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

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

MATTER OF A-D- CORP.

DATE: NOV. 25, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a Florida corporation engaging in “multimedia graphic designs, web services[,] and e-commerce development,” seeks to extend the Beneficiary’s classification as an L-1A nonimmigrant intracompany transferee. *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.

The Petitioner, established in [REDACTED] claims to be an affiliate of [REDACTED] the Beneficiary’s foreign employer, located in [REDACTED] Venezuela. It seeks to extend the employment of the Beneficiary as its Chief Financial Officer for a period of two years.

The Director denied the petition, concluding that the Petitioner did not establish that the Beneficiary has been or will be employed in a qualifying managerial or executive capacity in the United States.

The Petitioner subsequently filed an appeal. The Director declined to treat the appeal as a motion and forwarded the appeal to our office for review. On appeal, the Petitioner asserts that the Beneficiary will be employed in a managerial capacity in the United States as a function manager. The Petitioner submits a brief and duplicate copies of evidence previously submitted in support of the appeal.

I. THE LAW

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

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

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- (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.

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

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

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

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

II. THE ISSUE ON APPEAL

The sole issue addressed by the Director is whether the Petitioner established that the Beneficiary will be employed in a qualifying managerial or executive capacity in the United States.

A. Facts

The Petitioner filed the Form I-129 on September 26, 2014. On the Form I-129, the Petitioner indicated that it engages in multimedia graphic designs, web services, and e-commerce development with seven current employees, plus six contractors, and a gross annual income of “\$144,993 as of 7/31/14.”

In its undated letter of support, submitted with the initial petition, the Petitioner described the Beneficiary’s duties as its Chief Financial Officer in the United States as follows:

In this key managerial role, [the Beneficiary] will continue to have autonomous control over the Finances of [the Petitioner], exercising wide latitude and discretionary authority in establishing the most advantageous courses of action for the successful management and direction of our development activities.

- Management of the organizations finances. Meeting and working with other managers, vendors, advisors to present strategic plan, define projects requirements, coordinate strategies across groups, and makes recommendations on project strategies as they relate to financial, budgeting, and expending decisions. Primarily managerial. 30% of time spent on duty.
- Complete discretion over the company’s financial and administrative matters. Formulating budget estimates in support of program objectives; presenting and justifying budget requests; development of plans for allocating resources; monitoring program execution; reviewing and analyzing funding documents; conducting comparative analyses to examine trends; reviewing budget policy and statutes to ensure compliance. Primarily managerial. 10% of time spent on duty.

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- Recruit, hire and fire employees. Supervises the work of a Production Manager, Account Executive, Financial Assistant, and Accountant. Promote employees and increase salaries based on company strategies. Evaluate employees' performance and profitability. Primarily managerial. 10% of time spent on duty.
- Leading meetings and conducting conference calls with team members, allocating tasks, discussing strategies, and providing guidance. Primarily managerial. 20% of time spent on duty.
- Supervise the support of the Commercial Strategies for the [REDACTED] ([the Petitioner's] Financial Solution Software). Market Research, Trends Analysis. Primarily managerial. 5% of time spent on duty.
- Supervision of the Integration and Training of [REDACTED] ([the Petitioner's] Financial Solution Software)[.] Primarily technical or administrative. 5% of time spent on duty.
- Planning and directing the daily activities of the financial projects, developing plans and making decisions on allocation of resources needed to meet target completion dates. Providing guidance and direction to other professionals on assigned tasks to be completed. Primarily managerial. 15% of time spent on duty.
- Strategic Planning to Develop better relationship and partnership with banks, and financial companies, vendors, software dealers. Primarily technical or administrative. 5% of time spent on duty.

In the same letter of support, the Petitioner further described the Beneficiary's position as follows:

In this position, [the Beneficiary] will satisfy all four of the criteria for a manager. . . .

- 1) *Manages the organization.* . . . [The Beneficiary] is the CFO of the company and thus she manages the organization's finances.
- 2) *Supervises and controls the work of other[s].* . . . [The Beneficiary] supervises the work of a Production Manager, Account Executive, Financial Assistant, and Accountant, all of who are considered supervisory/managerial and/or professional employees reporting to [the Beneficiary].
- 3) *Has the authority to hire and fire.* . . . [The Beneficiary] recruits, selects and hires the subordinate employees. She also promotes employees and increase salaries based on company strategies, evaluating employees' performance and profitability[.]
- 4) *Exercises discretion.* . . . As the CFO, she has complete discretion over the company's financial and administrative matters.

