



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

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

MATTER OF G-G-, LLC

DATE: AUG. 22, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a tactical apparel seller, seeks to temporarily employ the Beneficiary as the manager of its new office under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner had not established that: (1) it had secured sufficient physical premises for its new office; (2) the Beneficiary will be employed in a managerial or executive capacity for the U.S. entity; and (3) the Beneficiary has been employed abroad in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director's decision is arbitrary, capricious, and an abuse of discretion because the Director did not properly consider the evidence submitted under United States Citizenship and Immigration Services (USCIS) adjudication standards and guidelines.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a 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. Section 101(a)(15)(L) of the Act. 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. *Id.*

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

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

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.

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II. PHYSICAL PREMISES TO HOUSE THE NEW OFFICE

The first issue to be addressed is whether the Petitioner established that it has secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

A. Evidence of Record

The Petitioner filed the Form I-129 on October 6, 2014.¹ On the Form I-129, the Petitioner states that the Beneficiary will be employed at [REDACTED] Florida. The Petitioner submitted the first and tenth pages of a 12-page lease for this address.² The lease is for an initial term of one year beginning September 1, 2014. The first page of the lease states that the premises shall be used only for storage. The Petitioner stated that it intends to engage in wholesale and online retail sale of tactical clothing and accessories.

In a request for evidence (RFE) issued on November 3, 2014, the Director noted that it did not appear that the Petitioner had secured sufficient office space for its new office. The Director indicated that a copy of a complete lease, photographs, and information on the type of building, among other items, could be submitted to support a claim that the Petitioner had secured sufficient physical premises.

In response, the Petitioner submitted a copy of the same two pages of the lease with the first page revised to indicate that the premises shall be used only for “storage, warehouse, [and] office.” The Petitioner also submitted photographs of the outside of the building identifying the building as the [REDACTED] Warehouse. The photographs of the inside of the unit show shelving, cabinets, a desk with office equipment, an office chair, and an additional table. In the Petitioner’s updated business plan, the Petitioner noted that it had “a warehouse with office space for managing the inventory and the shipping to customers.”

The Director acknowledged the second amended lease submitted, but determined that the 400 square feet of space did not seem feasible to house the Petitioner’s five prospective employees to be hired within the first year. The Director concluded that the Petitioner had not presented evidence that it had secured sufficient physical premises to house the new office.

On appeal, the Petitioner claims that it had secured actual, physical premises when the petition was filed and had provided photographs of the premises with two desks as well as room to store merchandise. The Petitioner asserts that the Director abused her discretion when concluding that 400 square feet of space is not feasible to house the Petitioner’s proposed employees. The Petitioner

¹ The Petitioner submitted documentation to support the L-1A petition, including evidence regarding the proffered position, its proposed employees, and business operations as well as the foreign entity and its operations and employees. While we may not discuss every document submitted, we have reviewed and considered each one.

² The first page of the lease indicates that it is page 1 of 12. The signature page indicates it is page 10 of 12.

notes that upon the Beneficiary's entry into the United States, and prior to hiring employees, it will have ample space to begin business operations and that it will expand its premises when necessary.

B. Analysis

Upon review, the Petitioner has not established that it had secured sufficient physical premises to house the new office as of the date of filing. Proof of physical premises is required initial evidence for a new office petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(A). A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. 8 C.F.R. § 103.2(b)(1).

Here, the Petitioner initially submitted a partial copy of a lease for a storage unit. In response to the Director's RFE, the Petitioner submitted the same two pages of the lease but expands the use to include an office and warehouse and adds photographs showing some office equipment. The Petitioner does not offer an explanation for the two different versions of the lease. The Petitioner does not submit any probative evidence that the lessor agreed to the revision made on the face of the lease. As the record does not include a copy of the complete lease, we also cannot determine if there are other restrictions on the use of this space for an office. While the record includes a copy of the Petitioner's business tax receipt with the address of the storage unit and a phone number, the record does not include a copy of the Petitioner's business license. There is no information in the record that the property has been zoned or approved for office use.

