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

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

MATTER OF S-P-C-S-

DATE: OCT. 1, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a California corporation operating as a “supplier of pest control devices,” seeks to classify the Beneficiary 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, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Petitioner, established in July 2014, claims to be a subsidiary of [REDACTED], located in the United Arab Emirates. It seeks to employ the Beneficiary as the Chief Executive Officer of its new office in the United States.

The Director denied the petition on two alternative grounds, concluding that the Petitioner did not establish that (1) the Beneficiary will be employed in a qualifying managerial or executive capacity within one year of approval of the new office petition, and (2) it had acquired sufficient physical premises to commence operations 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 an executive capacity within one year of approval of the petition and that its sublease agreement establishes its physical premises in the United States.

#### I. THE LAW

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(1)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

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

## II. THE ISSUES ON APPEAL

### A. Employment in a Managerial or Executive Capacity in the United States

The first 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 within one year of approval of the new office 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.

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## 1. Facts

The Petitioner filed the Form I-129 on December 5, 2014, and indicated that it operates as a supplier of pest control devices with one current employee in the United States and a projected gross annual income of \$180,000.00. On the L Classification Supplement to Form I-129, where asked to describe the Beneficiary's proposed duties in the United States, the Petitioner stated as follows:

- 1) Establishment of a new corporate office in [REDACTED], California;
- 2) Oversight of incorporating the new business under the laws of the State of California;
- 3) Exercising a wide latitude in discretionary decision-making authority over day to day business operations, including overseeing the company's finance, accounting, and management functions[;]
- 4) Developing short and long range corporate goals and objectives for the enhancement of the business;
- 5) Planning, developing, and establishing [the Petitioner's] policies and procedures in accordance with the corporate charter, as well as revising the company objectives and plans in accordance with current and future developments;
- 6) Developing company policies to coordinate [the Petitioner's] business activities, including purchasing, marketing, and financial operations;
- 7) Negotiating and finalizing contracts and agreements with suppliers, real estate owners, customers, and employees;
- 8) Consulting current regulations and trade journals to ensure all products and practices of the corporation comply with local law and regulation and use the most up to date supplies and practices;
- 9) Speak with other companies in the field to ensure that prices are competitive in the community; and
- 10) Monitoring and evaluating the company's progress and performance by reviewing activity reports, financial statements, and managing the company's budget, as well as revising company objectives in accordance with current and anticipated future business[.]

In its letter of support, dated November 25, 2014, the Petitioner specifically stated that the Beneficiary will be employed in an executive capacity and "will provide executive leadership and direction to all business activities with [the Petitioner]." The Petitioner then listed the same proposed duties previously listed on the Form I-129, except for the first and second duties, and added one more duty: "[m]aintaining contact with the parent corporation . . . to ensure that the goals of the parent are being met by the new corporation."

The Petitioner submitted its Business Plan describing the Beneficiary's proposed position in the United States and its proposed staffing plan as follows:

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[The Beneficiary] plans to add two personnel to his employee roster each year, as demand for [the Petitioner's] products increases and it becomes necessary to keep pace with that demand. After three years of operation, when [the Petitioner] expands to offer extermination services, [the Beneficiary] will add and train additional employees for that side of the business.

....

#### 7.5 Personnel Plan

[The Petitioner] projects to increase its staff size by at least two persons annually. Currently, the company's only employee is its Chief Executive. However, a growing [REDACTED] market will require additional personnel – as many as ten more by 2019. That will include security, sales, and service representatives.

....

#### 8.1 Management/Principals

[The Petitioner] is run by [the Beneficiary]. . . .

#### 8.2 Organizational Structure

At present, the company structure consists of one employee, Chief Executive Officer [the Beneficiary].

#### 8.3 Professional Consultants

At this time, [the Beneficiary] has retained the services of . . . CPA, in [REDACTED] CA to manage the financial records of the corporation.

....

#### 9.3 Future Plans

Within a three-year frame, [the Petitioner] plans to increase its business to \$1.5 million worth of sales and hire at least six new employees to act as drivers, sales representatives, and service providers.

The Petitioner's business plan also included projected profit and loss statements for the first several years of operations. For the first year, the Petitioner anticipates a monthly labor cost of \$1,500, but does not include any expenses for salaries, wages, contractors or commissions. The projections show that the monthly labor cost would increase to \$2,000 in year two, to \$3,000 in year three, and to \$25,000 in year four.

The Petitioner submitted a document titled “Description of Duties: Chief Executive Officer,” describing the Beneficiary’s proposed duties in the United States exactly as described in its letter of support dated November 25, 2014.