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....

As Chief Financial Officer, [the Beneficiary] will continue to be responsible for directing, managing, coordinating and supervising the financial operations of the Company in the United States. She will exercise discretion over the day-to-day operations on all financial activities of the Company. Moreover, she will manage the financial operations of the company, establishing goals, policies and procedures to undertake and implement the expansion plan in the United States.

[The Beneficiary] will also exercise wide latitude in discretionary decision making, establishing the most advantageous courses of action for the successful management and direction of the operations of the petitioner.

The Petitioner submitted its organizational chart depicting the Beneficiary as "C.F.O.," reporting to the "C.E.O.," [REDACTED]. As CFO, the Beneficiary supervises a "Product Manager," to be hired; a "Production Manager," [REDACTED] an "Accountant," outsourced to [REDACTED] and an "Intellectual Advisor," outsourced to [REDACTED]. The Production Manager supervises a "Web Art Designer," [REDACTED]; a "Sales Executive," [REDACTED] a second Sales Executive, to be hired; a "Digital Marketing Specialist," to be hired; a "Financial Assistant," [REDACTED] an "Account Executive," [REDACTED] and the following independent contractors: a Web Designer, two Social Media Copywriters, a Web Developer, a "Business Develop. Assoc.," and a Mobile App Developer. The organizational chart indicates that the CEO and CFO positions are managerial and executive and that the Product Manager, Production Manager, Accountant, Intellectual Advisor, Web Art Designer, Sales Executives, and Digital Marketing Specialist positions are all professional and supervisory.

The Petitioner submitted copies of [REDACTED] bachelor's degree in advertising and [REDACTED] bachelor's degree in electronics.

The Petitioner submitted its 2013 IRS Form W-3, Transmittal of Wage and Tax Statements, indicating that it paid \$176,220.00 in wages, tips, and other compensation during 2013. The Petitioner also submitted its 2013 IRS Forms W-2, Wage and Tax Statement, showing that it paid [REDACTED] \$35,520.00, [REDACTED] \$45,300.00, [REDACTED] \$8,500.00, [REDACTED] \$7,200.00, [REDACTED] \$12,200.00, and the Beneficiary \$67,500.00 in wages, tips, and other compensation during that year.

The Petitioner submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, for the first and second quarters of 2014 and the third quarter of 2013, indicating that it had four employees and paid \$31,675.00 in the first quarter of 2014, seven employees and paid \$49,590.50 in the second quarter of 2014, and six employees, paying \$44,525.00 in the third quarter of 2013. The Petitioner also submitted its State of Florida Form RT-6, Employer's Quarterly Report, electronic filing print-outs for the first and second quarters of 2014 and the third quarter of 2013, indicating that it had three employees each month and paid \$30,075.00 in the first quarter of 2014, five employees the

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first month and seven employees the following two months and paid \$49,590.50 in the second quarter of 2014, and six employees each month, paying \$44,525.00 in the third quarter of 2013.

The Petitioner did not submit its IRS Form 941 or State of Florida Form RT-6 for the third quarter of 2014, which is the time of filing the instant petition.

The Petitioner submitted an employee list including position title, salary, and education for each of its employees. According to the list, all of its employees except two of the independent contractors currently hold bachelor's degrees and have at least two years of experience. The list includes the following individuals:

| Position | Name |
|--|----------------|
| C.E.O. | |
| C.F.O. | |
| Financial Assistant | |
| Production Manager | |
| Account Executive | |
| Web Art Designer | |
| Sales Executive | |
| Digital Marketing Specialist | HIRING PROCESS |
| Sales Executive | HIRING PROCESS |
| Product Manager (SIA) | TO BE HIRED |
| Web Designer [Independent Contract] | |
| Social Media Copywriter [Independent Contract] | |
| Web Developer [Independent Contract] | |
| Social Media Copywriter [Independent Contract] | |
| Business Development Assoc. [Independent Contract] | |
| Mobile App Developer (IOS) [Independent Contract] | |

The Petitioner also submitted position descriptions for the CEO, Production Manager, Account Executive, Web Art Director, Financial Assistant, Intellectual Property Advisor, and Accountant positions.

The Petitioner submitted an Independent Contractor Agreement with [REDACTED] dated July 15, 2014, and signed by [REDACTED] as "CFO." The contract does not indicate the contractor's position title, type of work to be performed, or duration of time for said agreement; however, Exhibit A of said contract indicates that he will work on the Petitioner's mobile application and his final payment will be on October 31, 2014.

