



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

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

MATTER OF N-E- INC

DATE: JAN. 14, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a company engaged in “retail, wholesale, warehousing, procurement, export and domestic supplies,” seeks to extend the Beneficiary’s temporary employment as its chief executive officer under the L-1A nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The Director denied the Petition concluding that the evidence of record did not establish that the Beneficiary will be employed in a qualifying managerial or executive capacity. The Petitioner subsequently filed a combined motion to reopen and reconsider. The Director granted the motion and affirmed the denial of the petition.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director’s latest decision did not properly address the evidence submitted on motion or explain why this evidence did not meet the Petitioner’s burden of proof. The Petitioner contends that it has satisfied all eligibility requirements for the requested extension of status.

Upon *de novo* review, we will dismiss the appeal.¹

I. THE LAW

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

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

¹ We conduct *de novo* review of all issues involving the application of law, policy, and discretion to the facts of a case.

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

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

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

II. THE ISSUE ON APPEAL

The sole issue to be addressed is whether the Petitioner established that it will employ the Beneficiary in a qualifying managerial or executive 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
- (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.

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A. Facts

The Petitioner filed the Form I-129 on November 15, 2013. The record reflects that the Beneficiary was initially granted L-1A status for one year, from November 19, 2012 until November 18, 2013, in order to open a new office as its CEO. The Petitioner stated on the Form I-129 that it is engaged in “retail, wholesale, warehousing, procurement, export and domestic supplies.” The Petitioner states that it is primarily operating a gas station and convenience store known as [REDACTED]. The Petitioner claimed six employees at the time of filing and stated that its estimated gross annual income is \$755,000.

On the Form I-129, the Petitioner described the Beneficiary’s proposed duties in the United States as follows:

Will oversee entire operations of US Company. Hire, train and supervise Managers for US operations. Develop survey of market and suggest parent company about the profitability of operations. Explore expansion and diversification of operations and investments. Develop business strategy and confer with clients and outside professionals. Ensure timely completion of targets and review progress of ongoing operations. His duties with our entity in US would include: He would [p]lan, direct or coordinate the operations of our Business development and Marketing of our services through Managers and four departmental heads. Direct and coordinate an organization’s financial and budget activities to fund operations, maximize investments, and increase efficiency. Confer with board members, organization officials, and staff members to discuss issues, coordinate activities, and resolve problems. Analy[z]e operations to evaluate performance of a company and its staff in meeting objectives, and to determine areas of potential cost reduction, program improvement, or policy change. Direct, plan, and implement policies, objectives, and activities of organization or businesses to ensure continuing operations, to maximize returns on investments, and to increase productivity. Prepare budgets for approval including those for funding and implementation of program. He through Managers would be responsible for hiring, promoting, transferring and firing Departmental head. He will oversee timely completion of projects to the satisfaction of clients. He will continue to be planning, acquiring and expanding our operations in USA.

In support of the Form I-129, the Petitioner provided copies of two assumed name certificates. The first was dated May 3, 2013 and stated that the Beneficiary would be doing business as a sole proprietor under the name [REDACTED] at [REDACTED] Texas. The Petitioner’s name does not appear on this document.² The Petitioner also submitted an assumed

² In response to the Director’s subsequent request for evidence (RFE), the Petitioner explained that the Beneficiary mistakenly filed the assumed name application as a sole proprietor. The Petitioner provided evidence that it re-filed the assumed name request on June 28, 2013 under its own name, along with evidence that it maintains a business checking account under this assumed name.

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name certificate dated August 20, 2013 indicating that the Petitioner is doing business as [REDACTED] at the same address in [REDACTED]

As noted, the Petitioner stated on the Form I-129 that it had six employees at the time of filing. The Petitioner submitted a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, and its Texas Employer's Quarterly Report for the third quarter of 2013, which reflects that the Petitioner had six employees in September 2013. The Petitioner also provided copies of its monthly payroll summaries and paystubs issued to each employee between the months of May and October 2013.

The Director issued a request for additional evidence (RFE) on April 4, 2014, advising the Petitioner that the initial evidence did not establish that the Beneficiary is employed in a managerial or executive capacity. The Director requested, among other items, more detailed descriptions of the Beneficiary's duties and the Petitioner's staffing, along with a detailed organizational chart and evidence of wages paid to employees and any contractors. The Director also requested that the Petitioner provide the names, job titles, job duties, education level and salary for all employees. In addition, the Director asked the Petitioner to explain the nature and scope of its business activities, noting the evidence in the record relating to different business names.