We acknowledge that the regulations do not specify the type of premises that must be secured by a petitioner seeking to establish a new office. The phrase "sufficient physical premises" is broad and somewhat subjective, leaving USCIS great flexibility in adjudicating this legal requirement. There may be cases in which a storage unit satisfies the regulatory requirements. However, the Petitioner bears the burden of establishing that its physical premises should be considered "sufficient" as required by the regulations at 8 C.F.R. § 214.2(l)(3)(v)(A). To do so, it must clearly identify the nature of its business, the specific amount and type of space required to operate the business, its proposed staffing levels, and evidence that the space can accommodate its growth during the first year of operations. USCIS may also consider evidence that the company has obtained a license to operate the business from a storage facility, if a business license is required, evidence that the company has made accommodations for the office use of the premises by the U.S. company, or any other evidence that would establish that a storage unit will meet the company's office needs and that such use has been approved by the appropriate government agencies.

While we acknowledge that the Petitioner may expand its premises once the Beneficiary enters the United States, the record did not include adequate evidence of the sufficiency of physical premises when the petition was filed. Although the Director provided the Petitioner the opportunity to submit further evidence, the Petitioner did not submit probative, consistent evidence establishing that the storage unit would adequately support its operations. The record is deficient in this regard.

As the Petitioner emphasized on appeal, it must prove by a preponderance of evidence that it and the Beneficiary are fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376

(AAO 2010). In evaluating the evidence, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Id.* Here, the Petitioner has not submitted consistent, probative evidence establishing that it had secured sufficient physical premises for its new office.

III. EMPLOYMENT IN A QUALIFYING MANAGERIAL OR EXECUTIVE CAPACITY

The Director also denied the petition finding that the Petitioner did not establish: (1) that the Beneficiary will be employed in a managerial or executive capacity within one year of approval; and (2) that the Beneficiary has been employed abroad in a managerial, executive, or specialized knowledge capacity.

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

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- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

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

We now turn to the issue of whether the Petitioner established that the new office will support the Beneficiary in an executive or managerial position within one year of approval of the petition.

1. Evidence of Record

In a letter, dated September 16, 2014, the Petitioner noted that it was incorporated in the State of Florida on February 24, 2014. According to the Petitioner it was organized “as a trading company which caters to several Israeli manufacturers who give [it] the right to market their product in the U.S.” The Petitioner indicated that it would act as both a wholesaler and retailer and that it was in the process of setting up a website to accept online sales. In the same letter, the Petitioner stated it planned to employ five individuals in the United States within the first year, including an office manager, three warehouse employees, and a sales agent. The Petitioner added that the Beneficiary “will be responsible for training each [of the employees] on respective topics including marketing and sales, wholesale service, website advertising, accounting and finance management, importing/exporting products, payroll, bills, and company management.” The Petitioner added further that the Beneficiary will work in a managerial position for the U.S. company.

In its June 2014 business plan, the Petitioner noted that it sells its retail products through a website and would sell its products to other wholesalers through [REDACTED] and [REDACTED] a Texas company.³ The Petitioner indicated that it also would export products from American suppliers to other countries. The Petitioner confirmed that it planned to hire five employees during the 2015 year. The business plan showed that the Petitioner would employ an office manager, two warehouse workers, a sales agent, and an administrative/finance worker.⁴ The Petitioner provided a brief overview of the proposed duties of the positions including the Beneficiary’s general manager position. The Petitioner stated that the Beneficiary as the general manager will (bullet points added and paraphrased):

³ In the Petitioner’s business plan submitted in response to the Director’s RFE, the Petitioner noted that the Beneficiary would join [REDACTED] sales efforts to wholesalers by making presentations to new customers and by training the company’s salesmen.

⁴ The Petitioner noted that the office manager and the sales agent would be paid as “agents” and that the warehouse workers and administration and finance worker would be paid weekly wages.