The Petitioner did not submit any additional information about the Beneficiary’s proposed position or job duties in the United States or the proposed organizational structure of its U.S. company.

The Director issued a request for evidence (RFE) on December 12, 2014, advising the Petitioner that the information provided, pertaining to the Beneficiary’s proposed position in the United States, was insufficient. The Director instructed the Petitioner to submit evidence that the Beneficiary’s proposed position in the U.S. will be in a managerial or executive capacity.

In response to the RFE, the Petitioner submitted a letter from the foreign entity, dated December 15, 2014, describing the Beneficiary’s proposed duties and the new operation staffing as follows:

To begin, [the Petitioner’s] sole employee will be [the Beneficiary], who will act as the Chief Executive Officer for [the Petitioner]. Once sales are able to begin in January 2015, when [the Petitioner] takes possession of their office space, and [the Petitioner] begins to sell its products, we anticipate that [the Petitioner] will hire at least two individuals within the first year. These first two employees will be a secretary and a sales representative. At least one will also deliver products to local customers. Both of these initial employees will be working on commission due to the nature of the position. In the second year of operation we anticipate [the Petitioner] will add two additional employees, one more sales representative as well as a driver to handle deliveries, one of the experienced sales representatives will be promoted to Sales Manager. At the end of the third year, once a permit to provide pest control services is procured, [the Petitioner] will hire at least two individuals who will be able to make house calls and provide pest control to homes and businesses. By the end of the fifth year of operation, we anticipate that [the Petitioner] will have hired ten (10) employees, one sales manager, two sales representatives, one delivery driver, one service supervisor, two service technicians, and one security guard, one accountant, and one marketing officer.

. . . .

[The Petitioner] requires an executive capacity position to manage its operations and oversee its growth. In order to establish, maintain, and grow [the Petitioner], an executive is needed to direct the management of the corporation, hire employees as required, establish goals and policies for the corporation that are commiserate [*sic*] with [the foreign entity’s] goals as well as accommodating the needs and requirements of a U.S. based corporation. . . .

[The Beneficiary] will have sole control over interviewing and hiring new employees to staff the U.S. subsidiary's office. Additionally, [the Beneficiary] will need to train these new employees, assign each employee to specific tasks, supervise them in their duties, and evaluate the work of each employee. [The Beneficiary] will also be in charge of determining whether to approve leaves of absence, vacations, and sick leave, as well as deciding whether an individual's employment needs to be terminated due to unsatisfactory work.

In order to grow the corporation, [the Beneficiary] will have sole responsibility for entering into contracts on behalf of the subsidiary corporation, [the Petitioner]. These duties will include entering into sales and distribution agreements, as well as contracts for goods and services to meet the needs of [the Petitioner] such as electricity, phone, internet, furniture, and supplies. Further, [the Beneficiary] will be responsible for contacting advertising outlets in order to purchase advertising for [the Petitioner's] goods and services.

Additionally, the new office requires an executive to be hands-on and be able to make immediate decisions regarding corporate development. [The Beneficiary] will have wide latitude to make discretionary decisions regarding the growth and functioning of [the Petitioner] and will report to [the foreign entity] regarding the progress and profits of the subsidiary corporation. Our corporation will offer minimal guidance to [the Beneficiary] as he establishes the subsidiary because, due to his long history with our corporation, we believe that his judgement regarding [the Petitioner] will be in our best interests. As such, [the Beneficiary] will be occupying an executive capacity position with the U.S. based corporation which requires such executive leadership in order to grow and expand into the U.S. and international markets.

The Petitioner submitted individual proposed organizational charts for each quarter of its first year of operations. During the first quarter, the Petitioner's organizational chart is broken up by "Office Administration," "Product, Merchandising," "Marketing," and "Corporate Development." Within Office Administration, the Beneficiary will "hire an assistant to take calls and aid in filing and filling orders"; within Marketing, the Beneficiary will "retain web designer" and "secure a marketing company to develop full marketing plan"; and within Corporate Development, the Beneficiary will "contact and hire an accountant."

During the second quarter, the Petitioner's organizational chart is broken up by "Office Administration," "Corporate Expansion," and "Corporate Development." Within Office Administration, the Beneficiary will "hire an Operations Manager and Sales Manager to oversee the sales of [the Petitioner's] products," "retain an [I]nternet technology expert," and "consult with a logistics expert"; and within Corporate Development, the Beneficiary will "hire an intellectual property attorney to file patent applications."

