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

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

MATTER OF N-R- LLC

DATE: SEPT. 24, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a Texas limited liability company engaged in scientific and research work for the transportation sector, 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 claims to be a subsidiary of [REDACTED] located in Kazakhstan. The Beneficiary was previously granted one year in L-1A classification in order to open a new office in the United States. The Petitioner seeks to employ the Beneficiary as its President for an additional period of two years.

The Director denied the petition on three separate grounds, concluding that the Petitioner did not establish that: (1) the Petitioner has been doing business in the United States; (2) the Beneficiary will be employed in a qualifying managerial or executive capacity in the United States; and (3) the foreign entity is a qualifying organization doing business abroad.

On appeal, the Petitioner asserts that both the foreign and U.S. entities are doing business and that the Beneficiary will be employed in a qualifying executive capacity in the United States. The Petitioner submits a brief and duplicate copies of previously submitted 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)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

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II. THE ISSUES ON APPEAL

A. United States Company Doing Business

The first issue to be addressed is whether the Petitioner established that it has been and will continue doing business in the United States. Specifically, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines that term as:

Doing business means the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner must provide evidence in support of this extension petition to establish that it has been doing business for the previous year. The Beneficiary's prior L-1A petition was valid for a one-year period commencing on December 5, 2012.

1. Facts

The Petitioner filed the Form I-129 on December 2, 2013. Where asked to describe the "type of business" on the Form I-129, the Petitioner indicated, "scientific and research work for transportation sector." The Petitioner listed its company address as [REDACTED] Texas and indicated that the Beneficiary's work location would be the same.

The Petitioner submitted a copy of its Operating Agreement dated July 11, 2012, stating that the principal purpose of the company would be engaging in architectural consulting, project development, and other architectural drafting endeavors in the United States.

The Petitioner provided a copy of a lease agreement for the address listed on the Form I-129 between the Beneficiary and [REDACTED] valid from February 1, 2013 to December 31, 2013.

The Petitioner also provided a document titled "The development strategy of the branch of the [REDACTED] in [REDACTED]" dated 2013, which addresses the company's strategy for meeting new and previously set goals for the Petitioner's development based on changed conditions in the industry and the state's economy.

The Petitioner also provided two "Business Plans" dated in 2012 and 2013. The first was prepared by the foreign entity and stated that the Petitioner was established, in part, to assist in the development of a program and technical package for monitoring conditions of the railways of Kazakhstan's national railroad using georadar technology. The latter plan was developed by the Petitioner and indicates that the Petitioner would create a centralized databank of Kazakhstan transportation publications for an English-speaking audience as a paid service to the foreign entity.

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Finally, the Petitioner provided a copy of its bank statement from [REDACTED] dated November 12, 2013, indicating that its account was opened on February 7, 2013, and had a current balance of \$7,811.57 in November 2013.

In a request for evidence (RFE), the Director advised the Petitioner that the submitted bank records did not articulate or establish any business activities conducted in the United States, such as payment for services rendered. The Director instructed the Petitioner to submit evidence to establish that the it has been doing and continues to do business in the United States.

In response to the RFE, the Petitioner submitted its 2014 Texas Franchise Tax No Tax Due Information Report, indicating that it had total revenue of \$50,000.00 in 2013.

The Petitioner also submitted the Beneficiary's 2013 IRS Form 1040, U.S. Individual Income Tax Return, indicating that she had a business income of \$25,333.00. The Beneficiary's Form 1040 lists her occupation as "self-employed" in the signature portion of the form. The Petitioner also submitted the Beneficiary's 2013 Form 1040 Schedule C, Profit or Loss from Business (Sole Proprietorship), listing the petitioning U.S. company as the Beneficiary's proprietary business and gross receipts or sales of \$50,000.00.