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- Operate and manage the company and the staff.
- Personally provide vocational training to all the employees.
- Promote and fit the company's products to the market demands.
- Define the missions and job descriptions, will hire the workers, and will control the daily managing.
- Manage the website activities, promotion, and contents.
- Support the wholesale agent with professional guidance.
- Manage the promotion and marketing programs, as well as the import and supplies to wholesale division.
- Update the market research and extend the inventory accordingly.
- Extend the products range by adding more US and Israelis suppliers.

The Petitioner indicated that the office manager would take orders from the website and phone, check availability, prepare invoices, labels, and other necessary documents, send the packaging orders to the warehouse, receive the packages from the warehouse and arrange shipping, and handle customer services, claims, updates, and cancellations. The warehouse employees would be responsible for receiving goods and quality control, organizing the warehouse inventory, preparing shipments, and stocktaking. The sales agent's duties would include marketing, servicing, and selling to other wholesalers, advertising, and the website. The Petitioner noted that the administration and finance employee's duties included accounting, financial managing, import, export, payment of wages, and bill and vendor payments.

The business plan outlined the Petitioner's five-year forecast indicating estimated gross profits from the retail, wholesale, and export divisions as \$19,300 for 2014, \$105,732 for 2015, \$133,107 for 2016, \$167,326 for 2017, and \$210,099 for 2018.⁵

The initial record also included a letter of representation signed by the managing member of [REDACTED] dated January 2, 2014. The [REDACTED] representative authorized or appointed the Beneficiary as its international product specialist for five years, but restricted the Beneficiary's authority to sign contracts or incur obligations on behalf of [REDACTED]. The Petitioner's business plan in the executive summary noted that the Beneficiary is frequently invited by [REDACTED] for presentations and consulting.

In the RFE, the Director requested, among other items, evidence to demonstrate how the company will grow to be of sufficient size to support a managerial or executive position within one year.

In response to the RFE, the Petitioner asserted that the Beneficiary will serve in an executive capacity and that as the founder, owner, and managing director of the Petitioner he will be responsible for:

⁵ The forecast for 2015, the most applicable year for this petition, showed the company would spend \$63,000 on employee salaries and \$7,500 on commissions.

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- Formulating and implementing strategies of the company;
- Training appropriate members of his staff on connecting with real estate contractors and investors so that they may become self-managed upon his return to Israel;
- Strengthening existing relationships with investors;
- Establishing the new company's logistics system; and
- Enhancing the company's service base.⁶

The Petitioner also submitted its business plan updated on December 2014. The Petitioner noted that most of the imported products are manufactured in Israel, and that the retail sales will be generated through a website. The Petitioner indicated, more specifically, that it "is divided [into] three departments: retail by internet sales, wholesale to distributors in United States and Canada, and Export department of America domestic products to all over the world." The Petitioner identified the website through which it would sell retail goods as [REDACTED] a website built for this purpose. The Petitioner indicated that the Beneficiary will handle the wholesale marketing as well as the customer service to support the website.

The December 2014 business plan reiterated the Petitioner's plans to hire five employees in 2015. The Petitioner revised the individuals to be employed in 2015 to one part-time office manager and one part-time warehouse manager to be paid weekly, one sales agent working on commission, a freelance administration and finance employee to be paid annually, and the Beneficiary's position as general manager. The business plan repeated the job descriptions for the proposed employees, except for deleting several of the tasks previously assigned to the administrative/finance position and adding that the Beneficiary would be responsible for bill and vendor payments.

The business plan also included a proposed organizational chart for the Petitioner, which shows that the Beneficiary will supervise an office manager, a retail department, a wholesale department and an export department. The chart shows that the office manager would oversee accounting and custom services, the retail department would include "warehouse," the wholesale department would include salesmen, marketing companies and "production," and the export department would include "export/import" and salesmen.