The Petitioner submitted an Independent Contractor Agreement with [REDACTED] dated August 12, 2014 and signed by the Beneficiary as "CFO." The contract does not indicate the contractor's position title, type of work to be performed, or duration of time for said agreement;

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however, Exhibit A of said contract indicates that she will work on “copywrite for [REDACTED] website project” and her final payment will be on September 30, 2014.

The Petitioner submitted an Independent Contractor Agreement with [REDACTED] dated March 14, 2014 and signed by [REDACTED] as “CFO.” The contract does not indicate the contractor’s position title, type of work to be performed, or duration of time for said agreement; however, Exhibit A of said contract indicates that he will work on developing a web application for the Petitioner and his final payment will be “when finished.”

The Petitioner submitted a second Independent Contractor Agreement with [REDACTED] dated July 11, 2014 and signed by the Beneficiary as “CFO.” The contract does not indicate the contractor’s position title, type of work to be performed, or duration of time for said agreement; however, Exhibit A of said contract indicates that he will work on developing a web application for the Petitioner and his final payment will be on December 15, 2014.

The Petitioner submitted its Commercial Lease Agreement, along with a letter from the landlord, stating that it has leased 900 square feet of space authorized for use as an “interactive agency, web design, software development, online marketing, IT services, IT consulting and training.” The lease commenced August 15, 2012 through August 15, 2015.

The Petitioner submitted its Business Plan, which includes the Beneficiary’s current and future “functions and duties” as the CFO of the U.S. company. The Business Plan also states the following about its current staff:

[The Petitioner] has six full-time employees and two outsourcing professionals. Of the six full-time employees, there are three managerial positions: [REDACTED] as CEO, [the Beneficiary] as CFO and [REDACTED] as Production Manager. The other three positions at [the Petitioner] are: [REDACTED] as Account Executive, [REDACTED] as Financial Assistant and [REDACTED] as Web Art Director.

The two outsourcing professionals mentioned . . . are not employees at [the Petitioner] and are thus not under the company’s payroll expenses. . . . The two professionals are as follows:

- Mr. [REDACTED] Lawyer in Intellectual Property and Business Law and founder of [REDACTED]
- [REDACTED] Accountant and founder of [REDACTED]

The Business Plan further includes an organizational chart depicting the Beneficiary as CFO, reporting to the CEO, [REDACTED]. As CFO, the Beneficiary supervises an Intellectual Property Advisor, outsourced to [REDACTED] an Accountant, outsourced to [REDACTED] a Financial Assistant,

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██████████ a Production Manager, ██████████ and an Account Executive, ██████████
██████████ The Production Manager supervises a “Web Art Director,” ██████████

The Director issued a request for evidence (RFE) on November 13, 2014, advising the Petitioner that based on the submitted documentary evidence, the Beneficiary did not appear to meet the full definition of a manager. The Director noted that the Petitioner’s Forms 941 indicated that it employed between three and six employees, including the Beneficiary and her spouse,¹ which seemed to indicate that the Beneficiary did not manage or supervise professionals or supervisory employees who would relieve her from performing the day-to-day duties of the operation. The Director further noted that the Petitioner claimed to have six additional independent contractors, but the contracts submitted indicated that the independent contractors did not work for the organization full-time, but rather they provided piece work and small one-time projects. The Director advised the Petitioner to submit additional evidence to show that the Beneficiary was employed in a managerial or executive capacity.

In response to the RFE, the Petitioner submitted a letter, dated February 2, 2014, stating that the Beneficiary is a functional manager and describing her duties in the United States as follows:

[The Beneficiary] is a FUNCTIONAL MANAGER because her duties are “primarily” managerial. . . . [The Beneficiary] will clearly qualify as a senior level employee with Managerial capacity, given the fact that she will manage the most important component of the petitioner, which is the BUSINESS DEVELOPMENT FUNCTION of the company. Also she manages an essential function which is the business development of the company. Moreover, she functions autonomously and has complete day to day discretion as to the business development decisions (her primary function).

(Emphasis in original.)

