



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

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

MATTER OF M-M-G- LLC

DATE: JUNE 29, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a marketing firm, seeks to extend the Beneficiary's temporary employment as its general manager under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in an executive or managerial capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish that: (1) the Beneficiary has been or will be employed in either a managerial or executive capacity in the United States; (2) it has been doing business in the United States during the required period; and (3) it has acquired sufficient physical premises to conduct operations.

The matter is now before us on appeal. In its appeal, the Petitioner submits a brief and additional evidence and asserts that the Director erred because the Beneficiary will be employed in a primarily managerial capacity, as she will devote more than 50% of her time to managerial or executive duties.

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

I. LEGAL FRAMEWORK

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

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

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

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

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

II. U.S. EMPLOYMENT IN A MANAGERIAL OR 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 managerial or executive capacity. On appeal, the Petitioner specifically asserts that the Beneficiary will be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in a managerial capacity.

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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.

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. Section 101(a)(44)(C) of the Act.

A. Evidence of Record

The Petitioner filed the Form I-129 on February 10, 2015.¹ On the Form I-129, the Petitioner indicated that it operates a marketing firm with two current employees and a gross annual income of \$88,255.69. In its letter of support, dated January 26, 2015, the Petitioner described the Beneficiary’s proposed position in the United States, stating that as the general manager, the Beneficiary will continue to be responsible for directing the policies and managing the business operations, for making the [REDACTED] branch office profitable by efficiently carrying out the daily administrative activities with the support of an accountant/bookkeeper and other support staff and by obtaining new leads for the foreign entity. The Petitioner stated that she will also be responsible for the growth of its portfolio in the marketing consulting industry and establish policies and procedures to be followed in the upcoming years to facilitate its company’s growth. The Petitioner then listed her duties as follows:

¹ The Beneficiary was previously granted one year of L-1A status in order to open a new office of the Petitioner in the United States from March 19, 2014, to March 18, 2015.

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- **Administrative (10%):**
 - i. Develop and manage annual budget
 - ii. Supervise Accounting Executive processing of accounts receivable and payable
 - iii. Supervise Accounting Executive on monthly activity, year-end reports, and tax related requirements
 - iv. Supervise Accounting Executive on keeping in budget
 - v. Lead the branch towards profitability

- **Create new leads (30%)**
 - i. Create and implement communications campaigns aimed at trade channels in the U.S. and the Caribbean
 - ii. Cultivate existing and new relationships in those markets
 - iii. Represent [the foreign entity] in wood and/or furniture fairs and networking events in those markets
 - iv. Grow the foreign company's U.S. portfolio through effective marketing and promotional activities

- **Marketing Consultations (60%):**
 - i. Obtain new clients by marketing and promoting the branch's marketing consultancy services
 - ii. For clients, act as their marketing manager, working on behalf of the client to reach clients' goals. Activities include:
 - Monitoring market trends in different media outlets through access to data (varies according to media), and by studying the competition
 - Branding services – includes logo creation, color scheme, branding, creation of positioning message, overall look and feel of the brand
 - Promotional activities – producing collateral material with advertising agencies and vendors, coordinating communications and activities with PR agencies
 - Product advising – defining the product through market research, design and implementation of packaging in coordination with ad agencies and vendors
 - Serve as advisor for decisions regarding pricing and distribution

In the same letter, the Petitioner described its personnel and staffing plans, stating that it currently employs two individuals with the qualifications required to grow and expand the company and that during the first year of operations it has employed American independent contractors to fulfill most administrative tasks. The Petitioner stated that it uses [REDACTED] to handle payroll and payroll-related duties and also hired [REDACTED] from [REDACTED] for a specific project related to one of its contracts, given his experience in the consulting field. The Petitioner stated that it expects to grow its number of employees as well as its client base for both itself and the foreign entity in 2015.

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The Petitioner submitted its organizational chart depicting the Beneficiary as the General Manager, reporting directly to the foreign entity. As the General Manager, the Beneficiary supervises the “Principal for Business Development & Marketing Services, Administrative Assistant,” [REDACTED] Payroll, performed by [REDACTED] and “independent contractors.”