The December 2014 business plan included a revised sales forecast and profit chart showing a forecasted gross profit of \$290,000 for 2015. The Petitioner indicated that the sales forecast is based on contracts, experience and negotiations with customers, and studying potential customers. The expense portion of the 2015 forecast shows \$16,500 to be paid in commission for the wholesale department, and total wages paid for all departments as \$97,940, and an additional \$42,500 paid for marketing. The record also included translated copies of two of the foreign entity's bank statements.

⁶ The Petitioner's response to the RFE, included a letter from its counsel. It appears that this portion of the Petitioner's response may include information for a different company. For example, the Petitioner does not claim in its business plan, or elsewhere in the record, that it is involved in real estate, or that it has relationships with investors, or that the Beneficiary will perform primarily in an executive capacity rather than a managerial capacity.

The July 2014 bank statement showed an account balance of \$265,986 and the November 2014 bank statement showed an account balance of \$145,367. The record also included a translated copy of the foreign entity's 2012 tax assessment and a translation of an unaudited financial report for 2013 showing total assets of \$293,354.⁷

The Director denied the petition finding, in part, that the Petitioner had not included the Beneficiary's \$66,000 salary in its financial projections for 2015, and further that the record did not include evidence of a market research report corroborating its financial projections. The Director concluded that the record did not include sufficient evidence to demonstrate that the U.S. entity would be sufficiently staffed within one year of operation to support the Beneficiary in a managerial or executive capacity.

On appeal, the Petitioner asserts that it submitted a detailed business plan describing its business, organizational structure, and financial goals. The Petitioner also notes that the evidence submitted regarding the foreign entity's financial status demonstrates that there is sufficient funding available to support its operations for more than one year.

2. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that the Beneficiary will be employed in an executive or managerial capacity for the U.S. entity within one year of approval.

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 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 a beneficiary 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. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally* 8 C.F.R. § 214.2(l)(3)(v). 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.*

⁷ The foreign entity's translated documents identify the balances in Israeli shekels. The numbers have been converted into U.S. dollars so the numbers are approximate.

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When examining the managerial or executive capacity of a beneficiary, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(1)(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 either in an executive or 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 proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The petitioner's evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally* 8 C.F.R. § 214.2(1)(3)(v).

The record contains insufficient evidence that the Petitioner will employ sufficient staff to relieve the Beneficiary from performing first-line supervisory, marketing, and promotion duties within a twelve-month period. Although the initial record indicated that the Beneficiary would be responsible for training employees to perform various duties, the job descriptions of the proposed employees do not adequately incorporate the referenced duties. In response to the Director's RFE, the Petitioner indicated that it is the Beneficiary who will be handling customer service to support the website and who will be handling the bills and vendor payments. The record does not identify in detail who will assume these non-qualifying responsibilities within a one-year timeframe.

Additionally, the record lacks a concrete timeline for expanding the Petitioner's staff. Although the Petitioner indicates that it will hire five employees in 2015, the Petitioner revised the wages and positions of the proposed employees and deleted one warehouse position in response to the Director's RFE. Moreover, the Petitioner's chart indicates that the office manager and the warehouse employee will work part-time. The proposed plan to hire five employees in 2015 insufficiently identifies the duties of the proposed employees and agents and does not provide consistent information regarding their proposed wages and commissions. For example, the initial forecast for the 2015 year showed the Petitioner would spend \$63,000 on salaries and \$7,500 on commissions. In response to the Director's RFE, the Petitioner identified \$97,940 as wages to be paid for all departments and \$16,500 to be paid in commissions. It is not clear why the reduction in staff and the time they would work for the Petitioner, would result in an increase in anticipated wage and commission expenses, and the Petitioner has not otherwise explained the significant changes made to its financial forecasts for 2015.

Additionally, the record does not include adequate evidence identifying which positions would be paid via commissions. For example, initially the Petitioner identifies both the office manager and the sales agent as being paid as "agents," and in response to the Director's RFE, stated that only the sales agent would work on commission. It is not clear from the record whether the Petitioner's relationship with [REDACTED] is a commission-based relationship or some other

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relationship. Upon review of the totality of the record, the Petitioner has not provided sufficient consistent evidence regarding its proposed employees, their wages or commissions, and actual duties, to demonstrate their actual proposed role within the Petitioner's business operations.

