



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

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

MATTER OF NDE-A-S-, LLC

DATE: DEC. 14, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a healthcare billing software company, seeks to employ the Beneficiary as its General Manager and to extend his status under the L-1A nonimmigrant intracompany transferee 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. ISSUE

The issue before us is whether the evidence of record establishes that the Beneficiary will be employed in a qualifying managerial or executive capacity in accordance with the application statutory and regulatory provisions.¹

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.

¹ In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). We conduct appellate review on a *de novo* basis. *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015); see also 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*.

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

- (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.

Further, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a petitioner seeking an extension of a “new office” petition must submit 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.

II. MANAGERIAL OR EXECUTIVE CAPACITY

The sole issue before us is whether the Petitioner established that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition.

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.

Finally, 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

Matter of NDE-A-S-, LLC

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.

A. Facts

The Petitioner filed the petition on April 21, 2014. The record shows that the Beneficiary was previously granted one year in L-1A status in order open the Petitioner's new office as its General Manager.

In a support letter, the Petitioner stated that it "is dedicated to the distributing, consulting and training of health systems." The Petitioner indicated that it is "introducing to U.S. clinics and laboratories three of its successful products: [REDACTED] meant to "improve considerably the development of the companies' health systems." The Petitioner stated the following with respect to its development during its first year as a new office:

Unfortunately, [the Petitioner] ran into a minor problem in implementing its software in U.S. clinics and laboratories. After many discussions with medical doctors and staff, it was determined that software was required to assist with the U.S. medical insurance policies. Since the U.S. health insurance policies are significantly different than Brazilian policies, a new software program needed to be written to accompany the existing software programs. After much tedious work and collaboration, a new software program was written to assist medical doctors with U.S. insurance companies, [REDACTED]

The Petitioner stated that it is currently testing its new software in two offices in the United States, specifically [REDACTED]

The Petitioner indicated that it has hired a services manager and system support technician "to assist with upgrades and maintenance to the software as recommended and required by the two offices." The Petitioner further explained that the services manager has played a critical role in "designing and implementing the new software" and that the system support technician provides "hands-on assistance to clients." The Petitioner stated that it also hired a sales manager who was responsible for "managing the entire sales component of the organization" and "developing and implementing sales and marketing protocols for use when the software was out of the testing phase." The Petitioner noted that it planned on hiring "additional support and sales personnel" once the software was out of the testing phase.

The Petitioner submitted a business plan describing its products and plans. The Petitioner indicated that it "has the unique ability and empirical expertise of designing corporate communications and resource management plans" and has "extensive knowledge and experience of working and training with Fortune 500 and 1000 companies." The Petitioner stated that the Beneficiary has invested over \$75,000 to develop the new venture and that he "is willing to invest an additional US\$200,000 to hire personnel for services and sales in Florida." The business plan explained that the Petitioner projected that it would "procure necessary funding," "develop a strategic marketing plan," "initiate

Matter of NDE-A-S-, LLC

press releases,” “achieve \$200,000 in gross sales,” and break even within six months. The Petitioner described the software it is developing in the United States as [REDACTED] indicating that it would “send paper claims and electronic claims to the main insurance companies . . . helping users to avoid mistakes and to make physicians receive their money faster.” The Petitioner stated that it has “established relationships with [REDACTED] [REDACTED] to strengthen and broaden its foundation. The Petitioner mentioned that it had a “six month goal . . . [to] . . . procure the necessary funding for further development, personnel, and marketing.” The Petitioner provided financial projections reflecting that it would pay \$75,000 in wages during its second year of operations.