The Petitioner submitted its April 2014 [REDACTED] statement, showing that its beginning balance was \$4,744.95 at the start of the month and its ending balance was \$3,821.59 at the end of the month. Each of the debit transactions listed on the statement appear to be routine or daily transaction types, such as [REDACTED] an unknown recurring card purchase for \$57.46, and an ATM withdrawal. The only deposit to the account during April 2014 was an ATM check deposit for \$2,240.00. The statement also shows that there were no check transactions on the account in April 2014.

The Petitioner provided an undated letter from the Director of [REDACTED] expressing gratitude to the Director of the branch of the foreign entity in [REDACTED] for assisting in dealing with two other companies as it is merging with the foreign entity.

The Petitioner also submitted its Employment Agreement with [REDACTED] dated June 30, 2014, naming her as the director of Special Projects and Human Resources.

The Director denied the petition concluding, in part, that the Petitioner did not establish that it is doing business. In denying the petition, the Director noted that, although the Petitioner submitted its 2014 Texas Franchise Tax report indicating that it grossed \$50,000.00 in 2013, it did not submit any documentation to support the figures claimed on the tax forms. The Director acknowledged the submitted bank statements, but found that they did not clearly show any sales that would support the claimed \$50,000 income figure.

On appeal, the Petitioner asserts that it has presented evidence to demonstrate that it has been doing business. Specifically, the Petitioner refers to the previously submitted bank statements, the Beneficiary's personal income tax return, its Texas Franchise Tax Report, its employment agreement

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with [REDACTED] evidence of office space, and evidence demonstrating a long-term project with [REDACTED]. The Petitioner emphasizes that it has hired one employee and has at least \$50,000 in cash earnings.

In support of the appeal, the Petitioner submits duplicate copies of previously submitted evidence and its 2013 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, showing that it had \$50,000 in gross receipts or sales.

2. Analysis

Upon review, the Petitioner has not established that it has been doing business in the United States for the previous year or that it was doing business at the time of filing.

The Petitioner submitted its 2014 Texas Franchise Tax No Tax Due Information Report, its 2013 IRS Form 1120S, and the Beneficiary's 2013 IRS Form 1040, each indicating that it achieved \$50,000 in sales or receipts during 2013. The Petitioner also submitted its bank statement stating that it had a balance of \$7,811.57 in November 2013, and an ending balance of \$3,821.59 in April 2014. The Petitioner states that the tax and banking documents alone, along with the letter from [REDACTED] its lease agreement, and its newly hired employee, should suffice as evidence that it has been doing business in the United States.

However, the Petitioner did not submit any purchase orders, invoices, contracts, consulting agreements, or other documentation to demonstrate that it has been doing business and how it achieved the \$50,000 in income reported. Without this evidence, we cannot determine that the Petitioner has been doing business in a regular, systematic and continuous manner for the twelve months preceding the filing of the petition.

The Petitioner did not have any sales employees or consultants to generate the revenues listed. The only presumed employee is the Beneficiary and now [REDACTED] who was hired as the Director of Special Projects and Human Resources six months after the petition was filed, on June 30, 2014. The Petitioner has not claimed any additional employees or contractors, nor has it identified any employees of the foreign entity that are conducting the business of the U.S. company. As such, it cannot be determined that the Petitioner is doing business in the United States.

The lack of information pertaining to how the Petitioner acquired \$50,000.00 in gross sales or receipts during 2013 raises doubts as to the validity of the Petitioner's claims on its tax forms. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Based on the deficiencies discussed above and the lack of corroborating evidence of the Petitioner's sales during 2013, the Petitioner has not established that it has been doing business as defined in the regulations for the previous year, as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). Accordingly, the appeal will be dismissed.

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

The next issue to be addressed is whether the Petitioner established that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition.

