



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

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

MATTER OF D-C- CORPORATION

DATE: JULY 18, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a restaurant, seeks to temporarily employ the Beneficiary as a President under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) § 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 an executive or managerial capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish that the Beneficiary will be employed in a qualifying managerial capacity in the United States.

The matter is now before us on appeal. In its appeal, the Petitioner submits a brief and asserts that the Director erred in that the Beneficiary will be employed in a qualifying executive capacity in the United States. Upon preliminary review, our office issued a request for evidence (RFE) on September 24, 2015, instructing the Petitioner to submit evidence pertaining to the Beneficiary's proposed position in the United States, its qualifying relationship with the foreign entity, and its physical premises. The Petitioner submits additional evidence in response to this office's RFE.

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.

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary will be employed in a qualifying managerial or executive capacity in the United States. The Petitioner does not claim that the Beneficiary will be employed in a managerial capacity. Therefore, we will restrict our analysis to whether the Beneficiary will be employed in an executive capacity.

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.

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A. Evidence of Record

The Petitioner filed the Form I-129 on August 4, 2014, seeking to employ the Beneficiary as its President/Owner. On the L Classification Supplement to the Form I-129, where asked to describe the Beneficiary's proposed duties in the United States, the Petitioner stated the following:

Direct, manage, supervise, control and coordinate all aspects of business sales, high-quality [*sic*] inventory, live entertainment, profitability and customer service.

The U.S. Subsidiary consists of a Mexican Restaurant specializing [*sic*] in grilled meats, regional salsas and freshly-made flour and corn tortillas. Underlying the business' successful growth and iconic city-wide recognition has been a direct result of [the Beneficiary's] leadership and direction, and his strong commitment to continuous improvement. The Beneficiary plans to open and direct a second restaurant in November 2014.

In support of the petition, the Petitioner submitted its organizational chart, depicting the Beneficiary at the top tier of the hierarchy as Director, directly supervising a "Manager Cashier," [REDACTED]. The "Manager Cashier" position supervises a Waitress, [REDACTED] a "Grill Chef," [REDACTED] and two Dishwashers, [REDACTED] and [REDACTED]. The "Grill Chef" position supervises a "Second Grill Chef," [REDACTED] who in turn supervises three "Cook Preparers," [REDACTED] and [REDACTED].

The Petitioner did not submit any additional information pertaining to the Beneficiary's position or job duties and the positions or job duties of his subordinates.

The Director issued an RFE on August 14, 2014 instructing the Petitioner to submit evidence demonstrating that the Beneficiary will be employed in a managerial or executive capacity in the United States.

In response to the RFE, the Petitioner submitted a letter, dated October 29, 2014, stating that the Beneficiary will be employed in an executive capacity. The Petitioner claimed that 10 subordinate managers/supervisors will be under the Beneficiary's direction and supervision, and it listed their names and job titles as follows:

1. Administrative Manager and Sales Manager: [REDACTED]
2. Accounting Manager: [REDACTED]
3. Head Chef: [REDACTED]
4. Sous Chef: [REDACTED]
5. Kitchen Assistant/Food Prep: [REDACTED]
6. Kitchen Assistant/Food Prep: [REDACTED]
7. Kitchen Assistant/Food Prep: [REDACTED]

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- 8. Maintenance/Janitorial Manager: [REDACTED]
- 9. Maintenance Assistant: [REDACTED]
- 10. Wait Staff Manager: [REDACTED]

The Petitioner further claimed that 100% of the Beneficiary's time "is currently allotted to the executive duties of Director of Sales and Marketing." In addition, the Petitioner clarified that the Beneficiary "will direct and manage the Administrative Manager in the preparation of financial statements," and not be involved in their direct preparation as originally claimed. Regarding the degree of discretionary authority the Beneficiary would have over the day-to-day operations of the restaurant, the Petitioner stated:

The Beneficiary has full authority as the President of the company over day-to-day operations, including, but not limited to, all departments and their respective managers, supervisors, and subordinate staff members, who, in turn, report directly to him. The Beneficiary has full authority to hire and fire any employee and authority to sign all salary compensation checks; full authority over all restaurant operations.

The Petitioner concluded by stating as follows:

An understanding of the positions listed on the Chart establishes, by a preponderance of the evidence, in descending order, that the Beneficiary's position is an executive position and that he supervises all supervisors and managers. Please note, however, that the Beneficiary's position to which he would be transferred is an executive position and not a managerial one. As such . . . the Beneficiary's assignment in the organization is one in which he primarily directs a major component or function of the organization, and not one where he manages supervisors or managers or other employees in the organization.