The Petitioner submitted a copy of its 2013 IRS Form 1065 U.S. Return of Partnership Income, indicating that it had earned no revenue, paid no wages and salaries, and incurred over \$12,667 in “legal and professional fees” during that year. The Petitioner provided a 2014 IRS Form 941 Employer’s Quarterly Federal Tax Return for the first quarter reflecting that it had paid \$2,500 in wages to one individual during this quarter. A Florida Department of Revenue quarterly report for the same period reflected the identical information and indicated that the sole employee was the individual identified as the services manager. The Petitioner submitted IRS Forms W-4 relevant to the services manager and technical services employee indicating that they had been hired on March 27, 2014. The Petitioner provided the Beneficiary’s IRS Form 1040 U.S. Individual Income Tax Return indicating that he was paid no salary in 2013. The Petitioner submitted bank account statements reflecting that U.S. operations had been regularly supported by ten separate monthly wire transfers of approximately \$5,000 from the foreign parent company.

The Petitioner provided an organizational chart reflecting that the Beneficiary supervised the services and sales manager, and that the services manager oversaw the systems support employee. Further, the Petitioner described the Beneficiary’s duties as general manager as follows:

- Establishes and exercises wide discretion over Software development and Human Resources Departments’ policies and goals and monitors the same to ensure proper implementation (20%)
- Creates operating plans that’s support strategic direction set by the board in Brazil promoting revenue, profitability, and growth as an organization (20%)
- Exercises complete discretionary authority over personnel issues, such as hiring, firing, promoting, determining staffing requirements, final approval over candidates for the various positions, etc. (10%)
- Represents the company in communications with foreign and domestic companies and governmental entities (10%)
- Oversees company operations to insure efficiency, quality, services, and cost-effective management of resources (10%)
- Holds the final decision regarding signing of contracts and agreements with other companies (5%)

Matter of NDE-A-S-, LLC

- Immediately directs the work of Services and Sales Managers and indirectly supervises the Technical Support staff (20%)
- Participates in the process to create new brand software for the medical billing purpose (5%)

In addition, the Petitioner submitted duty descriptions for each employee on its organizational chart. The Petitioner stated that the services manager is responsible for managing software installations and the software support team, receiving reports from the support technicians and maintaining customer satisfaction. The Petitioner indicated that the sales manager was tasked with selling the company's product, setting prices, preparing advertising, and assisting the software development team. The Petitioner explained that the technical support employee was engaged in installing software, training clients in the software, conducting system reviews, communicating with the software development team, designing software procedures and processes, and ensuring compliance with the company's policies and procedures.

The Petitioner also submitted resumes for each of its employees. The services manager's resume reflected that she has been the owner of [REDACTED] since 2009 where she was responsible for maintaining patient files and following up on collection for patients and insurance, and previous to this, that she worked as an accounting "clerk/biller" with a medical billing company up until 2014. The Petitioner provided educational documentation reflecting that she held accounting and medical billing certificates. The Petitioner submitted a diploma indicating that the technical support technician has a bachelor of applied science degree. The sales manager's resume reflected that he has been the owner of [REDACTED] since 2009 where he "helps individuals and small and medium size businesses find solutions to their insurance needs." Lastly, the Petitioner provided the Beneficiary's resume which stated that he had worked for the company since 2013 and that he was "participating of [sic] software conversion to US market," "participating in the process to create a new [sic] brand new software," and "working to find distributors to resell our products in other states."

In addition, the Petitioner submitted a "Products Test Agreement" executed with [REDACTED] on April 4, 2014 within which it was granted permission to test its developing software. The Petitioner also provided a copy of a similar agreement it had executed with [REDACTED] on September 6, 2013 with its current services manager.

The Director later issued a request for evidence (RFE) pointing to various evidence in the record suggesting that the Petitioner had not established that it could support a qualifying managerial or executive position after its initial year of operations. For instance, the Director stated that the evidence reflected that the Petitioner had run into problems implementing its software, had only one employee listed in its most recent IRS 941, hired its sole employee only a month prior to the filing the extension, that the Beneficiary had not received a salary in 2013, that the sales manager appeared to be a proprietor and not an employee of the company, and that the company appeared to have insufficient employees to perform the non-qualifying duties of the business. The Director indicated that this evidence suggested that the Beneficiary was not primarily engaged in qualifying managerial

Matter of NDE-A-S-, LLC

or executive duties. Further, the Director stated that the duties submitted for the Beneficiary were overly vague and did not indicate the actual tasks the Beneficiary performs.

