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

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

MATTER OF M-I-, LLC

DATE: SEPT. 14, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an import and export company trading in automobiles and automobile parts, seeks to employ 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, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Petitioner is a Georgia limited liability company established in [REDACTED]. It claims to be an affiliate of [REDACTED] located in Nigeria. The Petitioner seeks to employ the Beneficiary as the chief executive officer of its new office in the United States for a period of one year.

The Director denied the petition, concluding that the evidence of record did not establish that the Beneficiary will be employed in a qualifying managerial or executive position within one year of approval of the petition, or that the new office “will be able to meet its financial obligations the first year of operation.”

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 it provided sufficient evidence to support the approval of the petition. The Petitioner submits a brief and additional evidence 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 shall be accompanied by:

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

The regulation at 8 C.F.R. § 214.2(l)(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 (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

- (3) The organizational structure of the foreign entity.

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. ISSUE ON APPEAL

The primary issue to be addressed is whether the Petitioner established that the Beneficiary would be employed in a qualifying managerial or executive capacity within one year of approval of the petition.

A. Facts

The Petitioner submitted a letter dated January 6, 2014 in support of the Form I-129. The Petitioner stated that it was established as a Georgia limited liability corporation in September 2012 and would operate as an export and import company dealing in salvaged automobiles and automobile parts. The Petitioner intends to employ the Beneficiary as its chief operating officer (CEO) for one year at an annual salary of \$50,000.

On the Form I-129, the Petitioner stated that the Beneficiary's proposed duties are consistent with those of an L-1A executive and described his proposed tasks as follows:

- Responsibility for setting up and beginning operations for the U.S. operations, including establishing office policies and procedures, securing a location and establishing the corporate culture and work environment.
- Hiring and training the team, including, within the first year, the VP Operations, a Logistics Manager, an Inventory Manager and 3 Mechanics. Responsibility for determining job position descriptions, recruitment, hiring, training and firing of all U.S. employees including subordinate managers; determine salary and benefits for each employees, review and approve personnel actions such as raises, bonuses, vacations, etc.
- Setting the strategic policies and direction of the company. Revising as necessary to meet market conditions in Nigeria.
- Directing the financial management of the company at the highest level of management; Budgetary control on expenses and financials of the U.S. company.
- Delivering on revenue targets for 2013, and 2014, authorize purchases and expenses.
- Contracting with US auctions houses and used vehicle sellers in order to purchase used cars for export to Nigeria. Exploring other options for obtaining vehicles parts at lower or less expensive rates. Managing the bidding at auctions and sourcing vehicles and parts at various locations over the U.S.
- Establishing export and overseas shipping processes. Ensuring the company is following U.S. export policies and requirements.
- Review and recommended [sic] solutions to problems and issues that arise in the daily management of the company; hold wide-latitude decision-making power in executing decisions involving the management of the company in the U.S.

The Petitioner provided a copy of a proposed organizational chart showing the staffing planned for the first three years of operation. The chart depicts the Beneficiary as President and CEO and his spouse as the "VP operations." The chart shows proposed positions for a vice president of channel management, a CFO, a logistics manager, an inventory manager, two shipping clerks and three mechanics. The chart indicates that the Petitioner intends to hire the VP operations, logistics manager, inventory manager and mechanics during its initial year of operations.

The Petitioner also provided a document titled "Company Job Descriptions" which briefly describes each proposed position. This document indicates that the Beneficiary's responsibilities will include

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handling finances, accounts and taxes, as well as marketing and sales. In addition, it states that the Beneficiary will perform the duties assigned to the Vice President of Channel Management and the CFO until those positions are filled.

The Petitioner also submitted a business plan that included mission summaries of its affiliate in Nigeria and the petitioning company. The plan included a table depicting the Petitioner's anticipated start-up costs and investment, as well as projected sales, expenses, and gross and net profit for its first three years of operations. The plan indicated that the Petitioner's total payroll for the first year would require \$226,560 for seven employees. The personnel plan indicates that the Petitioner anticipates hiring a part-time CFO during its third year in operation and does not include a projected start date for the VP Channel Management during the first three years. The business plan reiterates that the Beneficiary will initially perform the duties of these two positions as well as performing marketing and sales functions and handling finances, accounts and taxes.

The Petitioner also provided: financial information and documentation for the foreign entity; a service agreement, dated May 15, 2013, with [REDACTED] in which [REDACTED] agreed to accept, store, dismantle, and package automobiles and parts for export or storage and assist with shipping; a sublease for office space effective May 9, 2013; and photographs, licensing documents, and bank statements, among other business documents.