During the third quarter, the Petitioner's organizational chart is broken up by "Marketing and Sales," "Corporate Development," and "Financial Accounting." Finally, during the fourth quarter, the Petitioner's organizational chart is broken up by "Corporate Analysis," "Future Planning," and "Year End Actions." Within Corporate Analysis, the Beneficiary will "evaluate work done by employees of [the Petitioner], determine quality, and provide feedback of strengths and areas for improvement."

The Petitioner also submitted its organizational chart for the overall proposed structure of the company, depicting the Beneficiary at the top tier of the hierarchy as Chief Executive Officer, supervising a Sales Department, Finance Department, Operations, Service & Operations Department, and Marketing. The Sales Department consists of a Sales Manager who supervises an unknown number of Sales Representatives; the Finance Department consists of an Accountant; Operations consists of Security and Delivery; the Service & Operations Department consists of a Service Department Supervisor who supervises an unknown number of "General Pest Control Technicians"; and Marketing consists of a Chief Marketing Officer.

The Director denied the petition on January 23, 2015 concluding, in part, that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity in the United States within one year of approval of the new office petition. In denying the petition, the Director noted that the quarterly timeline indicates that the Petitioner will hire an assistant and outsource a web designer, an accountant, and an attorney. The Director then noted that the assistant was not listed on the proposed organizational chart and thus it was unclear where she would fall within the company. The Director found that since a timeline for the employees in the Finance Department, Marketing, and Operations Security was not provided, it was reasonable to conclude that the Beneficiary will be the one performing the duties of these departments. The Director further found that the duties provided for the Operations and Sales Manager and the Assistant suggest that they are not professionals or supervisory employees, and as such, the Petitioner did not establish that the new office would have an organizational structure to support the Beneficiary in a managerial or executive position.

On appeal, the Petitioner submits a brief, dated February 6, 2015, stating that the Beneficiary will be employed in an executive capacity. The Petitioner states that, within the first year of operations, it will hire a full-time Secretary to aid in handling sales and taking calls, and an Operations and Sales Manager to oversee the sales and operations of the U.S. company. The Petitioner states that the Beneficiary will supervise the external experts; specifically, the web designer, marketing company, accountant, Internet technology expert, logistics expert, and intellectual property attorney. The Petitioner specifically addresses the Director's concern about the assistant and explains that the timeline "clearly states that the assistant will be assisting in the taking and filling of orders which would place that assistant within the Sales Department." The Petitioner further reiterates the Beneficiary's proposed duties and states that it "has shown that these tasks will take up more than the required 51 percent of Beneficiary's time and these duties fall squarely within the regulatory requirements for an executive position."

## 2. Analysis

Upon review, and for the reasons stated herein, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States within one year of approval of the new office petition.

The one-year “new office” provision is an accommodation for newly established enterprises, provided for by U.S. Citizenship and Immigration Services (USCIS) regulation. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial/executive responsibility cannot be performed in that first year. The “new office” regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a “new office,” it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally* 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a “new office,” a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

When examining 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 petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in 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 understanding a beneficiary's actual duties and role in a business.

Although the Petitioner specifically states on appeal that the Beneficiary will be employed in an executive capacity in the United States, we will first discuss whether the Beneficiary's proposed position meets the definition of managerial capacity.

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).

The Petitioner characterized the Beneficiary’s role as Chief Executive Officer of its U.S. company and provided a very vague description of his proposed position that does not establish that he will be primarily employed in a managerial capacity. The Petitioner noted, in part, that the Beneficiary will establish a new corporate office, develop company policies to coordinate business activities, including purchasing, marketing, and financial operations, negotiate and finalize contracts and agreements with suppliers, real estate owners, customers, and employees, and monitor and evaluate the company’s progress and performance by reviewing activity reports, financial statements, and managing the company’s budget. The Petitioner did not provide any additional information about the Beneficiary’s duties or how much time he will devote to each of them. The Petitioner’s description of the Beneficiary’s job duties does not establish what proportion of the Beneficiary’s duties will be managerial in nature, if any, and what proportion will be non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). 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 the Beneficiary will primarily manage the organization 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 his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990).

Although the Beneficiary is not required to supervise personnel, if it is claimed that his 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’s business plan specifically stated that the Beneficiary will hire two employees within the first year of operations. In its letter in response to the RFE, the Petitioner specifically stated that the Beneficiary will hire a secretary and a sales representative, both paid solely on commission, and one of which will also deliver products to local customers. The Petitioner did not claim that either of these employees would be supervising subordinates or performing duties that would typically be performed by a professional.