The Petitioner submitted its IRS Forms 941 for the third and fourth quarters of 2014, indicating that it had six employees and paid \$45,525.00 in the third quarter of 2014, and seven employees, paying \$50,302.00 in the fourth quarter of 2014. The Petitioner also submitted its State of Florida Form RT-6 electronic filing print-outs for the third quarter of 2014, indicating that it had three employees each month and paid \$30,075.00 in total gross wages during that period. The Form RT-6 lists the following paid employees for the third quarter of 2014: ██████████ and the Beneficiary, who were collectively paid a total of \$30,075.00 during that period. The same Form RT-6 lists the following unpaid employees for the third quarter of 2014: ██████████ and ██████████. The Petitioner then submitted a Correction to the RT-6 for the third quarter of 2014, indicating that it paid ██████████

¹ We note that the Petitioner has explained on appeal that the Beneficiary’s husband is not employed by the U.S. company; rather, her son, ██████████ whom the Director refers to as her spouse, is the CEO and owner of the petitioning U.S. company.

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█ a total of \$15,450.00, raising its total gross wages paid in the third quarter of 2014 to \$45,525.00.

The Petitioner submitted its 2014 IRS Form W-3, indicating that it paid \$177,092.50 in wages, tips, and other compensation during 2014. The Petitioner also submitted its 2014 IRS Forms W-2, showing that it paid █ \$30,182.00, █ \$41,865.50, █ \$9,450.00, █ \$16,900.00, █ \$17,100.00, █ \$6,670.00, █ \$16,800.00, and the Beneficiary \$38,125.00 in wages, tips, and other compensation. The Petitioner then submitted its 2014 IRS Forms 1099-MISC, Miscellaneous Income, showing that it paid █ \$1,376.00 and █ \$1,250.00 in nonemployee compensation.

The Petitioner submitted a diagram outlining the Beneficiary's duties as the CFO managing the "business development function" of the Petitioner. The diagram outlines the duties as follows:

Lead all strategic aspects of Business Development: Finance, Sales, Production, HRRR [*sic*] and New Business Lines.

[Sales & Marketing:] Coordinate the execution of Commercial strategies for █ training.

Coordinate with:

- Sales Executives
- Sales
- Account Executives
- Repeat Sales
- Upgrades

[Human Resources:] Oversee Payroll policies, hiring process, performance review process and KPI's. Coordinate legal and regulatory compliance[.]

Coordinate with:

- CEO
- Production Manager
- Legal Counsel

[New Business Lines:] Analyze [*sic*] New Business Opportunities and provide leadership for implementation.

Coordinate with:

- CEO
- Legal Counsel
- Accountant
- New Business Supervisor █

[Production:] Coordinate Projects execution, products features, services, costs, timelines and █ deployment.

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Coordinate with:

- Production Manager
- Developers and Programmers

[Financial:] Complete discretion over financial matters. Coordinate creation of budget, plan and oversee their execution[.]

Coordinate with:

- CEO
- Accountant
- Financial Assistant

The Petitioner submitted an undated document, signed by [REDACTED] as CEO, titled, “Managerial Capacity of [the Beneficiary] in [the Petitioner].” The document includes the Beneficiary’s “previous managerial decisions” made for the Petitioner and “future managerial decisions” made for the Petitioner listed in part, as follows:

- [The Beneficiary] will continue providing strategic guidance for the creation of the goals, objectives and budgets for the company’s Business Development plan.
- [The Beneficiary] will continue to lead the financial projects of the company . . . focusing on achieving the goals set in the Business Development plan.
- She will provide strategic guidance for the implementation of a cost-benefit-based accountability . . . including [REDACTED]
- [The Beneficiary] will coordinate the annual incentive plan for executives and employees of the company. . . .
- [The Beneficiary] will continue to oversee the creation and implementation of the financial annual budget plan of the company. . . .
- She will coordinate the hiring of a specialized Head Hunter Company to provide [the Petitioner] with the most professional talents for developing, integration and technical support for the [REDACTED]. She will conduct the interviews, and she will decide to hire the most appropriate individuals for the positions.
- [The Beneficiary] will continue to coordinate the recruitment, training and evaluation of the administrative team of the company. . . .
- [The Beneficiary] will provide guidance on the best moment and the optimal loan amounts to finance the developing and launching of the [REDACTED] for the USA Market.
- Based on the small businesses market analysis, [the Beneficiary] will coordinate the execution of the CMR (Customer Relationship Management) Strategies for the [REDACTED] promotion; she also will evaluate and coordinate the system’s improvements and modifications based on the user’s relative ease of use.
- She will coordinate the elaboration of a complete and updated user’s guide of “How to Use [REDACTED]. She will decide the most convenient way to deliver the information to the customers and the index design to facilitate the understanding of the manual.