Therefore, the Director requested that the Petitioner submit evidence to further establish its staffing levels and structure. The Director asked the Petitioner to explain how the Beneficiary would manage the organization, what typical managerial decisions he would make and/or his expected executive decisions, how he would direct the management of the organization, or establish the goals and policies of the organization. The Petitioner further requested that the Petitioner provide copies of any IRS Form W-2, W-3 or 1099-MISC it had issued for the 2013 tax year.

In response, the Petitioner stated that the Beneficiary would supervise three professional employees, the services manager, systems support manager, and sales manager, acknowledging that the sales manager was not on the company's payroll. The Petitioner indicated that its payroll and administrative functions were performed by its accountants and that "some light administrative duties will temporarily be covered by [the service manager]" and noted that it intended "to add a dedicated administrative assistant (in-house) in the near future." The Petitioner further stated that the Beneficiary oversees its "out-house legal counsel and accounting services." The Petitioner explained that the Beneficiary "is not considered an employee but rather owner/partner of the Petitioner."

The Petitioner submitted a letter from the Beneficiary stating that the company had adjusted its plans once he arrived in the United States due to "unforeseen circumstances." The Beneficiary noted that "[the Petitioner] only needed to understand more about how customers buy their health systems" and that the real focus should be on medical billing software. The Beneficiary indicated that he had "visited Physicians and Medical Billing Offices and understand that the U.S. healthcare market values the [redacted]." The Beneficiary explained that he liaised with "the development team, partners, Brazilian commercial team, companies (clearinghouse, medical billing companies and medical practices) and local partners" and that he "only needed to develop the Medical Billing component." The Beneficiary further stated that "developing software is a kind of work that is very difficult and complex," but that, in conjunction with the "development team," he had created a new medical billing software. The Beneficiary explained that he had met with "the medical billing office and with the Clearinghouses (companies that provide services to send electronic claims and receive electronic feedbacks from the clients...)." The Beneficiary stated that he had negotiated agreements with clearinghouse companies [redacted] for "special pricing to sell clearinghouse services." The Beneficiary indicated that software development is time consuming, and as a result, the Petitioner had to "change the schedule of hiring new employees," but noted that it had "subcontracted" the services manager and the system support technician "in order to learn, teach and develop the new software." The Beneficiary explained that he had entered into a Joint Venture contract with its claimed sales manager, and that he had convinced [redacted] and [redacted] to test the company's new software.

The Petitioner submitted a copy of its Florida Department of Revenue Employer's Quarterly Report from the third quarter of 2014 indicating that it had two employees, the system support technician

and the services manager, and that it had paid the former approximately \$4,000 and the latter \$7,500 during that quarter. The Petitioner also provided an unsigned IRS Form 941 for the same quarter indicating an identical amount of salary paid during this period.

The Petitioner provided a copy of a joint venture agreement executed with the company's claimed sales manager dated August 1, 2013. The agreement indicated that the sales manager, referred to as "partner" in the agreement, would be responsible for marketing analysis, prospecting for and presenting to customers, and products sales. The agreement stated that "the [sales manager] shall not participate in or have any control over the Joint Venture business nor shall it have any authority or right to act or bind the Joint Venture." The Beneficiary stated in another support letter that "the position of Sales Manager is paid on commission" and it "is not a payroll-based position." The Petitioner asserted that "the Sales Manager is, at all times, operating under the direct supervision of [the Beneficiary]" and that it is a "professional position." The Petitioner indicated that it planned to hire two sales associates in the "near future."

