYS taxation authority. As a result of beneficiary's organizational efforts, corporate formalities were finalized. Beneficiary established a corporate bank account, which he primarily manages and controls.
- Beneficiary has established and continuously maintains contacts with the Chamber of Commerce, as well as local entrepreneur's associations to build up business connections and. He established prospective contacts within the local business community, identified opportunities, and compiled merchandising lists of goods to be purchased in the U.S. for export and resale in Europe.

With respect to the Director's request that the Petitioner provide information regarding the size of the U.S. investment, the Petitioner explained that, while it has established a U.S. bank account, its foreign parent company has wired funds to the Beneficiary's personal bank account, which will be transferred to the business account upon approval of the petition. The Petitioner stated that the Beneficiary's account has an average balance of approximately \$100,000 and the business account has an average balance of \$10,000, which is being used for the company's organizational expenses. The Petitioner provided copies of bank statements for both accounts. The business account had a balance of \$8595.25 as of December 31, 2014. The most recent bank statement for the personal account of the Beneficiary and Ms. [REDACTED] showed an ending balance of \$32,640 on September 9, 2014.

The Petitioner also submitted the minutes of the first organizational meeting of its board of directors dated July 1, 2014. The meeting minutes identify the officers of the company and their salaries as follows:

[REDACTED]	President, Treasurer, Chief Financial Officer	\$3,500/week
[The Beneficiary]	Vice President, Chief Executive Officer	\$2,500/week
[REDACTED]	Executive Officer/Import-Export Operations	\$2,500/week

The Director denied the petition on March 12, 2015, concluding that the Petitioner did not establish that it would employ the Beneficiary in a qualifying managerial or executive capacity within one year of approval of the petition or that the new office would be able to support a qualifying managerial or executive position within that one year timeframe. In denying the petition, the Director emphasized that the Petitioner did not provide a business plan or other information

regarding the nature of the company, its proposed organizational structure, or its financial projections in support of its claim that the Beneficiary would be employed in a qualifying position.

The Director acknowledged the Petitioner's submission of bank statements, but determined that the Petitioner did not provide evidence of the source of the funds or information regarding the size of the investment needed for the company to start up and operate during the first year. Accordingly, the Director found that the Petitioner had not established that it has sufficient funding or that it will grow to the point where it will necessitate and support a qualifying L-1A position by the end of the first year.

On appeal, the Petitioner asserts that the Beneficiary has been primarily managing the foreign entity's day-to-day operations and that he "will have essentially similar responsibilities in the U.S." The Petitioner describes these responsibilities as follows:

- Direct, oversee, and manage the U.S. subsidiary operations in their entirety accordance with the general company development plans;
- Set goals, establish long term strategic goals and short term policies as applied to the general company's expansion plans;
- Maintain contact with top management of the foreign parent entity and ensure compliance with the parent company direction regarding the U.S. subsidiary and its business activities.
- Supervise the U.S. subsidiary company's spending and budget, make determinations as to expenses accordingly;
- Oversee negotiations and execution of contracts with new clients, customers, contractors, and subcontractors;

Approximately 50 percent of his time on the job is dedicated to the above responsibilities. Moreover, as part of the assignment, [the Beneficiary] is currently planning, coordinating, and overseeing the commencement of import/export operations in New York, the most important function of the company. His objective is to establish a dependable practice of acquisition of goods and consistent shipping pattern. Approximately 30 percent of his time is dedicated to the issues of compliance, including paperwork, to ensure that the cargo delivery process is in line with the U.S. laws and regulations regarding taxes, tariffs, insurance, quotas, etc. Also, approximately 20 percent of the beneficiary's time is devoted to research and development matters, as he looks for opportunities to find lower cost carriers and faster shipping routes. Thus, the total 100% of the beneficiary's time on the job is dedicated to executive duties.

In support of the appeal, the Petitioner submits a "Start Up Business Plan and Financials" for 2015. According to the business plan, the Petitioner will specialize in exporting "foodstuffs and consumer products" to Russia and Eastern Europe for sale through its parent company's claimed chain of retail stores and local wholesale distributors. The company profile indicates that the Petitioner will

(b)(6)

*Matter of K-G-USA, Inc.*

continuously acquire specific goods that are in high demand in the target countries, and that it will outsource warehousing/storage and shipping/delivery through service agencies and independent contractors.