On May 16, 2014, the Director issued a request for evidence (RFE) advising the Petitioner to demonstrate how the company will grow to be of sufficient size to support a managerial or executive position. The Director also requested evidence to show that the Beneficiary's proposed position would be in a primarily managerial or executive capacity. The Director observed that the Petitioner's description of the Beneficiary's duties was vague and non-specific therefore, requested detailed duties and a percentage of time allocated to each duty, among other evidence.

In response to the RFE, the Petitioner provided a letter dated August 8, 2014. The Petitioner asserted that it submitted its business plan indicating its expectation of earning \$600,000.00 in revenue during the first year. The Petitioner provided a second duty description for the Beneficiary that was very similar to the initial description. The Petitioner reiterated that it would hire a vice president for channel management and a CFO during the second year. The vice president for channel management was once again described as the company's key person for establishing relationships with auction houses to ensure sourcing of vehicles and parts. The Petitioner reiterated that the Beneficiary would perform channel management duties until the position was filled during its second year of business operations.

The Director denied the petition on October 29, 2014, finding that the Petitioner had not established that the Beneficiary would be employed in a qualifying managerial or executive capacity within one year of the petition approval. Further, the Director found that the Petitioner did not establish that the new office "will be able to meet its financial obligations the first year of operation." In this regard, the Director found that the Petitioner cannot rely on speculated sales, but rather must demonstrate can remunerate the Beneficiary and the projected staff and pay all startup costs at the time of filing.

On appeal, the Petitioner asserts that the Director erred as a matter of law and fact. The Petitioner maintains that it established by a preponderance of the evidence that the Beneficiary would be employed in a qualifying managerial or executive capacity within one year of the approval of the petition, and that it has sufficient funds to support its first year of operation. The Petitioner asserts that “there is no doubt that [the Beneficiary] will serve in the highest level Executive position of CEO leading the operations of the entire company.”

B. Analysis

Upon review, the Petitioner has not established by a preponderance of the evidence that the Beneficiary would be employed in a qualifying or executive capacity within one year of the approval of the petition.

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.*

Here, the Petitioner primarily claims that the Beneficiary will be employed in an executive capacity within one year. The statutory definition of the term “executive capacity” focuses on a person’s elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to “direct the management” and “establish the goals and policies” of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they “direct” the enterprise as the owner or sole managerial employee. The beneficiary must also exercise “wide latitude in discretionary decision making” and receive only “general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.” *Id.*

When examining the executive or managerial capacity of a beneficiary, we will look first to the petitioner’s description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority

of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Here, while the Petitioner has established that the Beneficiary will exercise the appropriate level of authority over the new company and perform some high-level responsibilities, the totality of the evidence does not establish that he would primarily perform qualifying executive or managerial duties within one year.

The Beneficiary's duty description listed eight responsibilities, two of which related to the initial set up of the company. The remaining six responsibilities included both qualifying and non-qualifying tasks such as contracting with auction houses, managing the bidding at auctions, and budgeting. We are unable to determine whether the Beneficiary would be primarily engaged in qualifying tasks as CEO since the Petitioner did not describe the Beneficiary's specific tasks or assign a percentage of time to individual tasks as requested by the Director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Instead, the Petitioner provided a vague description of the Beneficiary's overall responsibilities. Reciting a beneficiary's vague job responsibilities or broadly cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The Petitioner has not provided any detail or explanation of the Beneficiary's proposed activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, in addition to providing a broad description of the Beneficiary's duties that included executive, managerial, and non-qualifying tasks, the Petitioner also stated that the Beneficiary would perform sales and marketing tasks and have responsibility for finances, accounts and tax matters that were not included in the list of eight duties summarized in its letter. Further, the Petitioner submitted evidence which indicates that the Beneficiary would perform the duties of the positions of Vice President of Channel Management and CFO until these positions are filled. The Petitioner has neither claimed nor submitted evidence of its intent to fill either of these positions within the initial year of operations, and in fact the personnel projections included in the business plan show that a part-time CFO would be hired in the third year, while the Vice President of Channel Management would be hired sometime after the third year. Therefore, the record shows that the Beneficiary will be responsible for performing all sourcing, bidding and purchasing of automobiles and parts well after the first year of operations, in addition to performing sales, marketing and routine financial matters. The Petitioner has not stated how the Beneficiary will divide his time among the three different roles attributed to him, all three of which will require him to perform various non-qualifying duties.

While no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the Petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church*

Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988). Here, given the multiple roles the Beneficiary will fill after the first year of operations, the Petitioner has not established that he will be primarily performing qualifying executive or managerial duties.