In a letter dated May 13, 2014, the Petitioner explained that it is "operating and performing [the] following business activities through its CEO":

1. [REDACTED]
This business has its own separate Bank account, own invoices and other activities. The bank statements and invoices are placed with this correspondence.
2. [REDACTED]
This business has its own separate bank account, invoices and assumed name which is placed separately with this correspondence.
3. [REDACTED]
This is US entity which is controlling and managing the operations of above two businesses and also performing procurement and export of equipment through paypal and other means. The equipment's [sic] are generally acquired and shipped directly to end user to avoid dual freight and storage charges to achieve competitive advantage.

The Petitioner's letter included the following breakdown of duties to be performed by the Beneficiary as follows:

1. Business Development and communication with clients both existing and potential - 30%
2. Staff development, Supervision and co-ordination with Management and Board. – 20%

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3. Analytical work and Management. – 20%
4. Human Resource Management and Development. – 15%
5. Operational Details and supervision. – 10%
6. Staff meetings and morale development. – 5%

The Petitioner also provided the following list of duties:

1. Direct and coordinate an organization's financial and budget activities to fund operations, maximize investments, and increase efficiency.
2. Confer with board members, organization officials, and staff members to discuss issues, coordinate activities, and resolve problems.
3. Analyze operations to evaluate performance of a company and its staff in meeting objectives, and to determine areas of potential cost reduction, program improvement, or policy change.
4. Direct, plan and implement policies, objectives and activities of organizations or businesses to ensure continuing operations, to maximize returns on investments and to increase productivity.
5. Prepare budgets for approval, including those for funding and implementation of programs.
6. Direct and coordinate activities of business or departments concerned with production, pricing, sales, or distribution of products.
7. Negotiate or approve contracts and agreements from suppliers, distributors, federal or state agencies, and other organizational entities.
8. Review reports submitted by staff members to recommend approval or to suggest changes.
9. Appoint department heads or managers and assign or delegate responsibilities to them.
10. Direct human resources activities, including the approval of human resource plans and activities, the selection of directors and other high-level staff, and establishment and organization of major departments.

The Petitioner emphasized that the Beneficiary “will directly supervise Managers working independently as heads of different departments,” as well as third party independent contractors, office staff and clerical support. The Petitioner stated that the Beneficiary’s time would be allocated to executive functions, evaluating and supervising managerial staff, and making investment decisions, and emphasized that he would not be involved in the day-to-day operation of the company or “Micro Management.”

The Petitioner explained that the Beneficiary initially negotiated and acquired [REDACTED] and later started [REDACTED] “which is involved in electronic and gift items procurement’s [sic] sales and service.” The Petitioner stated that the Beneficiary “has also been spearheading the business of acquisition of equipment through web based search and resourcing,” and that he “has been able to plan, acquire and export the equipment to Pakistan.”

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The Petitioner provided a copy of its 2013 IRS Form 1120, U.S. Corporation Income Tax Return, in which it reported \$364,349 in gross receipts for the year, and \$73,301 in salary and wage expenses. The Petitioner paid \$950 in legal and professional fees, but did not report any deductions for “cost of labor” or any other payments to contractors. The Petitioner also submitted its IRS Forms 941 and Texas Employer’s Quarterly Reports for the last three quarters of 2013 and first quarter of 2014, along with employee paystubs.

In November 2013, the month in which the petition was filed, the Petitioner paid the following individuals: \$5,000 to the Beneficiary (salary); \$1,000 to [REDACTED] (salary); \$1,000 to [REDACTED] (salary); \$1091.13 to [REDACTED] (hourly); \$1000.50 to [REDACTED] (hourly); and \$435 to [REDACTED] (hourly), who commenced employment on November 16, 2013. The Petitioner did not provide the requested organizational chart or any other information regarding the employees or the positions they held.

The Director denied the petition on June 20, 2014, finding that the evidence of record did not establish that the Beneficiary will be employed in a managerial or executive capacity under the extended petition. The Director acknowledged that the evidence of record showed that the Petitioner had five employees at the time of filing and one employee who commenced employment in mid-November 2013. However, the Director emphasized that the Petitioner did not submit its organizational chart or information regarding the job titles, job duties or educational level of its employees in support of its assertion that the Beneficiary supervises subordinate managers and department heads, nor did it submit evidence in support of its claim that he oversees third party independent contractors. Further, the Director determined that without the requested evidence relating to the Beneficiary’s subordinates, the Petitioner did not support its claims that the Beneficiary is relieved from involvement in the non-managerial, day-to-day operations of the company. The Director thus concluded, due primarily to these deficiencies, that the record did not support a finding that the company had grown to the point that it could support the Beneficiary in a qualifying managerial or executive capacity.