The business plan indicates that the Petitioner will require start-up funding of \$84,750. The Petitioner projects total sales of \$300,000 in year one, which reflects sales in the parent entity's retail stores in Russia and sales to wholesalers. The business plan indicates that the company will maintain a staff of three employees during the first three years of operations, including Ms. [REDACTED] as President, the Beneficiary as Vice President and [REDACTED] as Executive Manager, with a total payroll of \$300,000 the first two years. The business plan states that "support functions" will be handled by independent contractors and service agencies under outsourcing arrangements" while "day to day planning, directing, overseeing, and coordination responsibilities will be performed by the three executives." The business plan projects that the company may eventually hire lower level management personnel to administer day-to-day functions such as office management, payroll, accounting, warehousing and shipping.

The business plan also includes a list of current projects, which include the purchase of seasonal merchandise, backyard accessories, U.S. automobile spare parts, and snow removal equipment, along with estimated contract prices and the names of potential vendors. The Petitioner also provides a copy of its most recent bank statement, for the month of April 2015, which shows an ending balance of \$7,428.03.

#### B. Analysis

Upon review, we find that the evidence of record does not the Beneficiary would be employed in a qualifying managerial or executive capacity or that the new office would support a managerial or executive position within one year.

The "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. The Petitioner's evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). The Petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

When examining whether a beneficiary will be employed in a managerial or executive capacity, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Here,

while the Petitioner provided a description of the steps the Beneficiary has taken to date to prepare for the establishment of the new office, the Petitioner has not provided a detailed description of the duties he is expected to perform during the initial year of operations and beyond. For example, the Petitioner states that he will “develop, oversee and manage the U.S. subsidiary operations”; “set goals, establish long term strategic goals and short term policies”; and “supervise the U.S. subsidiary company’s spending and budget,” but it did not further elaborate on the specific tasks involved or how much of his time will be allocated to these broad areas of responsibility. 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. The Petitioner has not provided sufficient detail or explanation of the Beneficiary's proposed activities in the course of his daily routine. 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).

This general position description alone is insufficient to establish that the Beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the Petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the Beneficiary in the intended managerial or executive capacity. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. *See generally*, 8 C.F.R. § 214.2(l)(3)(v)(C).

The Petitioner did not describe the nature and scope of its new business, its proposed staffing levels, its anticipated organizational structure, or its financial projections and goals prior to the denial of the petition, despite the Director's request for evidence that would satisfy the regulatory requirements at 8 C.F.R. § 214.2(l)(3)(v)(C). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Without this material information, the Director correctly concluded that the evidence of record did not establish how the Petitioner would support a managerial or executive position within one year.

On appeal, the Petitioner submits a copy of its business plan for 2015, which, based on its date, appears to have been prepared in response to the denial of the petition. 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Further, the information included in the business plan does not establish that the Petitioner would be able to support a managerial or executive position within one year. The Petitioner explains that it intends to purchase foodstuffs and consumer products for export to Russia and Eastern Europe, where they will be re-sold in the foreign entity's retail stores and by wholesale distributors in the

(b)(6)

*Matter of K-G-USA, Inc.*

targeted regions. According to the business plan, the Petitioner's staff for the first year of operation will include the Beneficiary as vice president, the Beneficiary's spouse as president, and [REDACTED] as "executive manager,"<sup>1</sup> and its projected payroll expenses would be exactly equal to its projected gross sales. The business plan does not anticipate any additional hires in the first three years. The Petitioner has not provided financial projections for other business expenses, such as cost of goods sold, rent, contractors, taxes, and simply states that it expects to operate at a loss. In addition, the Petitioner did not provide position descriptions for the President and Executive Manager positions, and therefore it is unknown who would be performing the duties associated with sourcing, purchasing, logistics, export and sales of the purchased goods to wholesale distributors in the targeted region. Moreover, without a description of the President's proposed duties, we have no basis to conclude that the Beneficiary, as Vice President, would actually supervise this employee. Rather, the Petitioner states that "day to day planning, directing, overseeing and coordination responsibilities will be performed by the three executives" without distinguishing between their duties. Based on these deficiencies, the record does not support a finding that the Beneficiary would be required to perform primarily managerial or executive duties.