Further, the Petitioner submitted a letter from an accountant stating that the Beneficiary had received compensation as a "guaranteed payment" of \$22,400, given that he is a partner in the business and not an employee, and that this payment is reflected in his IRS Form 1065.

The Petitioner provided another duty description for the Beneficiary, which described his "main duties" as follows:

- i) Hire/dismiss employees
- ii) Sign partnership/alliance contracts
- iii) Create/update the company's regulations
- iv) Define the duties of the managers
- v) Negotiate investments in the USA's market with Brazilian company
- vi) Decide about how to invest to achieve faster company's objectives
- vii) Interact with development team in Brazil to determine what to develop in the system and create its priorities
- viii) Participate in meetings with partners and managers
- ix) Decide about any other important decisions in the American company

In addition, the Petitioner submitted duty descriptions and educational documentation for the Beneficiary's claimed subordinates nearly identical to that previously provided. However, the Petitioner added that the services manager oversees various accounting duties performed by the company's "out-house accountants." The Petitioner indicated that it planned on hiring an administrative assistant, at least two sales associates, and "more people to work as System support technicians."

Furthermore, the Petitioner provided a third support letter from the Beneficiary setting forth certain additional accomplishments, duties performed by the Beneficiary, and plans of the company. The Beneficiary stated that the company's new medical billing portal has "been tested in production in

Matter of NDE-A-S-, LLC

██████████, so, the system is actually running officially in the USA” and that he has been working with the “Brazilian development team to fix some minor bugs.” The Beneficiary indicated that he has “created some important partnership[s] with health companies, like ██████████’ including a contract “with special process to send electronic claims.” The Beneficiary further explained that the company “is signing an alliance contract with ██████████’ through which it “will open a very important new way to sell its products and services.” The Beneficiary stated that “he started to talk with ██████████ and other big companies that are actually working as partners with [the foreign employer].” The Beneficiary indicated that the Petitioner is also “creating an alliance with ██████████ to integrate its systems.”

The Petitioner provided an updated organizational chart reflecting that the Beneficiary oversees three managerial subordinates, the service manager, systems support technician and the sales manager, as well as “out-house accountants and an attorney.” The chart reflected that the service manager would oversee an administrative assistant, that the systems support technician would supervise other support technicians, and that the sales manager would oversee two sales associates. The administrative assistant, system support technician and sales associates were identified as “to be hired.”

In denying the petition, the Director concluded that the duty descriptions provided for the Beneficiary’s subordinates did not establish that they were professionals as defined by the regulations and indicated that the Beneficiary did not supervise other managers or direct the management of the organization. The Director found that it was unclear from the evidence provided which employees performed the administrative functions of the business. The Director stated that the Petitioner had not adequately supported its assertion that the operational tasks of the business are delegated to accountants and lawyers. In sum, the Director concluded that the evidence reflected that the Beneficiary likely primarily performed non-qualifying operational tasks.

On appeal, the Petitioner submits additional evidence in support of its assertion that the Beneficiary is and will be employed in a qualifying managerial or executive capacity and that he is not primarily performing non-qualifying operational duties. The Petitioner provides a duty description nearly identical to that submitted in response to the Director’s RFE. The description indicates that the Beneficiary devotes 60% of his time to supervising and controlling the work of his subordinate managers, 23% to interacting with a software development manager in Brazil, and 11% of his time participating in meetings with partners and managers. The Petitioner stated that the Beneficiary “does not do any direct work, he only Supervises and Controls the Manager’s duties.”

The Beneficiary further indicates in a support letter that he attended the ██████████ American Association of Clinical Chemistry annual meeting and networked with various managers within the medical billing industry. The Beneficiary states that the Petitioner is “still developing and testing the ██████████ in July/2014.” The Petitioner provides business cards of managers from various medical companies and indicated that the Beneficiary spoke with these contacts at the conference regarding potential future opportunities, but “did not try to do any sale.” The Beneficiary

states that the sales manager “did not have enough experience in this particular market” to handle the networking at this event.