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

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

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

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

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

1. Facts

On the Form I-129, the Petitioner indicated that it had one employee in the United States and did not indicate its gross annual income. Where asked to describe the Beneficiary's proposed duties in the United States, the Petitioner stated the following:

President of the branch carry out the general supervision of an administrative office of the branch and preside over the branch entrusted to him or her. The head of the representative office is to ensure profitable, break-even activity of the branch. Organize the work on implementation and the realization of plans for the introduction of new techniques and technologies, carrying out organizational technical actions. Find potential and perspective [*sic*] customers and partners, to come into business contracts. The head of the representative office is to make offers on new projects. [R]esponsible for human resource management, promotion, dismissal, hiring, and personnel layoffs according to professional requirements.

The Petitioner submitted a document titled List of Duties for the Head of the American Branch, listing the Beneficiary's proposed duties as follows:

The head of the representative office . . . bears responsibility for the results and the overall performance of the American branch of [the foreign entity]. The branch office head should carry out the following functions:

- 5% [C]arry out the general supervision of an administrative office of the branch and preside over the branch entrusted to him or her. . . . ensure profitable, break-even activity of the branch. . . . operate in the interests of the branch, and to define what those interests are before all establishments and organizations. . . . organize optimal interaction patterns among the departments of the parent organization and the branch.
- 35% [O]rganize the work on implementation and the realization of plans for the introduction of new techniques and technologies, carrying out organizational technical actions. . . . ensure timely preparation of engineering specifications (drawings, specifications, and technological charts).
- 10% [D]etermine the most effective market sectors, as well as to develop an action plan for taking advantage of the possibilities of the market. . . . find potential and perspective customers and partners, to come into business contacts. . . . make offers on new projects. . . . organize consideration and introduction of projects of the modernization developed by foreign organizations, and to facilitate the acquisition or rent of equipment.
- 10% [O]rganize the carrying out of research experiments, tests of new techniques and technologies, and also work in the field of the scientific and technical information gathering, optimization, and flow of the advanced know-how.

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- 5% [O]rganize the training and the improvement of professional skill of workers and engineer, as well as of technical workers . . . and to provide continuing education for the personnel.
- 5% [P]rovide the necessary level of technical training for the realization of the projects the branch carries out. . . . have control over the performance of the projects of the branch, and, in case of need, together with the parent organization to take measures on revising the course of performance of the branch's projects.
- 5% [A]nalyze the volume of works performed and to prepare reports according to the results of the analysis for presentation to the director of the parent company.
- 5% [B]e responsible for human resource management, promotion, dismissal, hiring, and personnel layoffs according to professional requirements.
- 10% [D]irect and correct the personnel in the working process for the achievement of best results. . . . distribute in the optimal fashion the duties among the workers of the branch, taking account of divisional functions, problems, as well as the necessary level of labor discipline, and being attentive to the execution of commissions and orders.
- 10% Financial planning and enterprise control. . . . supervise the distribution of money within the branch, including the payment of salary. The branch office has the right to make bonus payments to workers on impose penalties on those infringing industrial and labor discipline. . . . supervise expenditures for projects, and to supervise the incomes from those projects. . . . take note of the monthly expenses on the maintenance of the office and its functioning. The head of the representative office is to carry out accounting control.

The Petitioner submitted its organizational chart, in conjunction with the organizational chart for the foreign entity, showing that the "Head of the American office of [the Petitioner]" reports directly to the Director of the foreign entity. According to the organizational chart, the "Head" of the Petitioner supervises a Construction Department, which supervises "Experimental construction [*sic*] task," and "Research, planning and design for transportation objects," which supervises the "creation of engineering and topographical planimetry [*sic*]."

In the RFE, the Director advised the Petitioner that there is no evidence on the record that would establish that the Beneficiary executed any of the listed duties or that she has managed any employees, managed any business activities, managed any projects, or managed any marketing efforts. The Director instructed the Petitioner to submit additional evidence demonstrating that the Beneficiary will be employed in a managerial or executive capacity. The Director also instructed the Petitioner to submit a statement describing the staffing of the new operation in the United States.