The Petitioner subsequently filed a combined motion to reopen and reconsider which included: a letter from the Petitioner dated July 24, 2014; an employee list that identified 15 employees by name and job title, and included a brief summary of job duties for each position; and recent payroll evidence from June 2014.

On motion, the Petitioner contended that the Director’s finding that the company had no more than six employees at the time of filing was incorrect, as the company had six employees and ten contract workers when it filed the petition in November 2013. The Petitioner noted that these independent contractors were referenced in its letter in response to the RFE. The Petitioner further claimed that it had since “made all of our workers regular employees on the payroll,” and that it was paying 16 employees at the time it filed the motion.

The submitted employee list included a secretary, a vice president, an operations manager, two retail outlet managers, one assistant retail outlet manager, one sales associate, two cashiers, a purchasing

manager, a clerk who assists the purchasing manager, two stockers, and two maintenance workers. The Petitioner's Texas Employer's Quarterly Report for the second quarter of 2014 showed five employees in April 2014, six employees in May 2014 and ten employees in June 2014, and indicated that a total of 16 employees were paid during the quarter.

In a decision dated April 8, 2015, the Director affirmed the denial of the petition. The Director acknowledged the Petitioner's assertion that the Beneficiary would supervise 15 employees, but emphasized that it previously claimed and provided evidence of no more than six employees when the petition was filed. The Director, citing the regulation at 8 C.F.R. § 103.2(b)(1), emphasized that the Petitioner must establish that it is eligible for the requested benefit at the time it filed the petition.

On appeal, the Petitioner asserts that its evidence on motion addressed the concerns raised in the Director's initial denial decision and questions why the Director determined that a company with 16 employees did not establish by a preponderance of the evidence that it could support the Beneficiary in a qualifying managerial or executive capacity. The Petitioner asserts that the Director's decision on motion was conclusory and did not properly address why the additional evidence was insufficient to meet its burden of proof.

B. Analysis

Upon review, and for the reasons discussed herein, the Petitioner has not established by that the Beneficiary will be employed in a qualifying managerial or executive capacity.

As noted by the Petitioner, it must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Id.* at 376 (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)).

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 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 time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the Beneficiary manages a business does not 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").

On review, the Petitioner has provided very general descriptions of the Beneficiary's duties that provide little insight into what he will do on a day-to-day basis within the context of the Petitioner's actual business operations. In response to the RFE, the Petitioner included a list of twelve broad responsibilities such as "direct and coordinate an organization's financial and budget activities"; "direct, plan and implement policies, objectives and activities of organizations"; "direct and coordinate activities of businesses or departments"; and "analyze operations to evaluate performance of a company and its staff." The duties were described in hypothetical terms without specific reference to the Petitioner's actual business model. While such duties may generally describe the Beneficiary's areas of responsibility and indicate his senior level of authority, they do not explain the specific tasks he performs. Reciting a beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The Petitioner did not provide sufficient detail or explanation of the Beneficiary's proposed activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, while the Petitioner provided a breakdown of the percentage of time the Beneficiary would allocate to six specific areas of responsibility, this list of duties was even more nonspecific and did not correlate to the list of 12 responsibilities referenced above. For example the Petitioner stated that the Beneficiary spends 30% of his time on "business development and communication with clients both existing and potential." Given the Petitioner's claim that its primary business activity is operation of a convenience store, it is unclear how communication with clients is a qualifying managerial or executive duty, and it is unclear what this area of responsibility would entail other than marketing, promotions and sales activities. In response to the RFE, the Petitioner stated that the Beneficiary would leave all day-to-day oversight of the business to his subordinate managers, but it also stated that he allocates 20% of his time to staff development and supervision, 15% of his time to human resource management and development, 10% of his time to "operational details and supervision," and 5% of his time to "staff meetings." Contrary to the Petitioner's claims, this description of the Beneficiary's duties suggests that he devotes half of his time to personnel supervision and direct oversight of staff and daily operations, rather than assigning these functions to subordinates.

Therefore, the Petitioner's very broad breakdown of the Beneficiary's job duties did not establish what proportion of the beneficiary's duties will be managerial in nature, and what proportion will be actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). An employee who "primarily" performs the tasks necessary to produce a product or provide a service is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988).