In response to the RFE, the Petitioner also provided organizational charts showing that the Beneficiary will supervise various departments and employees with managerial titles by the end of the first year of operations. However, the Petitioner did not attempt to reconcile these organizational charts with the staffing projections made in its business plan and in its own letter in response to the

RFE, which indicate that the company intends to hire only two commissioned employees. Further, the charts were not accompanied by corroborating evidence, such as a revised business plan with updated staffing and financial projections showing how the company expects to grow to support the multi-tiered structure depicted in the charts. As noted, the business plan shows that the Petitioner anticipates a static monthly labor cost of \$1,500 for the entire first year of operations, a figure that is consistent with its initial claims that it will employ, at most, two commissioned employees. 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). Based on the unresolved discrepancies between the Petitioner's statements and the submitted organizational charts, the Petitioner has not provided sufficient evidence of the projected staffing structure of the company for the initial year of operation, and it has not established that the Beneficiary would be supervising a subordinate staff of managers, supervisors or professionals at the end of the initial year of operations.

The Petitioner has not established, in the alternative, that the Beneficiary 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, the Petitioner did not indicate that the Beneficiary qualifies as a function manager. The Petitioner did not articulate how the Beneficiary's proposed duties at the U.S. company qualify him as a function manager and did not provide a breakdown indicating the amount of time the Beneficiary will devote to duties that would clearly demonstrate that he will manage an essential function of the U.S. company.

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 his duties are "primarily" managerial. As discussed herein, the Petitioner's vague description of the Beneficiary's proposed duties at its U.S. company falls short of establishing that such duties are primarily managerial in nature.

We will now turn our analysis to the question of whether the Petitioner established that the Beneficiary will be employed in the United States in a primarily executive capacity by the end of the first year of operations.

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.

Here, the Petitioner specifically claims that the Beneficiary’s proposed position is executive in nature and characterized his role as the Chief Executive Officer of its new office. The Petitioner’s description of the Beneficiary’s proposed executive position, however, is very vague and does not establish that he will be primarily employed in an executive capacity. For example, the Petitioner claims that he will exercise a wide latitude in discretionary decision-making authority over day to day business operations, develop short and long range corporate goals and objectives, plan, develop, and establish policies and procedures in accordance with the corporate charter, develop company policies to coordinate business activities, including purchasing, marketing, and financial operations, consult current regulations and trade journals to ensure all products and practices of the corporation comply with local law and regulation and use the most up to date supplies and practices, speak with other companies in the field to ensure that prices are competitive in the community, and maintain contact with the parent corporation to ensure that the goals of the parent are being met by the new corporation. The Petitioner did not provide any additional information about the Beneficiary’s duties or how much time he will devote to each.

The Petitioner’s description of the Beneficiary’s job duties does not establish what proportion of the Beneficiary’s duties will be executive in nature, and what proportion will be non-executive. *See Republic of Transkei v. INS*, 923 F.2d at 177. These general statements fail to offer any clarification as to the Beneficiary’s actual proposed duties in the United States, and fall considerably short of demonstrating that that the Beneficiary will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. The vague description of the Beneficiary’s proposed position with the Petitioner does not demonstrate that the Beneficiary will focus the

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majority of his time on executive duties rather than the day-to-day operations of the business. Further, it appears that the Petitioner has simply paraphrased the language in the statute when describing the Beneficiary's proposed duties in the United States. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

In response to the RFE and on appeal, the Petitioner describes the Beneficiary's proposed duties similarly and again, does not provide any clarification or additional information pertaining to the Beneficiary's proposed duties. Further, as discussed, the Petitioner has not provided a credible and consistent description of its proposed staffing levels and organizational structure for the first year of operations. Absent a detailed description of the Beneficiary's actual executive duties, and absent evidence to show that his subordinates will relieve him from performing non-qualifying operational and administrative duties, the record does not establish that the Beneficiary will be employed in a qualifying executive capacity in the United States. Although afforded a second opportunity to provide the deficient information, the Petitioner did not provide any detail or explanation of the Beneficiary's activities in the course of his daily routine.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States within one year of approval of the new office petition. Accordingly, the appeal will be dismissed.

## B. Physical Premises

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

### 1. Facts

The Petitioner filed the Form I-129 on December 5, 2014, and therefore must establish that it satisfied the requirements at 8 C.F.R. § 214.2(l)(3)(v)(A) as of this date. 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. 1978).

On the Form I-129, the Petitioner identified its address as [REDACTED] California [REDACTED]. In its letter of support, dated November 25, 2014, the Petitioner described its physical premises as follows:

[The Petitioner's] principal place of business is currently located at [REDACTED] CA [REDACTED]. [The Petitioner] has leased additional office space beginning January 1, 2015. As of January 1, 2015, the principal place of business will be located at [REDACTED] CA [REDACTED]. This lease has been

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signed for the period from January 1, 2015 through November 30, 2020 at a monthly rent of \$1,000.00 plus additional fees of \$22.00 monthly.

