



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

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

MATTER OF B-P-USA, INC.

DATE: JAN. 6, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a cosmetics company, seeks to employ the Beneficiary as the President/CEO of its new office in the United States under the L-1A nonimmigrant intracompany transferee classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Director, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.¹

The Director concluded that the Petitioner did not establish that the Beneficiary will be employed in a qualifying managerial or executive capacity within one year of approval of the new office petition.

On appeal, the Petitioner asserts that the Beneficiary will be employed in a qualifying executive capacity in the United States. The Petitioner submits a brief 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(1)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

¹ We reviewed the record in its entirety before issuing our decision. We conduct appellate review on a *de novo* basis. *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015); *see also* 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989). We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

Matter of B-P-USA, Inc.

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

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

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

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

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

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

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

Finally, 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.

Matter of B-P-USA, Inc.

II. THE ISSUE ON APPEAL

The sole issue addressed by the Director is whether the Petitioner established that the Beneficiary will be employed in a qualifying managerial or executive capacity within one year of approval of the new office petition.

A. Facts

The Petitioner filed the Form I-129 on September 8, 2014 and stated that it had zero current employees in the United States. In its letter of support, dated August 28, 2014, the Petitioner described the Beneficiary's proposed duties as follows:

As Chief Executive Officer, [the Beneficiary] will possess and be in charge of conducting the following duties for [the Petitioner] in her position 100% of the time:

- Directing and controlling the management of the company in its business set-up and execution of production, pricing, distribution, and sales (100%) to entail:
 - Engaging in [] daily briefings with management in order to obtain status updates of production and distribution contracting with third parties and determine areas of potential cost reduction and productivity improvement (20%);
 - Establishing monthly and yearly financial goals of the company based on current sales figures and profits (15%);
 - Setting the necessary policies for contracting between the company and third parties in order to achieve financial goals (15%);
 - Contracting with third parties on behalf of [the Petitioner] (10%);
 - Analyzing the current cosmetics market to better determine the proper and necessary methods of distribution and advertising of the products and establish logical, workable solutions for existing and future problems connected with the marketing of the US business (15%);
 - Overseeing all legal aspects of the company including the necessity of obtaining all proper and necessary licensing necessary for distribution (10%);
 - Controlling all financial aspects and policies of the corporation including sales figures and policies for profit increases and efficiency increases (15%).

The Petitioner submitted its business plan containing the company's organizational chart. The organizational chart depicts the Beneficiary at the top tier of the hierarchy as CEO, supervising a Business Development Manager and a Sales Manager, [REDACTED]. The Business Development Manager supervises "PR," "Business Partnerships," and Product Development. The Sales Manager supervises Sales Attendants, "Management Point of Sale," and Sales Training. Aside from the

Matter of B-P-USA, Inc.

Beneficiary as CEO and [REDACTED] as Sales Manager, the Petitioner did not identify any employees by name.

The Director issued a request for evidence (RFE) on September 15, 2014, advising the Petitioner that the description of duties provided for the Beneficiary's position at the U.S. company was not sufficient to show that she will be employed in a qualifying managerial or executive capacity in the United States. The Director instructed the Petitioner to submit additional evidence demonstrating that the proposed position in the United States will be managerial or executive.

In response to the RFE, the Petitioner submitted a copy of the same letter of support, dated August 28, 2014, that it submitted in support of the petition. The Petitioner did not submit any additional information specifically pertaining to the Beneficiary's proposed position and job duties in the United States.

The Petitioner submitted a document titled '[REDACTED]' dated April 15, 2014. The document establishes that the Petitioner nominated, approved, and appointed the Beneficiary as the Chief Executive Officer of its U.S. company as of the document's date. The document does not list a position description or job duties for the Beneficiary's position.

The Petitioner also submitted an updated copy of its business plan containing a new proposed organizational chart. The organizational chart shows [REDACTED] as CEO at the top tier of the hierarchy, supervising the Beneficiary as Business Development Manager and [REDACTED] as Sales Manager. The positions listed subordinate to the Business Development Manager and Sales Manager remain the same as those in the previously submitted organizational chart: the Business Development Manager will supervise "PR," "Business Partnerships," and Product Development; and the Sales Manager will supervise Sales Attendants, "Management Point of Sale," and Sales Training.