Rather, a review of the Petitioner's projected personnel plan indicates that the Beneficiary will not have subordinates to relieve him from primarily performing any non-qualifying duties required of him in his position during the first three years of operations. 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'r 1988). We acknowledge that the Petitioner claims that it will hire independent contractors and service companies, but it did not provide any detail or timeline for these hiring plans, nor did it account for an expenses to be paid to service providers or contractors in its business plan. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

As noted by the Director, the Petitioner also provided little information regarding its projected startup costs and expenses for the first year of operations. The most recent bank statements provided show that the company consistently had less than \$10,000 in its account, while the personal account held by the Beneficiary and his spouse, again, based on the most recent bank statement, had a balance of less than \$40,000. The business plan submitted on appeal indicates that the Petitioner's startup costs would be approximately \$90,000 and there is no evidence that any money has been transferred to the Petitioner for startup costs or operating expenses to date. Further, as noted, the

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<sup>1</sup> The proposed "executive manager" has the same name as the Beneficiary's son, who was 16 years old at the time this petition was filed. Assuming that he is in fact the proposed employee, we note that dependent children of L-1 nonimmigrants are not authorized to accept employment while in L-2 status. While Section 214.2(c)(2)(E) of the Act authorizes L-2 spouses of L-1 nonimmigrants to obtain employment authorization in the United States, there is no similar provision for L-2 dependent children.

(b)(6)

*Matter of K-G-USA, Inc.*

Petitioner has not provided a realistic or detailed financial projection for the first year of operations, as it has taken into account only salary expenses.

Based on the deficiencies addressed above, the evidence of record does not establish that the Beneficiary would be employed in a qualifying managerial or executive capacity, or that the Petitioning company would support a managerial or executive position, within one year. For this reason, the appeal will be dismissed.

#### IV. PHYSICAL PREMISES

The second issue addressed by the Director is whether the evidence of record establishes that the Petitioner has secured sufficient physical premises to house the new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

##### A. Facts

At the time of filing, the Petitioner provided a sublease for its premises located on the second floor of a building located in [REDACTED] New York. The Petitioner's sublease indicates that it has agreed to pay a total of \$24,000 for the lease term beginning June 1, 2014 and ending May 30, 2017 and it identifies the sublessor as [REDACTED]. The agreement calls for 24 monthly rent payments of \$1,000. The Petitioner included photographs of an office containing three desks.

In the RFE, the Director requested additional evidence to establish that the premises secured would be sufficient to allow the Petitioner to commence operations. The Director instructed the Petitioner to provide evidence that its sublease of the premises was authorized by the lessor, as well as additional photographs and information regarding the type of business to be operated at the leased premises.

In response to the Director's RFE, the Petitioner submitted a copy of the commercial lease between [REDACTED] (lessee) and [REDACTED] (lessor). According to the terms of the commercial lease, Mr. [REDACTED] leased the premises for two years, from October 1, 2013 through September 30, 2015. The Petitioner submitted a "consent to sublease" dated June 1, 2014, signed by [REDACTED] which identifies the lessees/tenants as "[REDACTED]" and is signed by [REDACTED].

The Director determined that the Petitioner had not met its burden to establish that the leased office was sufficient for the operation of its business. The Director observed that the petitioner did not provide staffing projections, and therefore it was not possible to determine whether the office was of sufficient size to house the employees. In addition, the Director found that the Petitioner, as an importer and exporter, would likely require a warehouse or storage area which was not included in the leased premises.

On appeal, the Petitioner does not directly address this ground for denial. The Petitioner's business plan mentions that "the company does not plan to own or operate warehousing storage facilities or shipping/delivery carriers" and instead will outsource these services.

#### B. Analysis

Upon review, the Petitioner has not established that it has secured sufficient physical premises to house the new office.