In response to the RFE, the Petitioner submitted a new document titled "List of Duties for the Head of the American Branch," describing the Beneficiary's proposed duties as follows:

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The head of the representative office . . . bears responsibility for the results and the overall performance of the American branch of [the foreign entity]. The branch office head should carry out the following functions:

- 5% [C]arry out the general supervision of an administrative office of the branch and preside over the branch entrusted to him or her. . . . ensure profitable, break-even activity of the branch. . . . operate in the interests of the branch, and to define what those interests are before all establishments and organizations. . . . organize optimal interaction patterns among the departments of the parent organization and the branch.
- 35% [O]rganize the work on implementation and the realization of plans for the introduction of new techniques and technologies, carrying out organizational technical actions. . . . ensure timely preparation of engineering specifications (drawings, specifications, and technological charts).
- 20% [D]etermine the most effective market sectors, as well as to develop an action plan for taking advantage of the possibilities of the market. . . . find potential and perspective customers and partners, to come into business contacts. . . . make offers on new projects. **To engage in further development of the customer base, and established contacts.** . . . organize consideration and introduction of projects of the modernization developed by foreign organizations, and to facilitate the acquisition or rent of equipment.
- 20% **Perform and conduct international projects head company. At the request of the Head Company. Assistance in international negotiations, including the partner head organization.**
- 5% [B]e responsible for human resource management, promotion, dismissal, hiring, and personnel layoffs according to professional requirements.
- 10% [P]rovide the necessary level of technical training for the realization of the projects the branch carries out. . . . have control over the performance of the projects of the branch, and, in case of need, together with the parent organization to take measures on revising the course of performance of the branch's projects.
- 5% [A]nalyze the volume of works performed and to prepare reports according to the results of the analysis for presentation to the director of the parent company.

(Emphasis added.)

The Petitioner submitted a resume for [REDACTED], its newly hired Director of Special Projects and Human Resources, indicating that she has a Bachelor's degree in linguistics. The Petitioner also submitted its Employment Agreement with [REDACTED] dated June 30, 2014. The Employment Agreement listed six duties at Exhibit A, such as organization, translation, special projects, work planning, hiring of other employees and other functions. Each duty included a one- or two-sentence description of associated tasks.

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The Director denied the petition concluding, in part, that the Petitioner did not establish that the Beneficiary will be employed in a qualifying managerial or executive capacity in the United States. In denying the petition, the Director emphasized that the Petitioner has no other employees to execute the daily non-executive or non-managerial tasks required to run the business. The Director further found that the majority of the listed duties were not executive or managerial in nature. Finally, the Director found that the record did not establish that at the time of filing the instant petition, the Petitioner had hired, or employed any subordinate staff to support the Beneficiary's executive position as its President.

On appeal, the Petitioner asserts that the Beneficiary "is employed as the manager for the company" and directly supervises [REDACTED] who relieves her from performing day-to-day and routine tasks. The Petitioner states that the Beneficiary "is a manager of employees." The Petitioner further asserts that the Beneficiary "is working in an executive capacity." In support of this claim, the Petitioner contends that the Beneficiary is an executive and her "duties are strategic and involve strategic planning and long-term projects for the business."

2. 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 under the extended petition.

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

The definitions of executive and managerial capacity each 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 show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

In the instant matter, the Petitioner first characterized the Beneficiary's role as President and briefly described her proposed duties, allocating percentages of time she would devote to set clusters of duties, in very broad terms. Some of the listed duties are especially vague or require that the Beneficiary have sufficient subordinate employees to relieve her from performing the actual tasks associated with producing a product or providing a service of the Petitioner. For example, the Petitioner states that the Beneficiary allocates 35% of her time to organizing "the work on implementation and the realization of plans for the introduction of new techniques and technologies,