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- When the [REDACTED] is launched . . . [the Petitioner] will need a technical support platform to provide services to their customers. [The Beneficiary] will coordinate the creation of a Technical Support Department.

The same document then went on to state that the Beneficiary “will primarily perform managerial duties in regard to an essential function with the organization.” The Petitioner described the Beneficiary’s duties managing an essential function as follows:

[The Beneficiary] as [the Petitioner’s] Chief Financial Officer manages, develops and directs the Business Development function within the organization, coordinating the creation of the company’s budget and the implementation and overseeing the compliance of all policies and procedures to support the company’s Business Development plan. She also meets on a regular basis with the CEO and managers to provide strategic guidance and leadership for the implementation and review of key performance indicators for the company, and if said performance is not up to expected levels, she coordinates the necessary actions to improve it in order to achieve the company’s goals.

....

[The Beneficiary] as [the Petitioner’s] CFO manages the company’s Business Development, which is a key function of the company. To fulfill her duties she leads by providing strategic guidance to [the Petitioner’s] managerial team. [The Beneficiary] will continue establishing budgets and strategic guidelines under the form of short and long-term goals for the Business Development plan and coordinate the implementation and compliance of projects according [to] the before mentioned Business Development plan.

....

[The Beneficiary] functions autonomously and is responsible for managing, overseeing, directing, coordinating and leading all Business Development activities of the U.S. company. She has totally [*sic*] autonomous control over her duties and decisions.

As part of her duties [the Beneficiary] can coordinate the recruitment, selection and hiring of the personnel needed for the organization’s strategic plan. Additionally, [the Beneficiary] with the purpose of supporting the Business Development plan of the institution formulates policy guidance on a range of human resources issues: enforcement of disciplinary actions, dismissal of employees. She also oversees the process for assigning employees’ salary raises and bonuses based on the individual and group contribution to the company’s results.

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As Chief Financial Officer [the Beneficiary] is the most senior level employee as to the function she manages and thus is in a position to exercise full discretion and wide latitude in decision-making to establish the most advantageous courses of action for the successful development of [the Petitioner]. She provides strategic guidance to the organization's personnel and coordinates the team's effort to lead them to achieve the Business Development goals in the most cost effective way possible.

In addition, the Petitioner submitted a Software Development Agreement with [redacted] for work on a web site with a contingency period of one week, from May 1, 2014 to May 5, 2014. The Petitioner also submitted a Confidentiality Agreement with [redacted] dated July 10, 2014.

The Director denied the petition on March 25, 2015. In denying the petition, the Director found that it appeared the Beneficiary and her subordinates were both providing services to the organization's customers/clients and therefore, the Beneficiary's primary duties were not managerial or executive in nature. The Director further found that the Petitioner did not establish that the Beneficiary would be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who could provide her relief from performing the services of the corporation. The Director noted that as it was not clear who was actually providing the goods and services of the operation to the Petitioner's customers/clients on a full-time basis, it seemed likely that the Beneficiary would help to perform these duties.

On appeal, the Petitioner contends that "the Beneficiary does not need to supervise professionals because she is a functional manager who supervises a function and not professionals." The Petitioner asserts that the Beneficiary's duties are primarily managerial, and clearly qualify her as a senior-level employee with managerial capacity, given the fact that she will manage the most important component of the Petitioner, which is the business development function of the company.

In support of the appeal, the Petitioner submits duplicate copies of the diagram outlining the Beneficiary's duties as the CFO managing the "business development function" of the Petitioner, and the undated document, signed by [redacted] as CEO, titled, "Managerial Capacity of [the Beneficiary] in [the Petitioner]."

B. Analysis

Upon review, and for the reasons stated herein, the Petitioner has not established that the Beneficiary will be employed in a qualifying managerial or executive capacity, or as a function manager, in the United States.

When examining the executive or managerial capacity of the beneficiary, U.S. Citizenship and Immigration Services (USCIS) looks first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the

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duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to an understanding of the beneficiary's actual duties and role in a business.