The Director denied the petition on November 19, 2014, concluding that the Petitioner did not establish that the Beneficiary will be employed in a qualifying managerial or executive capacity within one year of approval of the new office petition. In denying the petition, the Director found that the Petitioner did not establish how the Beneficiary would be able to focus primarily on managerial or executive duties within one year of the commencement of business operations. The Director noted that it instructed the Petitioner to submit a detailed organizational chart for the new office, listing all proposed positions and including a summary of proposed duties and expected educational levels of the proposed employees; however, the Petitioner did not submit the requested information. The Director further noted that the Petitioner did not indicate the number of workers it plans to hire, nor did it provide a specific hiring plan for the listed positions. Therefore, the Director concluded that the Petitioner did not establish that it will have a structure and staff developed to the point where it will be able to support the Beneficiary in an executive or managerial position within one year.

Matter of B-P-USA, Inc.

On appeal, the Petitioner contends that the Beneficiary will be employed in an executive capacity in the United States. In support of the appeal, the Petitioner submits a copy of its business plan, updated for a second time, containing a proposed organizational chart. The organizational chart again shows [REDACTED] as CEO at the top tier of the hierarchy, supervising the Beneficiary as Chief Operating Officer and [REDACTED] as Sales Manager. The positions listed subordinate to the Sales Manager remain the same as the two previously submitted organizational charts. However, the positions listed subordinate to the Beneficiary have changed. The chart shows that the Beneficiary, as Chief Operating Officer, will supervise "PR," "Business Partnerships," and "Service & Logistics." Like the two previously submitted organizational charts, aside from [REDACTED] as CEO, the Beneficiary as Chief Operating Officer, and [REDACTED] as Sales Manager, the Petitioner did not identify any additional employees by name or job title.

The updated business plan also includes new information under the section titled "Operations," listing the responsibilities of each manager as follows:

[Beneficiary] – chief of operations officer

- * Development of the operating procedures and execution.
- * Leading processes and changes inside and outside the enterprise.
- * Current management of logistics & service systems.
- * Developing the U.S market by establishing the brand and creating business relationships with commercial entities.
- * Responsibility for product delivery and coordination with a number of factors within and outside the system.
- * Making job interviews and responsibility for the recruitment of new staff to work.
- * Concern for the welfare of workers and their working wage[.]

[REDACTED] – sales manager

- * Preparation and strategizing for the sales staff.
- * Sustain and increase customer share.
- * Identifying potential customers and increase market share for existing customers.
- * Making professional training for current employees and mentoring the new employees and absorption them [sic] to the system.

B. Analysis

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

When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial/executive responsibility cannot be performed in that first year. Therefore, 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. *See generally* 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed 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 a complete understanding of a beneficiary's actual proposed duties and role in a business.

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/CEO and briefly described her proposed duties, allocating percentages of time she would devote to them, in very broad terms. Specifically, the Petitioner stated that she would: engage in daily briefings with

management – 20%; establish monthly and yearly financial goals based on current sales figures and profits – 15%; set the necessary policies for contracting between the company and third parties in order to achieve financial goals – 15%; contract with third parties on behalf of the Petitioner – 10%; analyze the current cosmetics market to better determine the proper and necessary methods of distribution and advertising of the products and establish logical, workable solutions for existing and future problems connected with the marketing of the U.S. business – 15%; oversee all legal aspects of the company – 10%; and control all financial aspects and policies of the corporation including sales figures and policies for profit increases and efficiency increases – 15%. The Petitioner summarized the Beneficiary's job duties by stating that she will direct and control the management of the company in its business set-up and execution of production, pricing, distribution, and sales. The Petitioner did not include any additional details or specific tasks related to each duty, nor did the Petitioner indicate how such duties qualify as managerial or executive in nature. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In response to the RFE, the Petitioner submitted the same documentation previously submitted with the petition, but updated its organizational chart within the business plan to reflect a new title for the Beneficiary of Business Development Manager, while showing a different individual senior to the Beneficiary in the CEO role. The Petitioner did not submit a new position description or job duties; it simply changed the Beneficiary's title in the organizational chart and did not further address it.

On appeal, the Petitioner states that the Beneficiary's new title of Business Development Manager "does not contradict the fact that developing the business is a central duty of an executive of a new company in the United States." The Petitioner continues by claiming: that "[d]eveloping a business as an executive do[es] involve all the specific duties provided to the USCIS which include developing the business through (i) establishing financial goals; (ii) set policies; (iii) analysis of the industry; and (iv) oversee legal aspects of the company." The Petitioner then proceeded to change the Beneficiary's title for a second time to Chief Operating Officer, "with specified executive duties such as (i) development of the operating procedures and execution; [(ii)] development of the United States market; (iii) logistics, and (iv) human resources development duties."