carrying out organizational technical actions” and ensuring timely preparation of engineering specifications” such as drawing, specifications and technological charts. In addition, the Petitioner stated that the Beneficiary will “organize” the carrying out of research experiments, the testing of new techniques, and direct work in the field of “scientific and technical information gathering.” Absent additional explanation, and in the absence of any subordinate employees at the time of filing, these duties suggest that the Beneficiary would spend a significant amount of time providing the companies’ technical and research services rather than managing or overseeing such services. The duty description also indicated the Beneficiary’s direct involvement in market research and client acquisition activities that have not been shown to be managerial in nature, such as finding potential and prospective customers, making offers on new projects, and introducing projects developed by foreign organizations. Collectively, according to the breakdown provided, these non-managerial duties would account for more than half of the Beneficiary’s time.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify a 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. Section 101(a)(44) of the Act. The Petitioner’s initial description of the Beneficiary’s duties did not satisfy that burden. The actual duties themselves 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).

In response to the RFE, the Petitioner submitted a revised duty description which included some additions and deletions to the initial duty description, including revisions of percentages allocated to various areas of responsibility, and a reduction in the total number of responsibilities (from ten to seven). The description was actually less detailed than the initial description and did not provide additional specific tasks related to each duty. Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff’d*, 905 F.2d 41 (2d. Cir. 1990). Further, the Petitioner did not provide any explanation for the revisions and deletions made to the description. Accordingly, we have given greater weight to the initial description as it appears to represent the more complete description of the Beneficiary’s actual duties as of the date of filing.

On appeal, the Petitioner states that the Beneficiary will be an executive and clearly exercises wide latitude in discretionary decision making. The Petitioner states that the Beneficiary’s position meets the requirements for both managerial and executive capacity; however, the Petitioner has not provided sufficient information detailing the Beneficiary’s proposed duties at the U.S. company to demonstrate that these duties will qualify her as a manager or executive. 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’s description of the proposed duties does not provide sufficient detail or explanation of the Beneficiary’s claimed managerial or executive activities in the course of her daily routine as the sole employee of the Petitioner’s research and consulting business. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

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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.

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. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Here, the submitted evidence does not establish that the Beneficiary supervised any subordinate staff at the time of filing. The Petitioner states that it has hired [REDACTED] as the Director of Special Projects and Human Resources and provides a very brief list of her job duties; however, she was hired six months after the filing of the instant petition, and as such, was not available to relieve the Beneficiary from performing non-qualifying duties at the time of filing the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Therefore, although the Petitioner has consistently stated that the Beneficiary has the authority to hire and fire employees, it has not established that she was eligible for the benefit sought as a personnel manager as of the date of filing.

The Petitioner has not established, in the alternative, that the Beneficiary is 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, a 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 is a function manager. The Petitioner did not describe an essential function to be managed by the Beneficiary or provide a breakdown of the Beneficiary's job duties to support such a claim.

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. 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 asserts that the Beneficiary will be an executive; however, the Beneficiary's proposed position has not been shown to be primarily executive in nature, and the Petitioner has not demonstrated that the Beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. As noted above, the Petitioner did not submit a detailed description of the Beneficiary's position or those of her subordinates sufficient to establish that the Beneficiary's daily routine will consist of primarily executive duties, rather than on providing the services of the organization as its sole employee. The Petitioner has not submitted evidence that it has staff who will relieve her from performing non-qualifying operational and administrative duties at the U.S. company. Although the Petitioner contends that it is not required to demonstrate that the Beneficiary has subordinate employees who will assist her, it is necessary to demonstrate that someone other than the Beneficiary will carry out the day-to-day routine duties required to continue operations. At this time, the Petitioner has not shown that there have been any employees to carry out such duties as of the date of filing the instant petition.

We note 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 to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to

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consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, 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. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Further, in the present matter, the regulations require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).¹ The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the Petitioner has not reached the point that where can employ the Beneficiary in a qualifying managerial or executive capacity.