The Petitioner correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa petition for classification as a multinational manager or executive. See section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for us to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The reasonable needs of the Petitioner will not supersede the requirement that the Beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the Petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not qualify a beneficiary who will spend the majority of his or her time on non-qualifying duties at the end of the initial one-year new office period. Here, there is a noted absence of projected employees to perform several of the non-managerial and non-executive functions of the company within one year, and the Petitioner expressly states that the Beneficiary will perform those duties until employees are hired.

The Petitioner further cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1574 (N.D. Ga. 1988), in support of its assertion that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, we note that the Petitioner has not furnished evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS), or *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, we are not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In both *National Hand Tool Corp.* and *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. We interpret the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, a petitioner is required to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks.

Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on the conclusion that the evidence is insufficient to establish that the Beneficiary will be primarily performing executive or managerial duties at the end of the Petitioner's initial year of operations; our decision does not rest on the projected size of the petitioning entity. Although the Petitioner intends to have a staff of seven employees by the end of its first year in operations, all of those employees would be performing operations functions in the area of logistics and inventory. The evidence of record indicates that the other key departments of the business, namely channel management, which includes all sourcing and purchasing of automobiles and parts, as well as finance-related duties, would be the sole responsibility of the Beneficiary during the first, second and even the third year of operations. Accordingly, the evidence submitted shows that the Beneficiary's actual duties would include a number of non-qualifying tasks not included in his broad responsibilities as CEO. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The Petitioner refers to a number of unpublished decisions in which we determined that a beneficiary met the requirements of serving as an L-1A manager or executive, including cases in which the beneficiary was a sole employee or the petitioner maintained a small staff, among others. However, the Petitioner has furnished insufficient evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

On appeal, the Petitioner offers a press release from Secretary of the Department of Homeland Security Napolitano and USCIS Director Ali Mayorkas dated August 2, 2011 as legal precedent ignored by the Director in the present case thereby doing "injustice" to the Petitioner and Beneficiary. The Petitioner suggests that the press release establishes a precedent for more lenient adjudication of L-1A petitions "to promote the creation of new start-up enterprises that will spur job creation in a time when the U.S. economy is sorely in need of jobs." We do not agree with the Petitioner regarding the intent of the press release. The release discusses the provision of more information regarding certain business-based nonimmigrant classifications through published "Frequently Asked Questions" via the USCIS website and other related educational and streamlining efforts. The press release does not discuss any modification to regulations, policy or precedent used to adjudicate L-1A, or any other, nonimmigrant petitions. Indeed, the L-1A nonimmigrant classification is not even mentioned in the press release. Regardless, even if the press release was found analogous here, information on agency websites does not constitute final agency action reviewable under the Administrative Procedures Act and does not create legally enforceable entitlements. *See Air Brake Systems, Inc. v. Mineta*, 357 F.3d 632, 646 (6th Cir. 2004).

Although we will affirm the Director's finding that the Petitioner did not establish by a preponderance of the evidence that it will employ the Beneficiary in a qualifying managerial or executive capacity within one year, we will withdraw the Director's observation that the Petitioner did not establish that it "will be able to meet its financial obligations the first year of operation." Upon review, the Petitioner provided sufficient evidence to establish that it has funding to cover its

startup costs and initial operating expenses, and it provided adequately supported sales projections to demonstrate how it intends to cover costs accrued during the initial year of operations. The Petitioner does not need to establish that all projected first year operating costs and expenses will be covered by an initial investment made prior to the time of filing.

Nevertheless, for the reasons discussed above, we find that the record does not establish that the Beneficiary would be employed in a qualifying managerial or executive capacity within one year of the petition approval. Accordingly, the appeal will be dismissed.

III. ADDITIONAL ISSUE

The remaining issue addressed by the Director is the Beneficiary's foreign employment in a qualifying capacity. Specifically, the Director stated: "Although not addressed in the RFE, if you choose to appeal this decision you will need to establish the beneficiary has been employed in a qualifying managerial or executive capacity . . . for one (1) year in the past three (3) years."

On appeal, the Petitioner summarizes the evidence submitted to establish that the Beneficiary was employed in a qualifying capacity by its Nigerian affiliate. The Petitioner asserts that "Since this was not an issue that was included in the RFE in the initial petition, this cannot be a reason for denial of the case, and bringing the issue up in one sentence as a matter of fact in the denial decision is arbitrary, capricious and against USCIS policy."

We agree with the Petitioner that the Director did not properly deny the petition on this basis. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). As the Director did not provide the Petitioner with information regarding specific evidentiary deficiencies or even clearly deny the petition based on a finding that Petitioner did not establish that the Beneficiary was employed by the foreign entity in a qualifying capacity, we will withdraw the Director's comment and will not address this issue further.

IV. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of M-I, LLC*, ID# 13130 (AAO Sept. 14, 2015)