Overall, the position description alone is insufficient to establish that the Beneficiary's duties would be primarily in a managerial or executive capacity. When examining the managerial or executive

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capacity of a Beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a Beneficiary's duties and those of his or her subordinate employees, the nature of the Petitioner's business, the employment and remuneration of employees, and any other facts that contribute to an understanding of a Beneficiary's actual role in a business.

The Petitioner claimed to have six employees at the time of filing the Form I-129. The Director requested in his RFE an organizational chart and a description of duties for each employee, along with evidence of wages paid to each employee, noting that the Petitioner should also provide evidence of any payments to workers made on IRS Form 1099.

The Petitioner's response to the RFE supported its claim that it had six employees, including the Beneficiary, at the time of filing.³ As noted, the Petitioner stated that the Beneficiary will "directly supervise Managers working independently as heads of different departments." The Petitioner also stated that the Beneficiary will have "third party independent contractors to assist him in achieving objectives," and that he will have "office staff and clerical support as well." The Petitioner did not submit an organizational chart showing the titles, job descriptions and salary for each employee. In addition, the Petitioner did not submit any evidence that it was using independent contractors at the time the petition was filed. In fact, the Petitioner's 2013 Form 1120 does not show any payments made to contractors. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

On motion, the Petitioner stated "[w]e sincerely apologize for the omissions contained in our previous submissions." The Petitioner provided the above-referenced list of 15 employees, along with an explanation that it actually had 16 workers at the time of filing, not six as indicated on the Form I-129. The Petitioner claims that ten individuals were paid as independent contractors in 2013, and it appears to assert that all 15 named individuals have been working for the company, either as employees or contractors, since the time of filing. The Petitioner's claim that these 16 people worked for the company at the time of filing is not persuasive.

First, the record of proceedings contains no evidence in support of the Petitioner's claim that it paid any of the individuals named on the employee list as independent contractors in 2013. The Petitioner did not submit copies of IRS Forms 1099, pay stubs, canceled checks, bank records, work schedules, or any other evidence which would show that most of these individuals worked for the company in any capacity in 2013.⁴ Further, the Petitioner's IRS Form 1120 for 2013 indicates that

³ The Form I-129 was filed on November 15, 2013 and the Beneficiary's previous L-1A petition expired on November 18, 2013. The record indicates that the Petitioner had an employee who started on November 16, 2013 and we will include this worker in evaluating the Petitioner's staffing levels at the end of its initial year of operations.

⁴ The Petitioner previously submitted evidence related to two individuals named on the employee list [REDACTED] who were not among the six employees documented at the time of filing. The record shows that [REDACTED] (identified as "purchasing manager") was paid \$4,390.92 as a regular employee in 2013 and last worked on August 28, 2013. The Petitioner provided evidence of this person's employment in 2014, but there is no evidence that he was being

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the Petitioner did not report any payments made to independent contractors. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). While the Petitioner did reference "independent contractors" in a previous letter, we will not accept that unsupported statement as evidence that it actually paid the individuals identified in the employee list as contractors in 2013. The Petitioner also did not identify any contractors by name or identify what positions they held when replying to the RFE.

As the Petitioner did not provide evidence that most of the 15 individuals in its employee list were working for it in any capacity at the time of filing, it cannot rely on the employee list and June 2014 payroll records to establish its 2013 staffing levels and organizational structure. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after a petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Therefore, our analysis of the Petitioner's staffing levels and organizational structure will be based on the Petitioner's documented employees as of the date of filing. The record of proceedings shows that, in November 2013, the Petitioner employed the Beneficiary as CEO and the individuals identified as holding the following positions: a vice president who "oversees the overall status of the company"; an assistant retail outlet manager who is responsible to "oversee the operations of the outlet" during the day shift or night shift; and, a clerk who assists with purchasing. The Petitioner also provided evidence of wages paid to two hourly employees (), whose job titles and job descriptions have not been provided.

At the same time, the Petitioner claimed on motion that its business supports 16 workers, including the positions identified above as well as an operations manager, two retail outlet managers, a purchasing manager, a secretary, two stockers, two cashiers and two maintenance workers. As the Petitioner did claim that an expansion occurred after the denial of the petition, and did not support its claim that these additional positions were actually filled by ten independent contractors as of November 2013, then it is reasonable to conclude that the Petitioner was not fully staffed at the time of filing.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations for the extension of a "new office" petition require USCIS to examine the organizational structure and

paid as an employee or contractor when the petition was filed. The Petitioner provided a copy of an IRS Form W-9 signed by on July 31, 2013, but did not provide any evidence of payments made to him in 2013. Therefore, these two individuals will not be considered as part of the petitioning organization as of the date of filing.