The Petitioner submits evidence confirming that it had entered into a “Channel Partner Agreement-Wholesale Partner” with [REDACTED] on August 14, 2014, an agreement setting future pricing for the sale of the Petitioner’s products through [REDACTED] distribution network. The Beneficiary explains that there was contact between the Petitioner’s sales and services managers and contacts at [REDACTED] regarding the contract, but that he used his “managerial skills to make this partnership happen.” The Petitioner submits emails to support that there were meetings and communications between the Petitioner and [REDACTED] regarding the aforementioned agreement. The Beneficiary further states that the Petitioner targeted to integrate its product for a customer [REDACTED] in June 2015 and that it projected that it would investigate franchising its product across the United States, mainly through the Beneficiary’s efforts. However, the Beneficiary clarified that he “did not perform or try to do any sale directly” and that he only participated in conversations with other managers from other companies.

The Petitioner also provides a copy of its contract with a company called [REDACTED] dated March 5, 2013 pursuant to which the vendor would provide administrative services, such as receptionist and mail services. In addition, the Petitioner submitted a “Service Agreement” dated July 1, 2013 with [REDACTED] pursuant to which the vendor would provide “accounting services including bookkeeping and payroll services, preparation of Income tax return, and orientation regarding accounting an payroll procedures.” Further, the Petitioner provides professional agreements it had entered into with its attorney. The Petitioner again submits duty descriptions for the Beneficiary’s subordinates which are largely consistent with those previously provided. The Petitioner indicated that the services manager “manages and works with the employees under her to help the customers to use the system in the best way possible and speed up the refund process and avoid mistakes” and that she “manages the training services to guarantee a continuously education in the system’s users.” The Petitioner stated that the sales manager “has been working in sales strategies” while waiting for the system to be ready to sell. The Petitioner provided a signed agreement with the sales manager dissolving their previously referenced joint venture on January 21, 2015, stating that the sales manager “could hire, dismiss, promote and perform other personnel related tasks.” The Petitioner explained that it previously projected that its software system would be ready for sale by June 2014, but noted that “the company needed to invest six more months to complete that task” due to “quality tests.” Lastly, the Petitioner provided numerous screenshots confirming the existence of its [REDACTED] “cloud computing based system” operated through a web browser, noting that “all managers and employees worked together to achieve success on this development.”

B. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the Petitioner has not established that the Beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition.

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

Beyond the required description of the job duties, United States Citizenship and Immigration Services (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 understanding a beneficiary's actual duties and role in a business.

The Petitioner primarily asserts that the Petitioner supervises other managerial and professional subordinates thereby qualifying him as a personnel manager. The statutory definition of "managerial capacity" allows for both "personnel managers" and a "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

In the current matter, the Petitioner has not submitted sufficient evidence to establish that the Petitioner is primarily performing qualifying managerial duties. In the Beneficiary's most recent duty description, the Petitioner indicates that the Beneficiary will spend 60% of his time supervising and controlling the work of other managers. However, the Petitioner has not demonstrated with sufficient evidence that it has developed during the first year to support managers subordinate to the Beneficiary. For instance, in response to the Director's RFE, the Petitioner submitted an organizational chart reflecting that the Beneficiary supervised the service manager, systems support technician, sales manager and independent accountants and an attorney. However, none of the employees were shown to have subordinates at the time of filing.

In addition, as of the date of the filing of the petition, the Petitioner's IRS Form 941 and related Florida tax documentation indicated that the company had only one other employee other than the Beneficiary, the services manager, who had been hired approximately one month prior to the filing of the petition in April 2014. As such, the record reflects that the Beneficiary had no managerial subordinates thereby undermining the Petitioner's assertion that he devotes 60% of his time

overseeing managerial subordinates. Merely changing the organizational configuration on appeal does not alleviate this apparent discrepancy. 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). 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).