Here, the Petitioner initially characterized the Beneficiary's role as Chief Financial Officer of its U.S. company and provided a description of her proposed managerial position that does not establish that she will be primarily employed in a managerial capacity. The Petitioner noted, in part, that she will manage the organization's finances; meet and work with other managers, vendors, and advisors to present a strategic plan, define project requirements, coordinate strategies across groups, and make recommendations on project strategies as they relate to financial, budgeting, and expending decisions; formulate budget estimates; develop plans for allocating resources; supervise the work of a Production Manager, Account Executive, Financial Assistant, and Accountant; lead meetings with team members, allocating tasks, discussing strategies, and providing guidance; supervise the support of the commercial strategies for the [REDACTED] (Petitioner's financial solution software); supervise of the integration and training of [REDACTED] plan and direct the daily activities of financial projects; and strategic planning to develop better relationships and partnerships with banks, financial companies, vendors, and software dealers.

This description provides a predominantly financial role for the Beneficiary and in no way demonstrates that she manages the function of business development.

In response to the RFE, the Petitioner stated that the Beneficiary will be employed as a function manager as she will manage the essential function of business development. The Petitioner then provided a new description of the Beneficiary's duties to include tasks such as, provide strategic guidance for the creation of the goals, objectives, and budgets for the company's Business Development plan; lead the financial projects of the company; provide strategic guidance for the implementation of a cost-benefit-based accountability; coordinate the annual incentive plan for executives and employees; oversee the creation and implementation of the financial annual budget plan; coordinate the hiring of a specialized head hunter company; coordinate the recruitment, training, and evaluation of the administrative team; coordinate the execution of the customer relationship management strategies for the [REDACTED] promotion; coordinate a complete and updated user guide of "How to Use [REDACTED]"; and coordinate the creation of a Technical Support Department for [REDACTED]. The Petitioner went on to state that the Beneficiary functions autonomously and is responsible for managing, overseeing, directing, coordinating, and leading all business development activities of its U.S. company.

These general statements do not offer any clarification as to the Beneficiary's actual proposed duties in the United States, and fall considerably short of demonstrating that that she will primarily manage the organization, or a function thereof, and supervise and control the work of other supervisory,

professional, or managerial employees. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The Petitioner has not provided any detail or explanation of the Beneficiary's activities in the course of her 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). Further, in light of the newly described duties as a function manager, the Petitioner did not provide any additional information pertaining to how much time the Beneficiary will devote to each duty. Given the evolving description of the Beneficiary's duties at the petitioning U.S. company, we are unable to determine whether the few claimed business development duties would constitute the majority of the Beneficiary's duties. Within the scope of the Beneficiary's newly described function manager duties, the Petitioner's description of the Beneficiary's job duties does not establish what proportion of her duties will be managerial in nature, and what proportion will be non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

It appears that the Petitioner is attempting to alter the Beneficiary's role within its U.S. company in order to demonstrate that she manages the business development function. However, although the Beneficiary may manage the Petitioner's finances, it is not evident that she manages business development. Furthermore, even if it were established that she manages the business development function of the Petitioner, the Petitioner has not established that she has sufficient subordinate staff to perform the tasks associated with that function. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. *See* 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary, when the petition was filed, merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the Petitioner in its response to the Director's RFE did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 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. *See* 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

Here, the Petitioner stated that the Beneficiary will hire, fire, and supervise personnel, and initially indicated that she would devote 10% of her time to this duty. The Petitioner submitted two different organizational charts. The first organizational chart indicated that the Beneficiary would supervise an existing Production Manager, an outsourced Accountant, an outsourced Intellectual Advisor, and a not yet hired Product Manager. The second organizational chart, included in the Petitioner's business plan, indicated that the beneficiary would supervise an existing Production Manager, an existing Financial Assistant, an existing Account Executive, an outsourced Accountant, and an outsourced Intellectual Property Advisor. The Petitioner also submitted brief position descriptions and duties for the Production Manager, Account Executive, Financial Assistant, and both outsourced positions; however, the actual job duties listed for the Beneficiary's subordinates' positions do not demonstrate that they require a professional degree. Nor do they indicate that the positions have supervisory or managerial responsibilities. *See* section 101(a)(44)(A)(ii) of the Act. Regardless, the fact that one of the Beneficiary's subordinates may manage a particular function or supervise lower-level employees is not sufficient to elevate the Beneficiary to a position that is managerial in nature. The Petitioner has not demonstrated that the Beneficiary's duties primarily focus on the management of the organization and the supervision of qualifying managerial, professional, or supervisory employees, rather than on producing a product or providing a service of the U.S. company. As noted above, the Petitioner did not submit a detailed description of the Beneficiary's position to establish that her daily routine will consist of primarily managerial duties. Finally, the petitioner has not submitted evidence that the Beneficiary's subordinate employees will relieve her from performing non-qualifying operational and administrative duties at the U.S. company.