The Director issued a request for evidence (RFE), instructing the Petitioner to submit an in-depth description of the Beneficiary’s duties and the names of the U.S. professional/supervisory personnel who are managed by the Beneficiary, their position descriptions and the educational requirements for their positions, and copies of their educational credentials.

In response to the RFE, the Petitioner submitted a letter, dated August 5, 2015, describing its operations and stating that the business plan states that the beneficiary will have marketing assistants and initially one assistant will be sufficient to handle the day-to-day operations, and relieve the beneficiary of these duties. As such, [REDACTED] has been hired on a full-time basis as the Principal for Business Development & Marketing Services, Administrative Assistant. Additionally, other day-to-day operations, such as bookkeeping, tax filings, payroll, and accounting will be handled by individuals retained on a contract basis. The Petitioner stated that it is not uncommon for emerging businesses to contract their tax filings, bookkeeping, and other similar duties to accountants and other similar professionals.

The Petitioner submitted a letter from the foreign entity, dated July 31, 2015, describing the Beneficiary’s proposed position in the United States almost identically to the description provided by the Petitioner in its initial letter of support. However, the foreign entity added several duties to the “administrative” and “marketing consultations” headings and changed the percentages of time the Beneficiary will devote to the clusters of duties, such as 10% to “administrative,” 15% to “create new leads,” and 75% to “marketing consultations.”

The Director denied the petition on October 19, 2015, concluding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity in the United States. In denying the petition, the Director found that the Beneficiary’s duties indicated that she will be doing most of the day-to-day tasks. The Director found that the record did not contain adequate documentary evidence to demonstrate that the Beneficiary would be relieved from performing non-managerial duties or that she would be managing any professional or supervisory employees. The Director found that, with only one subordinate employee, the Beneficiary would be performing most of the day-to-day tasks.

On appeal, the Petitioner submits a brief and states that the Beneficiary will be employed in a primarily managerial capacity by virtue of her supervision of a subordinate professional employee. The Petitioner further states that, if we find that the Beneficiary’s subordinate is not a professional employee, then the Beneficiary would also qualify as a function manager.

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In its appeal brief, the Petitioner describes the position and job duties of the Beneficiary's subordinate, [REDACTED] and states that it created his to relieve the general manager position from the daily administrative tasks as well as to further expand the services it could offer its clients. The Petitioner further states that [REDACTED] has a financial background and expertise in business development and strategic marketing, and experience with managing an office in its daily administrative activities. The Petitioner then goes on to list job duties for [REDACTED] position, and specifically states that he will devote 30% of his time to administrative duties and 70% of his time to account management.

On appeal, the Petitioner also provides a new description of the Beneficiary's duties, significantly changing the two previous descriptions provided with the petition and in response to the RFE. This new list of duties states that the Beneficiary will devote 60% of her time to tasks associated with being a general manager, 20% of her time to creating new leads for the foreign entity's wood offerings, and 20% of her time to marketing consultations. The new description of the Beneficiary's duties shows that the tasks associated with being a general manager are: reports to managing director of the foreign entity; supervise administrative assistant; supervise development and management of budget; supervise company's accounting based on reports from accountant and administrative assistant; lead the branch towards profitability; hire and supervise new employees; and create company internal policies and processes. The tasks associated with creating new leads for the foreign entity's wood offerings are: create and implement communications campaigns aimed at trade channels in the U.S. and the Caribbean and cultivate existing and new relationships in those markets; represent the foreign entity in wood and/or furniture fairs and networking events in those markets; and grow the foreign company's U.S. portfolio through effective marketing and promotional activities. The tasks associated with creating new leads for marketing consultations are: obtain new clients by marketing and promoting the branch's strategic marketing consultancy services as well as through attending networking events and conferences; grow and supervise the strategic marketing and business development teams and their work with client accounts; and maintain communications with the top, high priority client accounts.

In support of the appeal, the Petitioner submits a copy of its offer of employment letter to [REDACTED]. The letter indicates that he will be employed as the "Principal for Business Development & Marketing Services, Administrative Assistant," beginning on September 1, 2014. The letter does not provide a description of [REDACTED] position or job duties; it simply states that he will report directly to the General Manager. The Petitioner also submits a copy of [REDACTED] resume and a copy of his master of business administration degree from the [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 a managerial capacity in the United States.