In addition, the preponderance of the evidence indicates that the Petitioner's business has not developed sufficiently during the first year to support the Beneficiary in a qualifying managerial capacity. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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. In the present matter, however, the regulations require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D).² 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.

Here, the Petitioner has submitted evidence reflecting that it did not earn any revenue during the first year and that it is wholly supported by regular wire transfers from its foreign parent company. The Petitioner provides no evidence indicating that it currently has any customers. Although the Petitioner submits evidence relevant to the testing of software and future sales, there is no evidence to indicate it has any agreements with customers or distributors that have led to actual income for the Petitioner. Further, the Petitioner states on the record that there is no immediate prospect for sales or revenue, indicating that the testing of its software will not be completed until the end of 2014, approximately eight months after the Petitioner was required to be sufficiently operational to support the Beneficiary in a qualifying managerial capacity.

As noted above, 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. The

² Following the enactment of section 101(a)(44)(C) of the Act in 1990, the former Immigration and Naturalization Service (INS) recognized that that managerial capacity could not be determined based on staffing size alone and deleted reference to "size and staffing levels" at 8 C.F.R. § 214.2(l)(3)(v)(C)(3) (1990), setting out the evidentiary requirements for initial new office petitions. See 56 Fed. Reg. 61111, 61114 (Dec. 2, 1991). However, the INS chose to maintain the review of the new office's staffing, among other criteria, at the time that the new office seeks an extension of the visa petition. See 8 C.F.R. § 214.2(l)(14)(ii)(D).

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).

In addition, the lack of revenue and operations for the Petitioner leaves significant question as to whether the Beneficiary has managerial subordinates and spends a majority of his time overseeing these employees. For instance, the Petitioner indicates that the services manager works with customers to “speed up the refund process and avoid mistakes” and “manages the training services.” Likewise, the Petitioner states that the sales manager is responsible for creating pricing, meeting with customers, and interacting with the services manager to meet client needs. Again, the Petitioner has no current clients and is not yet providing services. The Petitioner indicates that the sales manager is paid by commission alone, but the record reflects that it has no sales and it did not provide evidence of any payments made to the sales manager to date.

Further, the Petitioner states that the systems support technician is responsible for installing software at customer’s locations, training customers and providing maintenance on implemented software. However, again, the evidence reflects that the Petitioner does not currently have customers and that it is not providing services to clients. Although the Petitioner provides some evidence that these purported managers are performing some limited duties for the company in the development phase, there is insufficient evidence to demonstrate that these are substantial enough to require the Beneficiary to spend a majority of his time delegating tasks to these employees and overseeing their performance. In fact, the Beneficiary states directly that he has substantial concern over delegating certain non-managerial tasks to these subordinates and submits evidence indicating that he is involved in the performance of their claimed duties. For instance, the Petitioner stated that the Beneficiary was hesitant to allow his service and sales managers to handle networking with potential clients, undermining its assertion that he delegates all non-qualifying operational tasks, as is asserted elsewhere on the record. 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, the evidence of record does not support a finding that the sales or services managers can be considered employees primarily under the supervisory control of the Beneficiary. The Petitioner provided a joint venture agreement specifying that the sales manager was an executive of his own company providing medical insurance reimbursement consulting, and that he would be engaged by the Petitioner as a “partner” on a commission basis. The joint venture agreement states that the sales manager would have no authority as a manager of the Petitioner. Now, on appeal, the Petitioner provides evidence that the joint venture agreement has been dissolved and that the sales manager now has authority as a manager for the company. However, nothing on the record indicates that the sales manager was acting as subordinate manager for the company as of the date of the petition in April 2014. Again, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin*

Matter of NDE-A-S-, LLC

Tire Corp., 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Similarly, there is also insufficient evidence that the services manager acts as a subordinate manager to the Beneficiary. The services manager's resume reflects that she is the owner of [REDACTED] an independent company with whom the Petitioner is purportedly testing software. Again, 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).