The Petitioner did not include any additional details or specific tasks related to each duty listed for the Beneficiary's new title of Chief Operating Officer, nor did the Petitioner indicate how such duties qualify as managerial or executive in nature. As noted above, 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. Further, the newly listed duties for the Beneficiary's most recently titled position of Chief Operating Officer are not the same as those listed for her previous position titles. We understand that a position may evolve over time; however, on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities.

The petitioner must establish that the position offered to the beneficiary, when the petition was filed, merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

In the instant matter, 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 has assigned three different job titles to the Beneficiary's proposed position and has not provided a detailed or consistent description of the specific tasks she is expected to perform during the first year of operations and beyond. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

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).

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

Here, the Petitioner's organizational chart indicates that the Beneficiary will directly supervise "PR," "Business Partnerships," and "Product Development" or "Service & Logistics"; however, the Petitioner did not submit any information relating to these positions or how they will relieve the Beneficiary from performing non-qualifying operational or administrative duties. Further, it is not clear that these headings refer to specific staff to be hired or simply the Beneficiary's areas of responsibility. The Petitioner did provide a brief description of the Sales Manager position, but that position is parallel to the Beneficiary's position. The Petitioner did not provide a description of any

proposed positions listed subordinate to the Beneficiary and therefore, it cannot be determined that those positions would relieve the Beneficiary from performing non-qualifying operational and administrative duties. The Petitioner has not submitted evidence that the Beneficiary will oversee professional supervisory or managerial subordinate employees, or that she will have subordinates to relieve her from performing non-qualifying operational and administrative duties at the U.S. company within one year.

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

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial. Here, we find that the Petitioner has not provided sufficient evidence to establish that the Beneficiary will be employed in a primarily managerial capacity as either a personnel manager or as a function manager.

We will now review the Petitioner's assertion on appeal that the Beneficiary's position is primarily executive in nature.

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. As noted, the Petitioner has submitted three different job titles and two different lists of job duties for the Beneficiary. None of the submitted variations of the Beneficiary's duties establish that her duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. Further, as discussed, the evidence of record does not provide sufficient information regarding the number or types of employees to be hired during the first year of operations, making it difficult to determine that there will be employees other than the Beneficiary to perform the non-executive tasks associated with the company's day-to-day operations.

As previously noted, when a new business is 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 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 order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). 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.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a qualifying managerial or executive capacity, or that the Petitioner will grow to the point where it will require the Beneficiary's services in a qualifying capacity by the end of its first year of operations. Accordingly, the appeal will be dismissed.

III. EMPLOYMENT ABROAD FOR ONE YEAR

Beyond the decision of the Director, the Petitioner has not established that the Beneficiary was employed full time by a qualifying foreign entity for one continuous year within the three year period preceding the filing of the petition, pursuant to 8 C.F.R. § 214.2(l)(3)(iii).

A. Facts

On the Form I-129, the Petitioner stated that the Beneficiary's "date of last arrival" to the United States was December 16, 2012 and her current nonimmigrant status is "F1 Student," valid for a Duration of Status (D/S). On the L Classification Supplement to Form I-129, the Petitioner stated that the Beneficiary was employed by the foreign entity from January 2004 to December 16, 2012. Where asked to explain any interruptions in the Beneficiary's employment, the Petitioner stated, "In December 16, 2012 [the Beneficiary] came to visit the US." Finally, the Petitioner did not respond where asked to list the Beneficiary's previous stays in the United States in an H or L status. In its initial letter of support, the Petitioner again stated that the Beneficiary has been employed by the foreign entity since 2004.

The Petitioner submitted a letter from the foreign entity, dated April 23, 2014, stating that the Beneficiary is a senior employee at the company and functioning as the chief of its product development department. The letter further states that the Beneficiary has been working at the foreign entity for more than 10 years.

The Petitioner submitted a single pay stub for the Beneficiary from the foreign entity stating that her employment commenced on January 1, 2011. The translation of the pay stub does not include the date of payment; the original copy of the pay stub includes a date of June 29, 2014 at the top left corner, but the meaning of that date is unknown.

The Petitioner submitted a second letter from the foreign entity, dated June 19, 2014 (06/19/2014), stating that the Beneficiary was employed at the foreign entity from January 1, 2004 (01/01/2004) to August 1, 2012 (08/01/2012).

In response to the RFE, the Petitioner submitted a third letter from the foreign entity, undated, stating that the Beneficiary was employed at the foreign entity from January 1, 2011 (01/01/2011) to January 12, 2012 (01/12/2012) as the head of the development and the research department.