Even if the Petitioner's business did grow sufficiently to employ an office manager, one or two warehouse workers, a sales agent, and an administrative/financial worker, the Beneficiary would continue to perform non-qualifying duties of promoting and marketing the company's products, the daily tasks associated with importing and exporting tactical products, handling customer service for the website, and handling bills and vendors payments.⁸ The Petitioner has not demonstrated that any of the planned subordinate staff would take over these non-qualifying duties. The Petitioner has not submitted contracts demonstrating that it employs outside agencies to perform these duties. Furthermore, even if some of the duties were transitioned to subordinate staff, the absence of a level of management or supervisory personnel between the Beneficiary and such staff precludes us from making a determination that the Beneficiary would primarily be engaged in a managerial or executive capacity, focusing on managing and directing the organization, within one year, rather than performing the essential tasks necessary to continue the Petitioner's operations.

Furthermore, our analysis of the Beneficiary's employment capacity and the Petitioner's ability to employ him in a qualifying capacity by the end of the first year of operations is restricted because the record does not include sufficient probative information on the nature of the petitioning entity's proposed business activities. We have reviewed the Petitioner's business plan and the other information in the record regarding the Petitioner's proposed retail sales through its website, its intention to offer its products to wholesalers, and to export goods to other countries. We have also reviewed the letter submitted by [REDACTED] appointing the Beneficiary as its product specialist. This letter seems to conflict with the Petitioner's claim that it will rely on this company to promote its products to wholesalers. The Petitioner's claimed website, [REDACTED] although founded by the Beneficiary's foreign employer and a manufacturer, appears to be operated by a separate limited liability company.⁹ Florida state records indicate that the Petitioner is a member of the separate limited liability company but the record includes no evidence of the Petitioner's percentage interest or any documentation detailing the Petitioner's rights and obligations in this limited liability company or in relation to the website.

Thus, the record lacks documentation detailing the actual owners of the website the Petitioner relies upon to generate retail sales via the Internet and does not include probative evidence that the Petitioner will generate significant income from these sales. Additionally, the record does not include probative evidence that the Petitioner has established or will be able to generate income from its wholesale business. The Petitioner does not identify specific potential wholesalers or offer substantive information to support the viability of plans to sell products to wholesalers. The Petitioner has not sufficiently explained its business model or provided a realistic view of its

⁸ Although the Petitioner, in response to the Director's RFE, identified a line item on its 2015 forecast of \$42,500 for marketing, the record does not include contracts or other evidence identifying how this money will be spent.

⁹ A review of the website shows that it is currently operational as an online retailer.

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financial structure to support its forecast. The regulations require the Petitioner to present a credible picture of where the company will stand in one year, and to provide sufficient evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position within that time. Without a consistent explanation of the Petitioner's financial objectives for the first year of operations and documentation supporting the Petitioner's financial goals, it is not possible to conclude that the Petitioner will be able to support a qualifying managerial or executive position within a twelve-month period.

Based on these deficiencies, we find that the Petitioner has not established that it will be able to support the Beneficiary in a primarily managerial or executive capacity by the end of the first year of operations.

B. Employment in a Managerial or Executive Capacity Abroad

The next issue to be addressed is whether the Petitioner established that the Beneficiary was employed by the foreign entity in a managerial or executive capacity for one year in the three years preceding the filing of the petition. *See* 8 C.F.R. § 214.2(I)(3)(v)(B).

1. Evidence of Record

The Petitioner stated that the Beneficiary has been employed in Israel by [REDACTED] in the position of manager and owner since 2006. The Petitioner described the foreign entity as a wholesaler that markets products designed and manufactured for safety, security, and outdoor purposes. The initial record included a translation of a report showing the foreign entity's employees by name, position, and wages paid, for the 2011, 2012, and 2013 years. These reports show that in 2011, the foreign entity employed the Beneficiary, an administration manager, a salesperson, and two designers. In 2012, the foreign entity employed the Beneficiary, an administration manager, and a sales person.¹⁰ In 2013, the foreign entity employed the Beneficiary, an administration manager, and a designer.