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staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D).⁵ The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the “new office” operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the Beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

Here, the Petitioner has documented its employment of a CEO, a vice president, an assistant manager, a purchasing clerk, and two employees whose duties have not been identified, but claims that it also requires cashiers, stockers, maintenance employees, two retail managers, an operations manager and a purchasing manager. The Petitioner has not explained why a retail business with six employees has a reasonable need for three managerial or executive employees, nor has it established that the personnel in place at the time of filing were able to relieve the Beneficiary from involvement in the non-managerial, day-to-day operations of the company.

Further, the Petitioner stated that it is running three separate lines of business, and it provided a very brief explanation of its business activities beyond those of “_____” To the extent that the Petitioner described the duties of its employees, those employees appear to work for _____. The Petitioner did not provide any evidence that its other two lines of business, one which sells “novelties and electronics” and one which appears to source and purchase electronic equipment online for export to Pakistan, are staffed, or otherwise explain who, other than the Beneficiary performs the day-to-day tasks needed to operate these lines of business. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The Petitioner has consistently claimed that the Beneficiary makes “executive decisions,” oversees the overall operations of the company, and oversees managerial employees. The statutory definition of the term “executive capacity” focuses on a person’s elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a Beneficiary must have the ability to “direct the management” and “establish the goals and policies” of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the Beneficiary to direct and the Beneficiary must primarily focus on the broad goals and policies of the organization rather than

⁵ Following the enactment of section 101(a)(44)(C) of the Act in 1990, the former Immigration and Naturalization Service (INS) recognized that that managerial capacity could not be determined based on staffing size alone and deleted reference to “size and staffing levels” at 8 C.F.R. § 214.2(l)(3)(v)(C)(3) (1990), setting out the evidentiary requirements for initial new office petitions. See 56 Fed. Reg. 61111, 61114 (Dec. 2, 1991). However, the INS chose to maintain the review of the new office’s staffing, among other criteria, at the time that the new office seeks an extension of the visa petition. See 8 C.F.R. § 214.2(l)(14)(ii)(D).

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.*

Due to the lack of a detailed position description for the Beneficiary and insufficient evidence that the Petitioner, which claims to operate three lines of business, was sufficiently staffed at the time of filing with employees or contractors to relieve the Beneficiary from spending a significant amount of his time on non-qualifying duties, the Petitioner has not established that the Beneficiary performs primarily executive duties.

For similar reasons, the record does not establish that the Beneficiary is employed in a qualifying managerial capacity. As noted, the Petitioner’s description of the Beneficiary’s duties was overly broad and did not identify the specific executive or managerial duties he would perform under the extended petition. However, the Petitioner’s breakdown of the Beneficiary’s duties suggests that he devotes as much as half of his time to personnel supervision.

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).

Though requested by the Director, the Petitioner did not provide the level of education required to perform the duties of the positions that are subordinate to the Beneficiary, such that they could be classified as professional positions requiring at least a bachelor’s degree. The Petitioner has not claimed that the Beneficiary supervises professional employees. Although the Petitioner claims that at least three of the six employees documented at the time of filing have managerial or executive job titles, the record does not contain sufficient evidence that any of these employees actually supervises subordinate staff members, such that they could be classified as managers or supervisors. Thus, the Petitioner has not shown that the Beneficiary’s subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act, and it has not established that he will be employed in a qualifying managerial capacity as a personnel manager. Finally, the Petitioner has not claimed that the Beneficiary manages an “essential function” of the organization or provided evidence in support of a claim that he qualifies as a “function manager.”

The Petitioner claims that, as it has now provided evidence of 16 employees on its payroll as of June 2014, it has established by a preponderance of the evidence that the Beneficiary is qualified for the benefit sought. As discussed, the Petitioner did not provide evidence that those 16 individuals were working for the company as employees or contractors at the time of filing. If the Petitioner wishes to have USCIS consider its current staffing levels, it can file a new petition with updated evidence of its staffing and organizational structure. The denial of this petition will not prejudice future filings

made on behalf of the Beneficiary. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

For all of the foregoing reasons, the Petitioner has not established that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition. The appeal will be dismissed.

IV. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of N-E- Inc*, ID# 15127 (AAO Jan. 14, 2016)