The Petitioner also submitted a new organizational chart, depicting the Beneficiary, again, at the top tier of the hierarchy as Director, directly supervising an "Administrative & Sales Manager," [REDACTED] and an "Accounting Manager," [REDACTED]. The "Administrative & Sales Manager" position supervises a "Wait Staff Manager," [REDACTED] a "Head Chef," [REDACTED] a "Maintenance Janitorial Manager," [REDACTED] and a "Maintenance Assistant," [REDACTED]. The "Head Chef" position supervises a "Sous Chef," [REDACTED] who in turn supervises three "Kitchen Assistants/Food Prep," [REDACTED] and [REDACTED].

The Petitioner did not submit any additional information pertaining to the Beneficiary's position or actual job duties.

The Director denied the petition on November 10, 2014, concluding that the Petitioner did not establish that the Beneficiary will be employed in a managerial capacity in the United States.¹ In denying the petition, the Director found that it does not appear that the Petitioner employs full-time persons to provide the sales and /or services of its organization to its customers. The Director found that it is unclear how the Petitioner can support so many managerial positions given its size and scope and who is actually performing all the day to day functions of the business.

On appeal, the Petitioner submits a brief asserting that the Beneficiary will be employed in an executive capacity and describing his proposed position in the United States as follows:

[T]he Beneficiary's proposed position in the U.S. to which he would be transferred is an executive position and not a managerial one. As such . . . the Beneficiary's assignment in the organization is one in which he primarily directs a major component or function of the organization, establishes goals and policies; exercises wide latitude in discretionary decision making and; receives only general supervision or direction from the board of directors or stockholders, and not one where he manages supervisors or managers or other employees in the organization.

.....

Here, the Petitioner submitted a detailed description of [the Beneficiary's] current and proposed duties as President stating that 100% of the time will be allotted to his executive duties of President and not to day-to-day tasks. . . . An understanding of the positions listed on the [organizational] Chart and on the fiscal documentation establishes . . . that the Beneficiary's proposed assignment in the organization . . . is one in which he will primarily direct a major component or function of the organization, and not one where he will manage supervisors or managers or other employees in the organization and that he currently is and will be the most senior of corporate employees, and as the Beneficiary has been offered the position of President of the Petitioner's U.S. operations, he will be the Petitioner's highest paid employee. . . . The Beneficiary, moreover, is not required to supervise personnel, and the Petitioner does not claim that the Beneficiary's duties involve the day-to-day supervision of employees and therefore is not required to establish that the subordinate employees are supervisory, professional, or managerial.

.....

¹ We note that, in her decision, the Director incorrectly stated that this petition is a first request for an extension of a prior nonimmigrant visa petition for a "new office." Then, at the end of her decision, the Director incorrectly stated that "the record does not establish that the new office has grown enough to support an executive or managerial position within one year of the initial petition's approval." In this instance, the Petitioner has been doing business in the United States for at least one year and cannot be considered a new office in these proceedings. This is also the first petition filed by the Petitioner and therefore it also cannot be considered an extension petition.

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[The Petitioner] has provided a comprehensive description of the Beneficiary's duties sufficient to establish that his duties are primarily related to directing a major component or function of the organization and not to producing a product, providing a service, or performing other non-executive functions. The evidence submitted also establishes . . . that the Beneficiary establishes goals and policies of the organization, exercises wide latitude in discretionary decision-making and receives only general supervision or direction based on a backing by a quorum from the Board of Directors.

Our office issued an RFE on September 24, 2015, instructing the Petitioner to submit a detailed description of the Beneficiary's duties for the Petitioner, along with other documentation demonstrating that the Petitioner actually employs the individuals listed on its organizational chart.

In response to our RFE, the Petitioner submits a "Definitive Statement" signed by [REDACTED] as Secretary, dated November 10, 2015, describing the Beneficiary's proposed position in the United States exactly as described on appeal and adding the following:

Please be advised that the position currently filled by [the Beneficiary] is that of President, which is an executive position within the company and not a position managerial in scope.

....

Please be advised that 100% of [the Beneficiary] time will be allotted to his executive duties as President and not to day-to-day tasks, as is evident on the Organizational Chart for our U.S. Company listing the Beneficiary's current and proposed position as President; and as is also evident on the fiscal and payroll documents.

....

[T]he Petitioner established . . . a reasonable need for a President at the U.S. company and has provided a comprehensive description of the Beneficiary's duties sufficient to establish that his duties are primarily related to directing a major component or function of the organization and not to producing a product, providing a service, or performing other non-executive functions. The evidence submitted also establishes . . . that the Beneficiary establishes goals and policies of the organization, exercises wide latitude in discretionary decision-making and receives only general supervision or direction based on a backing by a quorum from the Board of Directors.