The Director reviewed the information provided and issued an RFE requesting additional information about the Beneficiary's position abroad. In response, the Petitioner stated that the Beneficiary has been serving in an executive position overseeing the foreign entity. The Petitioner noted that as the founder and owner of the company, the Beneficiary had sole responsibility for setting up its staff and overseeing the development of company policy and procedure. The Petitioner also submitted the foreign entity's articles of incorporation, government documents identifying the Beneficiary as the director of the foreign entity, and the employee reports showing the employment of the staff, and asserted that these documents establish that the Beneficiary has been working for the foreign entity for the last three years in an executive capacity.

¹⁰ The administration manager is listed by name three times on the 2012 report but the report only identifies her administrative position.

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The Petitioner also submitted the foreign entity's organizational chart identifying the Beneficiary as the chief executive officer. The tier of departments directly beneath the Beneficiary includes accounting, CPA, operation manager, and R&D. Reporting to the operation manager are a production department with one employee, a sales department with two employees, and an import/export department with one employee. The R&D department includes a designer, and an outside engineering firm. The notes accompanying the organizational chart note that [REDACTED] is performing the accounting function until someone can be hired, approving invoices, making payments, managing the company's cash flow and inventory, and that she is also the operations manager supervising sales and production. The notes also identify an individual performing import/export duties, an individual creating drawings and product specifications as the designer, two agents performing sales duties, and a production and quality control person. In addition, the notes identify a CPA who manages accounting and inventory and prepares the annual report.

The record further included "accounting reports" confirming that [REDACTED] was paid throughout the 2014 year, the designer was paid from May to December 2014, and the two salespersons were paid throughout the 2014 year. The reports also include one payment made to the CPA, payments made to a manufacturer, and payments made to an unidentified individual.

The Director denied the petition, in part, determining that the Petitioner had not submitted sufficient information regarding the Beneficiary's duties for the foreign entity.

On appeal, the Petitioner asserts that it has submitted evidence of seven employees working for the foreign entity, numerous contracts and purchase orders executed by the Beneficiary on behalf of the foreign entity, and the business plan developed by the Beneficiary. The Petitioner claims that these documents, along with the Articles of Incorporation and the Israeli corporation agency demonstrate that the Beneficiary is actively involved in the management and oversight of the company and that he oversees the operations and is the sole executive member of the team.

2. Analysis

Upon review, we find that the Petitioner has not established that the Beneficiary has been employed abroad in a managerial or executive position with the foreign employer.

Again, 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 will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See, e.g., Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

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Here, the Petitioner does not provide the necessary detailed description of the Beneficiary's duties so that we may assess whether he is primarily performing managerial or executive duties or the day-to-day routine operations of the foreign entity. The Petitioner did not provide an actual description of the Beneficiary's daily duties relying instead on the Beneficiary's title as the Owner/Director/Manager of the foreign entity. However, the fact that the Beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act. While the Beneficiary may exercise discretion over the foreign entity's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, including personnel and contractual decisions, the Petitioner has not offered a position description to establish that his actual duties include primarily managerial or executive duties.

The record suggests that the Beneficiary as the owner and manager of the company performs primarily marketing and promotional duties relating to the foreign entity's products. The record does not identify individuals who perform this function. We note that the letter from [REDACTED] also suggests that the Beneficiary is acting as this entity's sales agent or representative. Further, the Petitioner's December 2014 business plan mentions that "[the Beneficiary's] personal and physical involvement with suppliers, shipping operation and quality control is very important to match the product to customer's needs," and notes that the Beneficiary "sold to his customers 430K" in goods in the last two years. As the record does not include an adequate description of the Beneficiary's duties for the foreign entity or sufficient information regarding its relationship with manufacturers, or other entities, we cannot ascertain the nature of the Beneficiary's primary role within the foreign entity's business operations.