Furthermore, it is not clear what duties the systems support technician is performing, since as noted, the Petitioner has no current customers, and the Petitioner otherwise provides little supporting evidence that the systems support technician is significantly engaged in performing duties for the company. In addition, the Petitioner has not provided evidence establishing that any of the Beneficiary's claimed managerial subordinates have subordinates of their own or that they are performing supervisory or managerial duties. 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)).

The Petitioner indicates that the Beneficiary is tasked with overseeing independent contractors, such as accountants handling its billing and taxes and an attorney handling undisclosed matters. However, although the Petitioner has submitted evidence that it has professional contracts in place with these parties, it does not provide evidence to demonstrate that the Beneficiary's supervision of these independent contractors could account for a substantial portion of the Beneficiary's time. In fact, it is not clear what billing services the Petitioner's claimed accountants could be performing when the company currently has no customers or revenue. Likewise, other than services related to the filing of this petition and appeal, the Petitioner does not describe the services its attorney performs for the company or what these services could entail given its current level of operations. Indeed, the Petitioner's 2013 IRS Form 1065 indicates that the company paid \$12,667 in "professional fees" during that year, an amount not indicative of the significant engagement of independent contractors such that they could be considered subordinates of the Beneficiary or his claimed managerial subordinates.

Therefore, in sum, the preponderance of the evidence does not support a conclusion that the Beneficiary devotes his time primarily to overseeing managerial or supervisory subordinates, or performing other qualifying managerial duties, as of the date the petition was filed. The evidence provided on appeal only further supports a conclusion that the Petitioner has not sufficiently developed after more than one and a half years to allow the Beneficiary to primarily perform managerial tasks. In fact, the evidence indicates that the Beneficiary is more likely than not devoted primarily to operational tasks necessary to launch the business, such as networking with potential distributors and customers and developing the company's proposed medical billing software. Little

of the evidence provided indicates that the Beneficiary significantly delegates tasks to subordinates or that he is primarily engaged in setting the goals and policies of the organization. Rather, the preponderance of the evidence indicates that he is still primarily engaged in nearly every facet of its operation.

Lastly, the Petitioner suggests that the Beneficiary qualifies as a personnel manager based upon his oversight of professional subordinates, and provides educational credentials for most of his claimed subordinates. In evaluating whether the beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that “[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” The term “profession” contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm’r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

First, as previously noted, the Petitioner has not provided sufficient evidence to demonstrate that the Beneficiary’s asserted professional subordinates are engaged by the company as necessary to support its claim that the Beneficiary allocates 60% of his time overseeing these individuals. The evidence does not establish that the services and sales manager and systems support technician are actually employees of the Petitioner devoting most of their time to the company’s operations. As noted, the company has no customers for these managers to support and no product to currently sell. Further, the Petitioner has no revenue to support payroll or customers to bill, leaving question as to whether its contracted accountants can be considered professional subordinates to the Beneficiary. The Petitioner has provided evidence demonstrating that its systems support technician has a bachelor’s degree, but it not explain why this position requires a set of advanced knowledge requiring a specific baccalaureate degree. The Petitioner submits little evidence to establish that the systems support technician performs a significant level of professional services for the company as of the date of filing. In fact, as discussed, the Petitioner has no customers for this claimed professional employee to support. The Petitioner has not supported its claim that the Beneficiary acts as a personnel manager as the evidence does not support a finding that he is primarily supervising managerial, supervisory or professional staff.

In conclusion, the evidence provided indicates that the Beneficiary is more likely than not still primarily engaged in the performance of non-qualifying operational duties. Further, the evidence reflects that the Petitioner has not developed sufficiently after one year to support the Beneficiary in a qualifying managerial capacity. For this reason, the appeal must be dismissed.

III. CONCLUSION

The appeal will be dismissed and the petition will remain denied for the above stated reason. 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). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *NDE-A-S-, LLC*, ID# 14809 (AAO Dec. 14, 2015)