We acknowledge that the regulations do not specify the type of premises that must be secured by a petitioner seeking to establish a new office. The phrase "sufficient physical premises" is broad, leaving us flexibility in adjudicating this legal requirement. To establish that its physical premises is sufficient, a petitioner should clearly identify the nature of its business, the specific amount and type of space required to operate the business, its proposed staffing levels, and provide evidence that the space can accommodate the petitioner's growth during the first year of operations. We note that the Petitioner has not explained its requirements regarding its physical premises and it has not addressed the matter on appeal.

While the Petitioner's business plan indicates that it will not have an immediate need for its own warehouse or any storage facilities, the plan does not indicate that the Petitioner has budgeted for any outsourced warehouse or storage expenses in its financial projections. The burden to establish that it has sufficient space is left to the Petitioner. We also note that the Petitioner's sublease requires 24 rent installment payments for a 36 month sublease which is based on a 24 month commercial lease held by the landlord. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, although the Petitioner submitted photographs of an office, the master lease for the premises states that "the Lessee shall maintain available a substantial stock of goods, wares and merchandise adequate to ensure successful operation" and "shall store and stock in the Premises only such inventories as the Lessee intends to sell at retail from or on the premises." The photographs submitted do not appear to show a premises intended for retail use, and the Petitioner does not claim that it will engage in retail sales in the United States.

Based on the evidence submitted, the Petitioner has not established that it has secured sufficient physical premises for the new office and the appeal will be dismissed for this additional reason.

#### V. FOREIGN EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The third and final issue to be addressed is whether the Petitioner established that the Beneficiary has been employed by its foreign parent company in a qualifying managerial or executive capacity.

(b)(6)

*Matter of K-G-USA, Inc.*

#### A. Facts

The Petitioner states that the Beneficiary has been employed abroad by its parent company since 2009. The Petitioner states that its Russian parent company imports and resells goods on the local Russian retail market through its own chain of retail stores and through wholesalers. The Beneficiary's duties abroad as executive director and chief executive officer included his responsibility for "supervising, directing, and coordinating the parent company's operations in Russia, as well as the company's business activities in the U.S." The Petitioner stated "[t]he duties we anticipate [the Beneficiary] to perform in the U.S. will be substantially similar to those he presently performs." It did not provide a separate description of the Beneficiary's job duties beyond what was included in the foregoing discussion of his proposed U.S. position.

The Petitioner provided a translated Russian document listing the parent company's administrative management personnel as follows: (1) [REDACTED], owner and company head; (2) the Beneficiary, executive director; and (3) [REDACTED] accounts and treasurer.

In the RFE issued on October 17, 2014, the Director requested additional evidence to establish that the Beneficiary has at least one year of continuous full-time employment in a managerial or executive capacity with a qualifying foreign entity. Specifically, the Director requested a specific breakdown of the Beneficiary's actual job duties, an organizational chart, and evidence providing the job titles, duties, salaries and educational requirements for all subordinate employees of the foreign entity.

The Petitioner submitted the foreign parent company's organizational chart depicting the Beneficiary as vice president and executive director reporting directly to the parent company's president, treasurer, and chief financial officer, [REDACTED]. The chart also depicts [REDACTED] as executive manager reporting directly to [REDACTED]. The chart did not depict any additional named employees, but shows "Lower Level Management Staff," "Accounting," "Office Management" and "Warehouse and Shipping." The Petitioner did not provide any additional information regarding the foreign entity's staffing. The Petitioner stated that the foreign entity sells imported food products and other goods to local business owners and the general public and indicated that it was submitting business documents such as sales and purchase orders, shipping and handling documentation, bills of lading, warehouse and stores delivery receipts, and miscellaneous receipts and invoices. The Petitioner submitted a substantial number of business documents in the Russian language, but these were not accompanied by a certified English translation.

In denying the Petition, the Director determined that, based on the limited evidence submitted, the Petitioner did not establish that the Beneficiary has been employed abroad in a managerial or executive capacity other than in job title. The Director emphasized that the Petitioner did not provide the requested description of the Beneficiary's specific duties abroad or the detailed information requested regarding the foreign entity's organizational structure, staffing levels and the duties performed by the Beneficiary's subordinates.