Whether the Beneficiary is a managerial or executive employee turns on whether the Petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. The Petitioner's descriptions of duties include insufficient detail to determine whether the duties for the foreign entity are or were managerial, executive, administrative, or operational tasks. We cannot determine from the information provided whether the Beneficiary is primarily performing or performed qualifying or non-qualifying duties for the foreign entity. *See, e.g., IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

When reviewing the totality of the record to determine the claimed managerial or executive capacity of a beneficiary, we also review the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

The 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 a beneficiary to direct and a 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 an 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.*

Here, the record does not include sufficient consistent evidence that the foreign entity has a subordinate level of managerial employees for the Beneficiary to direct. The duties ascribed to the operation manager's position depict an individual who is primarily performing the necessary administrative and operational tasks of the organization, such as handling invoices, payments, cash flow, inventory, and collections. Thus, the operation manager is not primarily managing employees or functions. Likewise, there is insufficient information in the record to conclude that the other individuals reporting directly to the Beneficiary hold positions that require them to primarily manage other employees or functions. Accordingly, the Beneficiary is not primarily directing a level of managerial employees.

Further, while the Beneficiary likely exercises the appropriate level of decision-making authority based on his role as the foreign entity's owner, the record does not contain a sufficiently detailed description of his duties to establish that he primarily focuses on the foreign entity's goals and policies. As noted, the evidence submitted suggests that he has been directly involved in the day-to-day operations of the foreign company alongside its other employees.

While the Petitioner claims the Beneficiary has been employed abroad in an executive capacity, we have reviewed the record to determine if there is sufficient evidence to establish that the Beneficiary's duties for the foreign entity are primarily managerial in nature. 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. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. 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)(4). If a petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act; 8 C.F.R. §§ 214.2(l)(1)(ii)(B)(2)-(3).

To determine whether the Beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of

endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining “profession” to mean “any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation”). Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that “[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.”

We again refer to the Petitioner’s organizational chart which shows that the Beneficiary is directly supervising an operation manager, a CPA, and individuals in the R&D department. However, the descriptions of the duties of these positions do not provided sufficient information to establish that these individuals supervise or manage other employees. The record is simply deficient in this regard. Thus, we cannot conclude that these positions as described are supervisory or managerial employees. The record also does not establish that the operations manager or the designer positions as described constitute professional positions. While the CPA ordinarily would be considered a professional position, here the record does not include evidence that the CPA is employed full-time by the foreign entity. Thus, the Beneficiary’s supervision, if any, of this position would not require a significant portion of his time. The record does not establish that the Beneficiary primarily supervises and controls the work of other supervisory, professional, or managerial employees at the foreign entity.

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. The term “essential function” is not defined by statute or regulation. If a petitioner claims that a beneficiary managed an essential function, a petitioner must clearly describe the duties performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary’s daily duties dedicated to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, a petitioner’s description of a beneficiary’s daily duties must demonstrate that the beneficiary managed the function rather than performed the duties related to the function.

Here, the Petitioner does not identify a specific function that the Beneficiary manages at the foreign entity. Additionally, the record does not include descriptions of the Beneficiary’s duties such that we may conclude that the Beneficiary manages a specific function. Further, it is not possible to ascertain how much time the Beneficiary would devote to any specific function. Upon review of the totality of the record, the Petitioner has not submitted sufficient probative evidence establishing the Beneficiary’s actual duties for the foreign entity and whether those duties constitute primarily managerial duties.

We also note that while the initial record identified the Beneficiary as an employee for the foreign entity in 2011, 2012, and 2013, the accounting reports submitted in response to the Director’s RFE do not identify any payments made to him.

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Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary was employed in a managerial or executive capacity abroad.

IV. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of G-G-, LLC*, ID# 18033 (AAO Aug. 22, 2016)