As discussed, the Petitioner states that it conducts scientific and research work for the transportation sector, but does not provide any evidence of scientists, researchers, consultants, or other employees who would provide the services of the company or assist the Beneficiary with administrative and other routine matters. As such, the record reflects that, to the extent that the Petitioner has commenced business operations, the Beneficiary, as the sole employee at the time of filing the instant petition, is providing these services on behalf of the Petitioner. Whether the Beneficiary is an employed in a qualifying managerial or executive capacity turns in part on whether the Petitioner has sustained its burden of proving that her duties are "primarily" managerial. Here, the Petitioner has not met that burden.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity, under the extended petition. Accordingly, for this additional reason, the appeal will be dismissed.

C. Doing Business Abroad

The final issue addressed by the Director is whether the Petitioner established that the foreign entity continues to do business abroad. In her decision, the Director also observed that "the record does not establish that [redacted]; is affiliated with [the Petitioner] or [redacted]"

1. Facts

¹ Following the enactment of section 101(a)(44)(C) of the Act in 1990, the former Immigration and Naturalization Service (INS) recognized that that managerial capacity could not be determined based on staffing size alone and deleted reference to "size and staffing levels" at 8 C.F.R. § 214.2(l)(3)(v)(C)(3) (1990), setting out the evidentiary requirements for initial new office petitions. *See* 56 Fed. Reg. 61111, 61114 (Dec. 2, 1991). However, the INS chose to maintain the review of the new office's staffing, among other criteria, at the time that the new office seeks an extension of the visa petition. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).

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The Petitioner identified the Beneficiary's foreign employer as [REDACTED] located in Kazakhstan. In its letter of support, dated November 25, 2013, the Petitioner stated that the Beneficiary "has been working for the Scientific [REDACTED] as the Chief Project Coordinator for over a year."

The Petitioner submitted a Certificate of Registration of a Business Entity, dated February 27, 2004. The Certificate of Registration lists the entity's legal name as [REDACTED] and identification number as [REDACTED].

The Petitioner submitted two documents titled "Minutes of the General Meeting of Stockholders" for [REDACTED] dated May 17, 2012 and June 17, 2012, respectively.

The Petitioner submitted a copy of its Operating Agreement between the Beneficiary and [REDACTED] establishing the Petitioner as a Texas limited liability company, dated July 11, 2012.

In addition, the Petitioner provided a foreign bank statement confirming that [REDACTED] is clear of overdue payments. The document lists the above name for the company and [REDACTED]. In its table of contents, the Petitioner refers to this document stating that it pertains to [REDACTED].

Finally, the Petitioner submitted a document from the Tax Committee of [REDACTED] of the Republic of Kazakhstan, titled "Certificate of Tax Clearance" dated September 12, 2013, confirming that [REDACTED] is current on taxes. The document lists the above name for the company and the number [REDACTED]. In its table of contents, the Petitioner refers to this document stating that it pertains to [REDACTED].

In the RFE issued on March 12, 2014, the Director advised the Petitioner that some of the above listed documents did not appear to relate to the claimed qualifying foreign entity. The Director instructed the Petitioner to submit evidence demonstrating that a qualifying foreign entity continues doing business in Kazakhstan.

In response to the RFE, the Petitioner submitted a document from a Kazakhstan city tax committee regarding the absence (presence) of taxpayer's tax debt, receivables on compulsory pension contributions, compulsory professional pension contributions and social contributions as of May 04, 2014, issued to [REDACTED]. In its table of contents, the Petitioner refers to this document stating that it pertains to [REDACTED].

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The Petitioner submitted a document titled “Minutes No. 5” of the meeting of representatives of [REDACTED] and [REDACTED]” dated March 25, 2014.

The Petitioner also provided a copy of a contract between the [REDACTED] [REDACTED]” dated November 1, 2013.