The Petitioner submitted a copy of the foreign entity's Form 106, Employer Payroll Tax, for 2011 and 2012 showing a check mark for each month in 2011 and 2012 indicating that the Beneficiary was employed and receiving a wage during that time.

The Petitioner also submitted the Beneficiary's resume, which listed her positions at the foreign entity as follows: Director of Product Development (2000-2007), Director of Marketing (2007-2010), and Director of Public Relations (2010-2012).

In its letter responding to the RFE, the Petitioner lists the supporting evidence submitted and indicates that it is submitting a "copy of letter from [the foreign entity's] Human Resources Department confirming Beneficiary . . . employment history from January 1, 2011 to December 1, 2012."

B. Analysis

Upon review, and for the reasons stated herein, the evidence of record does not establish that the Beneficiary has one year of continuous employment with a qualifying organization abroad.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) states:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge. *Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.*

(Emphasis added).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) must be read together with the regulation at 8 C.F.R. § 214.2(l)(3)(iii), which requires evidence that the beneficiary 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*. If the beneficiary has spent time in the United States in a lawful status for a branch of the same employer, or a parent, affiliate or subsidiary thereof, this period of employment will not be considered interruptive of the beneficiary's continuous employment abroad, and USCIS will look beyond the three-year period immediately preceding the filing of the petition to determine whether the beneficiary meets the requirement set forth at 8 C.F.R. § 214.2(l)(3)(iii). A beneficiary's one year of continuous employment abroad, once established, remains continuous, despite the beneficiary's subsequent stay in the United States for a branch, affiliate, subsidiary, or parent of the foreign entity in an authorized nonimmigrant status.

We note that the Petitioner submitted contradictory statements regarding the Beneficiary's dates of employment at the foreign entity. The Form I-129 was filed on September 8, 2014, but the Beneficiary was last admitted to the United States on December 16, 2012 and remained here as of the filing date. She was also in the United States from August 7, 2012 until November 26, 2012 in B2 nonimmigrant status. The Petitioner must show that the Beneficiary was employed by the foreign entity on a full-time basis for one continuous year between December 2009 and December 2012 and the three months she spent in the United States just prior to her last admission cannot be counted towards that time.

Here, the Petitioner submitted multiple letters from the foreign entity contradicting her initial start date of employment at the foreign entity. One letter states that she commenced her employment in

Matter of B-P-USA, Inc.

2004 and another states that she commenced employment in 2011. The Beneficiary's resume states that she was employed as Director of Product Development commencing in 2000. Further, the letters also provide contradictory claims regarding the Beneficiary's final date of employment at the foreign entity. One letter states that she ended her employment on August 1, 2012, another states her employment ended on January 12, 2012, and the Petitioner states that her last date of employment was December 1, 2012. The Petitioner's letter stating that her final date of employment at the foreign entity is December 1, 2012 is inverting the month and day indicated in the foreign entity's letter. However, given that the dates in the letter from the foreign entity have been translated, and the date at the top of the page indicating the date the letter was written is not inverted, it is reasonable to believe that the intended date listed is January 12, 2012, not December 1, 2012.

As such, there is insufficient evidence in the record to establish the Beneficiary's actual dates of employment at the foreign entity. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Based on the inconsistencies discussed above, the Petitioner has not established that the Beneficiary was employed full time by a qualifying foreign entity for one continuous year within the three year period preceding the filing of the petition, in accordance with 8 C.F.R. § 214.2(l)(3)(iii). For this additional reason, the petition cannot be approved.

IV. PREVIOUS PETITION

Beyond the decision of the director, it is noted that the Petitioner indicated under penalty of perjury in Part 4 of the Form I-129 petition that the Beneficiary had never been denied the requested classification. This petition was filed on September 8, 2014. The Petitioner previously filed a Form I-129 requesting that the Beneficiary be granted L-1A classification on May 22, 2014 and that petition was denied on July 25, 2014 [REDACTED]. The regulations at 8 C.F.R. § 214.2(l)(2)(i) state that "[f]ailure to make a full disclosure of previous petitions filed may result in a denial of the petition." As the Petitioner indicated on the form that the Beneficiary had never been denied the requested classification, and the Petitioner did not disclose the previously filed petitions, this petition will be denied for this additional reason as a matter of discretion.

V. CONCLUSION

We maintain discretionary authority to review each appeal on a *de novo* basis. Our *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9th Cir. 2003).

Matter of B-P-USA, Inc.

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

ORDER: The appeal is dismissed.

Cite as *Matter of B-P-USA, Inc.*, ID# 12650 (AAO Jan. 6, 2016)