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

In the instant matter, the Petitioner initially characterized the Beneficiary's role as general manager and provided a broad description of her proposed duties, stating that she will devote 60% of her time to marketing consultations and the remainder of her time to administrative tasks (10%) and creating new leads for the company (30%). Although the Petitioner included percentages of time the Beneficiary will devote to clusters of duties, and listed brief tasks associated with those duties, it did not indicate how such duties qualify as managerial in nature. For instance, the Petitioner specifically stated that the Beneficiary will supervise an accounting executive, but it did not provide any evidence that it has hired such a position, nor is that position listed in its organizational chart. The Petitioner also specifically stated that the Beneficiary will represent the foreign entity in wood and furniture fairs and networking events and grow the foreign entity's U.S. portfolio through effective marketing and promotional activities, but has not established how those particular tasks are managerial in nature. Finally, the Petitioner stated that the Beneficiary will obtain new clients and act as the clients' marketing manager working on their behalf, but did not indicate how these particular duties are managerial in nature, rather than the actual work required to produce a product or provide a service of the Petitioner. The Petitioner also included some vague and undefined tasks, such as branding services, promotional activities, and product advising, for the Petitioner's clients which do not establish that the Beneficiary will be employed in a managerial capacity. Here, it appears that the tasks listed for the clusters of duties further indicate that the Beneficiary will be providing the services of the organization, rather than managing the organization.

In response to the RFE, the Petitioner modified the percentages of time the Beneficiary will devote to clusters of duties and added some additional duties to the list, changing the percentage of time to 75% devoted to marketing consultations and the remainder of her time to administrative tasks (10%) and creating new leads for the foreign entity's wood offerings (15%). For the reasons discussed above, the Petitioner has not demonstrated that the Beneficiary will perform in a managerial capacity.

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, 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 its associated job responsibilities. The Petitioner must establish that the position offered to the Beneficiary, when the petition was filed, merits

classification as a qualifying managerial or executive position. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the Petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the Petitioner in its response to the Director's RFE did not clarify or provide more specificity to the original duties of the position, but rather modified the quantity of listed duties and added new generic duties to the job description.

Further, on appeal, the Petitioner again modified the percentages of time the Beneficiary will devote to clusters of duties and significantly changed her role at the U.S. company by changing the duties she will perform, now noting that she will devote 60% of her time to duties related to being the General Manager, such as supervising an Administrative Assistant, the development and management of the budget, accounting, hiring and supervising new employees, and creating internal policies and processes; 20% of her time to creating new leads for the foreign entity's wood offerings, and 20% of her time to creating new leads for marketing consultations, such as obtaining new clients, growing and supervising the strategic marketing and business development teams, and maintaining communications with the top, high priority client accounts. The Petitioner has again modified the Beneficiary's duties to make them appear more managerial. The change in the percentage of time the Beneficiary will devote to marketing consultations is significant because the Petitioner is attempting to change the Beneficiary's position from primarily providing the services of the business to primarily performing the duties of a general manager. Further, the new description of the Beneficiary's duties states that she will be supervising an administrative assistant, rather than an account executive. This is also significant because the Petitioner has not hired an account executive, nor is that position listed on its organizational chart. We note that the Petitioner hired a position titled "Principal for Business Development and Marketing Services, Administrative Assistant," which is more aligned with the duties listed on appeal. Rather than providing clarification on the account executive position, the Petitioner changed the position supervised altogether.