The Petitioner submitted a copy of its Sublease Agreement, dated October 1, 2014, between [REDACTED] as Tenant and the Petitioner as Subtenant. The Sublease Agreement is for [REDACTED] of [REDACTED] located at [REDACTED] containing approximately 275 square feet of rentable space. Although the Sublease Agreement is dated October 1, 2014, it is set to begin on January 1, 2015 and continue through the remainder of the tenant's Prime Lease, which terminates on November 30, 2020. The Sublease Agreement specifically states that "[t]he Prime Lease requires the prior *written consent* of Landlord to any subletting of the Premises."

(Emphasis added).

The Petitioner did not submit any evidence of its actual physical premises at the time of filing the petition on December 5, 2014.

In the RFE, the Director advised the Petitioner that it had not submitted documentation show that the landlord approved the sublease from [REDACTED]. The Director instructed the Petitioner to submit evidence that satisfies this requirement.

In response to the RFE, the Petitioner submitted a letter, dated December 15, 2014, explaining its use of the physical premises.

The Petitioner also submitted a letter from [REDACTED] of The [REDACTED] (title unknown), dated January 7, 2015, approving a sub-lease of [REDACTED] to the Petitioner contingent upon the Petitioner obtaining and maintaining insurance for the premises. The letter is addressed to [REDACTED]

The Petitioner submitted a copy of the original Prime Lease agreement, dated May 23, 2013, between [REDACTED] and [REDACTED], an individual doing business as [REDACTED]. The Prime Lease is for [REDACTED] of [REDACTED] located at [REDACTED] containing approximately 3,896 square feet of rentable space. The Prime Lease further states that the tenant must obtain written consent from the landlord prior to subletting any portion of the premises.

The Petitioner submitted photos of its claimed physical premises with its signage.

The Director denied the petition concluding, in part, that the Petitioner did not establish that it had secured sufficient physical premises to house the new office. In denying the petition, the Director noted that the letter authorizing the sublease from [REDACTED] the broker representing the landlord, is dated January 7, 2015, which is after the filing of the instant petition. The Director found that the sublease agreement submitted with the initial filing did not appear to have the approval of the landlord at the time it was executed. The Director concluded, therefore, that the

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Petitioner did not establish that the U.S. company had secured sufficient physical premises at the time of filing.

On appeal, the Petitioner provides a brief from Counsel, dated February 6, 2015, with the following explanation pertaining to its physical premises:

While the original lease between [REDACTED] and [REDACTED] does state that subleases of the property must be approved by [REDACTED] it does not specify that these subleases must be approved in writing. The Request for Evidence requested a letter from the property management company confirming that the property owner allows for a sublease of the premises. In order to respond to the [RFE], Petitioner approached [REDACTED] to have the oral approval of the sublease memorialized in writing for the purpose of fully responding to the [RFE]. Petitioner was already occupying the premises as had been previously agreed and was paying rent for the property.

## 2. Analysis

Upon review, and for the reasons stated herein, the Petitioner has not established that it had secured sufficient physical premises to house the new office prior to filing the petition.

Here, Counsel for the Petitioner states, on appeal, that the tenant's original lease does not require subleasing approval in writing and claims that the letter from the landlord is dated after the Sublease Agreement because the Director requested such approval in writing. In order to comply with the Director's request, the tenant asked the landlord to "memorialize" its oral approval of the sublease in said letter. However, the evidence in the record does not corroborate Counsel's statements.

The Petitioner submitted a Sublease Agreement with tenant [REDACTED] dated October 1, 2014, which plainly states that the Prime Lease requires *written consent* from the landlord prior to any subletting of the premises. The Prime Lease, referenced in the Sublease Agreement, does in fact state that *written consent* from the landlord is required prior to subletting the premises. Therefore, Counsel's assertions on appeal are not persuasive. Further, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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, the letter from the landlord is addressed to [REDACTED] an unknown person. This name does not appear anywhere else in the record; the Sublease Agreement and the Prime Lease only list the name of [REDACTED] as tenant. It remains unknown who the letter from the landlord is addressed to, and without further explanation, we cannot determine the validity of the

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letter from [REDACTED]. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591. 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. *Id.* at 591-92.

Based on the inconsistencies discussed above, the Petitioner has not established that it had acquired sufficient physical premises to house the new office as of the date of filing the petition. Accordingly, the appeal will be dismissed.

### III. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

Cite as *Matter of S-P-C-S-*, ID# 14042 (AAO Oct. 1, 2015)