....

In this position, [the Beneficiary] has been and will continue to be, responsible for all aspects of project development and implementation of the corporate charter and

business plan providing project management oversight. [The Beneficiary] has directed and overseen the preparation of the scope of work, food consumption, orders with suppliers, delivery of fresh food and beverages. He has directed and overseen the maintenance of company budget, employee records, payroll, bills, and bookkeeping records. [The Beneficiary] has directed and overseen the tracking of inventory, the quality of deliveries of fresh food and baked goods and has met with sales representatives to order supplies such as tableware, cooking utensils, and cleaning items. He has directed and overseen the selection and creation of successful menu items based on many considerations and the assignment of prices based on cost analysis. He has had complete authority to recruit, hire, fire and direct and oversee the training for staff. He has directed and overseen the preparation and methods of all foodstuff. Additionally, [the Beneficiary] has ensured that all specifications and requirements have been implemented and has promoted and maintained ethical relationships with current and new suppliers of any company or individual soliciting business with the company. . . .

In his capacity as President of the U.S. subsidiary, [the Beneficiary] has received and will continue to receive, only general supervision from the Board of Directors and has established and monitored management procedures, information systems, budgets and organizational procedures. He has directed resource planning activities and approved all changes in management control, procedures and budgetary limitations. . . . [The Beneficiary] has further attended meetings with industry associations to keep apprised of current and prospective regulatory changes and has had the ultimate authority to negotiate and execute all U.S. company contracts.

[The Beneficiary] has had full authority over day-to-day operations, including, but not limited to, all administrative departments and their respective staff members, who, in turn, report directly to him. [The Beneficiary] has had full authority to hire and fire any employee and authority to sign all salary compensation checks; full authority over general subcontractors' work and full authority over development projects; has overseen and monitored the activities of the subcontractors for development projects to assure all projects were completed within the prescribed schedules and budgets.

The Beneficiary's position with the U.S. subsidiary is executive in nature because the only person the Beneficiary has to answer to is to the board of directors and stockholders of [the foreign entity] in Mexico and for [the Petitioner] in the U.S. Furthermore, [the Beneficiary] alone deals directly with all administrative departments and their respective staff members within the U.S. organization. The staff, in turn, report directly to him.

The Petitioner submits its payroll records from April 2014 through June 2015. During the period from July through September 2014, the time of filing its Form I-129, the payroll records indicate that it had 11 employees, including the Beneficiary.

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The Petitioner submits its IRS Forms 941, Employer's Quarterly Federal Tax Return, for the second, third, and fourth quarters of 2014 and the first, second, and third quarters of 2015. The Petitioner's Form 941 for the third quarter of 2014, the time of filing its Form I-129, indicated that it had eight employees and paid \$33,433.12 in wages, tips, and other compensation during that period. The Petitioner also submits copies of its IRS Forms W-2, Wage and Tax Statement, for 2014, indicating that it had 15 employees, including the Beneficiary, during that year.

Finally, the Petitioner submits an organizational chart for each month between April 2014 and September 2015. The organizational chart for August 2014, the time of filing its Form I-129, shows the Beneficiary at the top tier of the hierarchy as President, directly supervising an "Administration Manager," [REDACTED] and a "Kitchen Manager," [REDACTED]. The "Administration Manager" position supervises a "Maintenance Assistant," [REDACTED] and the "Kitchen Manager" position supervises two "Cooks," [REDACTED] and [REDACTED] who in turn supervise two "Dishwashers," [REDACTED] and [REDACTED].

B. 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 capacity in the United States. Again, as the Petitioner does not claim that the Beneficiary will be employed in a managerial capacity, we will restrict our analysis to whether the Beneficiary will be employed in an executive capacity.

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.*

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

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.

In the instant matter, the Petitioner characterized the Beneficiary's role as President and briefly described his duties in very broad terms, noting that he will direct, manage, supervise, control and coordinate all aspects of business sales, high-quality inventory, live entertainment, profitability and customer service. 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 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 Director’s RFE, the Petitioner submitted a similarly vague description of the Beneficiary’s position, noting that he will devote 100% of his time to the executive duties of Director of Sales and Marketing. The Petitioner also stated that the Beneficiary will have full authority over day-to-day operations and full authority to hire and fire any employee. The Petitioner again specifically stated that the Beneficiary’s position will be executive in nature and that he will primarily direct a major component or function of the organization, rather than manage supervisors, managers, or other employees. This description of the Beneficiary’s duties does not provide any information about what he will actually do on a day-to-day basis. A blanket assertion that he will devote all of his time to executive duties and will primarily direct the organization is not sufficient to demonstrate that he will be employed in an executive capacity. The Petitioner did not include any additional details or clarify what duties the Beneficiary will actually perform that would qualify as executive. 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).