The Petitioner has not established, in the alternative, that the Beneficiary has been and will be employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

Here, for the first time in response to the RFE, the Petitioner stated that the Beneficiary will be a function manager. The Petitioner stated that the Beneficiary will manage the business development function of the Petitioner and provided a new description of her duties to include some related to managing the business development function. However, these newly listed duties do not clearly indicate that she will manage the business development function as a whole for the U.S. company; rather, the duties indicate that she will manage the business development function in terms of budget and financing. The Petitioner did not amend the amount of time the Beneficiary will devote to the newly listed duties in comparison to the previously provided duties that did not include duties specifically related to the business development function. Further, the Petitioner did not articulate what other employees would support the Beneficiary in her duties managing the business development function, such that the Beneficiary would manage the function rather than perform the actual tasks associated with carrying out the function. Again, as this claim is made for the first time in response to the RFE, it appears that the Petitioner is attempting to make the Beneficiary eligible by any means and is changing its description of the Beneficiary's position. 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. at 248.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. *See* section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial. As discussed herein, the Petitioner's vague description of the Beneficiary's proposed duties at its U.S. company does not establish that such duties are primarily managerial in nature.

Finally, the statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. *See* section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization.

(b)(6)

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Here, the Petitioner did not demonstrate that the Beneficiary's proposed duties primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. The job duties provided for the Beneficiary's proposed employment do not demonstrate that the Beneficiary will focus the majority of her time on executive duties rather than the day-to-day operations of the business.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a qualifying managerial or executive capacity, or as a function manager, in the United States. Accordingly, the appeal will be dismissed.

III. QUALIFYING RELATIONSHIP

Beyond the decision of the Director, the Petitioner has not established that the United States and foreign entities are qualifying organizations. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

As noted, on the Form I-129, the Petitioner indicated that it is an affiliate of the Beneficiary's foreign employer, [REDACTED]. Where asked to explain the company stock ownership and managerial control of each company, the Petitioner stated, [REDACTED] owns 51% of the Venezuelan Company and owns 100% of the U.S. Affiliate[.] Thus, he has effective control over both affiliate companies."

Throughout the record, the Petitioner claims it is wholly owned by [REDACTED] however, the record contains contradictory and inconsistent evidence as to the Petitioner's actual ownership.

In support of the petition, the Petitioner submitted its Articles of Incorporation indicating that it is authorized to issue 1,000 shares of common stock with "\$1 par value" and, at Article XIV, listed [REDACTED] as owner of 100% of its shares. The Petitioner also submitted its Share Certificate number one, dated October 15, 2007, issuing 1,000 shares to [REDACTED]

In support of the petition, the Petitioner submitted copies of its 2013 IRS Form 1120, U.S. Corporation Income Tax Return. The 2013 Form 1120 at Schedule K, which includes questions related to the Petitioner's ownership and control, are marked "yes" at question 4 which asks, "[a]t the end of the tax year: a. [d]id any foreign or domestic corporation, partnership (including any entity treated as a partnership), trust, or tax-exempt organization own directly 20% or more, or own, directly or indirectly, 50% or more of the total voting power of all classes of the corporation's stock entitled to vote?" The 2013 Form 1120 at Schedule G, which includes information on certain persons owning the corporation's voting stock, further lists [REDACTED], the foreign entity, as the owner of 100% of the Petitioner's voting stock.

(b)(6)

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In response to the RFE, the Petitioner submitted copies of its 2014 IRS Form 1120, reflecting the same responses at Schedules K and G, indicating that the foreign entity owns 100% of the petitioning U.S. company.

In the instant matter, the record does not clearly demonstrate the actual ownership of the petitioning U.S. company, as some evidence reflects that [REDACTED] is the majority owner, while more recent evidence shows the foreign entity as the sole owner. 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 (BIA 1988).

Based on the inconsistencies discussed above, the Petitioner has not established that the United States and foreign entities are qualifying organizations. For this additional reason, the petition cannot be approved.

IV. CONCLUSION

An application or petition that does not comply with the technical requirements of the law may be denied by this office even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that we review appeals on a *de novo* basis).

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, 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, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of A-D- Corp.*, ID# 14801(AAO Nov. 25, 2015)