On appeal, the Petitioner again asserts that the Beneficiary performs the same duties abroad as he will perform in the United States, and it submits the job description already quoted in full in this decision. Briefly, the Petitioner states that the Beneficiary spends 30% of his time on compliance issues and paperwork to ensure that the cargo delivery process complies with applicable taxes, tariffs, insurance and quotas, and an additional 20% of his time on “research and development matters, as he looks for opportunities to find lower cost carriers and faster shipping routes.” The Petitioner indicates that the remaining 50% of his time in his position abroad is spent “managing, coordinating and supervising the company’s day-to-day operations.”

## B. Analysis

Upon review, we find that evidence of record does not establish that the Beneficiary was employed abroad in a managerial or executive capacity for at least one year of the last three prior to filing this petition.

When examining a beneficiary’s executive or managerial capacity, we will look first to the petitioner’s description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner 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.* In this matter, the Petitioner characterized the Beneficiary as an executive who was responsible for a broad range of duties in overseeing the parent company, and stated that the Beneficiary is expected to perform those same duties to establish the Petitioning entity in the United States. We note, however, that the Petitioner provided very little detail regarding the actual duties the Beneficiary performed a day-to-day basis within the context of the parent company’s operations. Instead, the Petitioner focused on the duties the Beneficiary has performed to establish the U.S. office. Further, because the Petitioner relied primarily on the Beneficiary’s proposed duties that heavily focus on startup operations for the new office, it is not clear how accurately the listed duties describe his oversight of the foreign entity during the last three years. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff’d*, 905 F.2d 41 (2d. Cir. 1990).

Further, the position description provided on appeal indicates that that half of the Beneficiary’s time had been, and would be, spent on executive duties that were broadly described in its initial petition. However, another 30% of the Beneficiary’s time was allocated to non-qualifying duties involving compliance, regulations and taxes, for example, while the remaining 20% was allocated to research, also a non-qualifying duty. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). This newly submitted description does not establish that the Beneficiary has been primarily engaged in executive duties for the foreign entity.

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 the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The Petitioner claims that the foreign entity is a retailer and wholesaler of various imported goods in Russia and Eastern Europe, and that it operates its own chain of retail stores. The Petitioner has not submitted probative evidence corroborating the nature and scope of the foreign entity's operations, as none of the submitted business documents were accompanied by English translations. The regulation at 8 C.F.R. § 103.2(b)(3) provides that any document containing foreign language submitted to USCIS shall be accompanied by a full English translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. Because the Petitioner did not submit certified translations of the documents, we cannot determine whether the evidence supports the Petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3).

Further, despite the Director's request for a detailed organizational chart and information regarding the foreign entity's staffing and personnel structure, the Petitioner submitted a general chart which identifies only three employees by name. The chart's general reference to "lower level management staff," "office management" and "warehouse and shipping" was not responsive to the Director's request for the job titles, job duties, salaries, and educational qualifications of all of the Beneficiary's subordinates with the foreign entity. We cannot determine how the foreign entity is structured, the number of employees or whether there are actually subordinate managers, supervisors, professionals or subordinate staff to perform the day-to-day, non-executive functions. Moreover, although the Petitioner claims that the foreign entity operates a chain of retail stores, the chart does not appear to corroborate a retail department or division within the company.

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating a petition pursuant to the preponderance of the evidence standard, we examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Here, the Petitioner has not submitted sufficient relevant and probative evidence in support of its claim that the Beneficiary has been employed in a qualifying managerial or executive capacity, as the record does not contain a detailed description of his duties, evidence of the nature of the foreign entity's business, or evidence of the foreign entity's organizational structure and staffing levels. Again, going on record without supporting documentary evidence is not sufficient for purposes of

*Matter of K-G-USA, Inc.*

meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Accordingly, the appeal will be dismissed.

## VI. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of K-G-USA, Inc.*, ID# 14762 (AAO Dec. 7, 2015)