On appeal and in response to our RFE, the Petitioner again asserts that the Beneficiary will be employed in an executive capacity, but does not provide any additional information about the actual tasks he will perform. The Petitioner simply reiterates the statute and states that the Beneficiary will

direct a major component or function of the organization, establish goals and policies, exercise wide latitude in discretionary decision-making, and receive only general supervision. This is not sufficient to establish that the Beneficiary will act in an executive capacity. The Petitioner has not painted a clear picture as to how the Beneficiary will spend his time and what his daily tasks will actually be to demonstrate that he will perform qualifying duties that are executive in nature. Conclusory assertions regarding the Beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the Petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Additionally, although the Petitioner makes a blanket assertion that the Beneficiary will devote 100% of his time to directing the business, it did provide some tasks that the Beneficiary has been and will be responsible for, such as directing and overseeing orders with suppliers, tracking of inventory, quality of deliveries, and the selection and creation of menu items, along with meeting sales representatives to order supplies including tableware, cooking utensils, and cleaning items. However, the Petitioner did not quantify the amount of time the Beneficiary would spend on each listed task. This lack of documentation is important because the listed tasks do not fall directly under traditional executive duties as defined in the statute. In fact, the majority of the listed tasks, included but not limited to overseeing orders with food suppliers, overseeing delivery of fresh food and beverages, tracking of inventory, meeting with sales representatives to order supplies, and overseeing the preparation and methods of all foodstuff, are directly associated with producing a product or performing a service of the business. For this reason, the Petitioner has not established that the Beneficiary would primarily perform duties in either a managerial or executive capacity. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The Petitioner has not provided a consistent picture of the Beneficiary's role within the business and at the restaurant. Here, the Petitioner appears to have altered its organizational chart in response to the RFE in order to demonstrate that the Beneficiary has subordinate employees to carry out the routine non-qualifying duties associated with running the restaurant. Even if the Beneficiary is an executive, the Petitioner would still be required to demonstrate that he directs the management of the organization, rather than performing the administrative or operational duties associated with carrying out the day-to-day tasks associated with the restaurant. It appears that the Petitioner has altered the Beneficiary's position and those of the named employees in the organizational chart in order to make the Beneficiary eligible for the benefit sought. Although he is not required to supervise subordinate managers, the Petitioner has altered the names of the positions and their placement in its organizational hierarchy in an attempt to demonstrate that the Beneficiary has subordinate employees who will relieve him from performing non-qualifying operational and administrative duties at the U.S. company. This inconsistent evidence raises doubts as to the validity of the Petitioner's organizational structure and the Beneficiary's executive position within the organization or restaurant. 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*

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Izummi, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, although the Petitioner ultimately asserts that the Beneficiary will be employed in an executive capacity, it has not provided sufficient information detailing the Beneficiary's duties for the restaurant to demonstrate that these duties will qualify him as an executive. The Petitioner also did not indicate the percentage of time the Beneficiary will devote to each duty. Based on the current record, we are unable to determine whether the few claimed executive duties would constitute the majority of the Beneficiary's time. The Petitioner's description of the Beneficiary's job duties does not establish what proportion of the Beneficiary's duties will be executive in nature, and what proportion will be non-executive. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

Here, the Petitioner provided three different organizational charts, each including different job titles for the same employees at different tiers within the hierarchy. The first organizational chart, submitted at the time of filing the petition, shows a single position with a manager title directly subordinate to the Beneficiary. The second organizational chart, submitted in response to the Director's RFE, shows a new position title for the manager position referenced in the first chart and adds a second manager position directly subordinate to the Beneficiary. The second chart also adds three additional manager positions, two of which list the same employees previously listed in non-manager positions. The third organizational chart, submitted in response to our RFE and referencing the time period of the filing of the petition, shows two different manager positions directly subordinate to the Beneficiary, one is a new position title for the manager referenced in the first and second charts and the other is an individual previously listed at the lowest-level employee on the first chart. The Petitioner submitted inconsistent information pertaining to its current staffing and organizational structure and it is impossible for us to determine the organizational structure at the time of filing. It appears that the Petitioner is attempting to make the Beneficiary eligible for the benefit sought. As such, the Petitioner has not submitted evidence that the Beneficiary has subordinate employees who will relieve him from performing non-qualifying operational and administrative duties at the restaurant. Again, 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. at 249. 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. at 176.

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

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary will be employed in an executive capacity in the United States.

III. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of D-C- Corporation*, ID# 14026 (AAO July 18, 2016)