The Petitioner submitted a contract between [REDACTED] [REDACTED] dated August 15, 2011. In addition, the Petitioner submitted an agreement referencing the 2011 contract between [REDACTED] [REDACTED] dated December 23, 2013.

The Director denied the petition concluding, in part, that the Petitioner did not establish that a qualifying foreign entity continues to do business abroad. In denying the petition, the Director found that the record did not articulate or establish any business activity for the Beneficiary’s foreign employer or show that it generated any income from business activity. The Director further found that there was no evidence in the record to establish that the submitted contracts are currently being executed, such as recent invoices for services rendered supported by company bank statements. The Director also noted that Petitioner did not establish that [REDACTED] [REDACTED] is affiliated with the Petitioner or the Beneficiary’s foreign employer.

On appeal, the Petitioner contends that the qualifying foreign entity continues doing business as evidenced by the documentation submitted in support of the petition. The Petitioner also acknowledges the Director’s reference to a qualifying relationship, but focuses on its claimed qualifying relationship with the Beneficiary’s foreign employer. The Petitioner does not address the relationship between [REDACTED] the Beneficiary’s foreign employer, [REDACTED] and [REDACTED]

2. Analysis

Upon review, and for the reasons stated herein, the Petitioner has not established that the Beneficiary’s foreign employer or another qualifying entity continues doing business abroad.

The Petitioner submitted numerous documents it claims relate to the qualifying foreign entity; however, most of the documents list a different name for the foreign entity in place of the name of the Beneficiary’s foreign employer. Although the documents submitted from the tax authority show the same identification number for the listed foreign entity as the number listed on the qualifying foreign entity’s Certificate of Registration, the Petitioner has not explained why the submitted documents show a different name for the foreign entity. It is incumbent upon the petitioner to

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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 evidence submitted, we cannot conclude that a qualifying foreign entity is currently doing business as the Petitioner's evidence lists different names in the documentation submitted as evidence of the qualifying foreign entity's business. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the qualifying foreign entity, the Beneficiary's foreign employer, continues to do business abroad. 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 a subsidiary of the Beneficiary's foreign employer, [REDACTED]. Where asked to explain the company stock ownership and managerial control of each company, the Petitioner stated, "Kazakhstan's company owns 95% of [the Petitioner]."

The Petitioner submitted a copy of its Operating Agreement, which states at Exhibit C that Scientific [REDACTED] has a 95% membership interest in exchange for a \$100,000.00 USD contribution and the Beneficiary has a 5% membership interest in exchange for a \$5,000.00 USD contribution.

The Petitioner also submitted a document titled Minutes of the General Meeting of Stockholders for the foreign entity, dated June 17, 2012. The document states that it was decided to distribute the authorized capital of the U.S. branch (the petitioning U.S. company) as follows: 95% to the foreign entity and 5% to the Beneficiary.

The Petitioner submitted the Beneficiary's 2013 IRS Form 1040, U.S. Individual Income Tax Return, indicating that she had a business income of \$25,333.00. The Petitioner also submitted the Beneficiary's 2013 Form 1040 Schedule C, Profit or Loss from Business (Sole Proprietorship), listing the petitioning U.S. company as the Beneficiary's proprietary business and a gross receipts or sales of \$50,000.00.

Finally, on appeal, the Petitioner submits a copy of its 2013 IRS Form 1120S. The 2013 Form 1120S at Schedule K-1, Shareholder's Share of Income, Deduction, Credits, etc., specifically states that the Beneficiary owned 100% of stock for the tax year. The Summary of Stock Ownership attachment specifically states that the Beneficiary owned 100% of the Petitioner's shares at the beginning and at the end of the tax year. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. *See* Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part.

In the instant matter, the record does not clearly demonstrate the actual ownership of the petitioning U.S. company, as some evidence reflects that the foreign entity is the majority owner, while more recent evidence shows the Beneficiary 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 fails to 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 the AAO reviews 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 N- LLC*, ID# 13613 (AAO Sept. 24, 2015)