The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). The Petitioner made material changes to the Beneficiary's proposed job duties on appeal. The Petitioner specifically stated that it created the subordinate position to relieve the Beneficiary from performing non-qualifying administrative tasks and dramatically alters the Beneficiary's list of job duties on appeal to remove all administrative tasks from her purview. The Petitioner also removes all of the actual marketing consulting tasks from the Beneficiary's job duties and places them in the subordinate's list of job duties. The Petitioner did not provide any clarification or explanation about these changes and simply stated that the Beneficiary is relieved from performing those tasks by her subordinate employee. Given these inconsistencies, the Petitioner has not demonstrated that the Beneficiary will be relieved from performing non-qualifying administrative and operational tasks at the U.S. company. The Beneficiary's initial list of job duties had her primarily providing the marketing consulting services of the company. Then, on appeal, the Petitioner completely altered her listed job duties and listed the non-qualifying administrative and operational duties for the

subordinate's position. Again, a petitioner cannot offer a new position to a beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities on appeal. We note that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

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 company'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 business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See sections 101(a)(44)(A)(i) and (ii) of the Act. 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)(4). 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 the Petitioner claims that the Beneficiary's duties involve supervising employees, then the petitioner must establish that the subordinate employees are supervisory, professional, or managerial.² See section 101(a)(44)(A)(ii) of the Act.

The record reflects that the Petitioner employs one other individual subordinate to the Beneficiary, the "Principal for Business Development & Marketing Services, Administrative Assistant." On appeal, the Petitioner states that the subordinate employee has a master's degree in business administration and performs marketing functions which are associated with professional positions.³ The Petitioner provides a brief description of the subordinate's position and states that he will devote 30% of his time to administrative duties and 70% of his time to account management, such as

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

³ The possession of a master's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined below.

execute and analyze market research and data, develop business models and plans, execute profit optimization techniques, perform marketing activities for wood products and marketing consulting services, and perform the activities associated with managing client accounts. However, the Petitioner has provided inconsistent evidence in the record. On appeal, the Petitioner specifically states that it created this subordinate position in order to relieve the Beneficiary from performing daily administrative tasks and to expand its services. This statement raises concerns as to the validity of the subordinate's listed duties and the actual duties he will perform at the U.S. company because, given the listed duties for his position, it appears that he will primarily focus on the marketing consulting portion of the business. Additionally, the Petitioner initially listed the same marketing consulting job duties for the Beneficiary's position, which further raises concerns about the subordinate position itself and whether the listed duties will actually be performed by the subordinate employee or whether he will perform administrative tasks. Doubt cast on any aspect of [a] petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Id.* at 591-92.

The Petitioner specifically stated that it created the subordinate position to relieve the Beneficiary from performing non-qualifying administrative tasks and dramatically alters the Beneficiary's list of job duties on appeal to remove all administrative tasks from her purview. The Petitioner also removes all of the actual marketing consulting tasks from the Beneficiary's job duties and places them in the subordinate's list of job duties. The Petitioner did not provide any clarification or explanation about these changes and simply stated that the Beneficiary is relieved from performing those tasks by her subordinate employee. Given these inconsistencies, the Petitioner has not demonstrated that the Beneficiary will be relieved from performing non-qualifying administrative and operational tasks at the U.S. company. The Beneficiary's initial list of job duties had her primarily providing the marketing consulting services of the company. Then, on appeal, the Petitioner completely altered her listed job duties and listed the non-qualifying administrative and operational duties for the subordinate's position. Again, a petitioner cannot offer a new position to a beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities on appeal.

The Petitioner also continuously referred to independent contractors and its organizational chart shows that the Beneficiary directly supervises "independent contractors."⁴ However, the Petitioner

⁴ The Petitioner refers to an unpublished decision in which we determined that the Beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. The petitioner claims that the instant case is analogous to that case because the instant Beneficiary, like the Beneficiary in that case, directed independent contractors in the performance of various functions for the Petitioner, such as the outside contractors for payroll, accounting services, and other administrative day-to-day tasks. However, although there may be similarities, the Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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only references [REDACTED] and [REDACTED] that it hired for a specific project. The Petitioner did not provide any information pertaining to its contract with [REDACTED] the date of the contract, the terms of the contract, the number of contracted workers, the work to be performed, or who managed the contractors performing the work.

Contrary to its assertion on appeal, the Petitioner has not established, in the alternative, that the Beneficiary is employed primarily as a “function manager.” The term “function manager” applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an “essential function” within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term “essential function” is not defined by statute or regulation. If a petitioner claims that the beneficiary will manage an essential function, a petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary’s daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, a petitioner’s description of a beneficiary’s daily duties must demonstrate that the beneficiary will manage the function rather than perform the duties related to the function.

Here, although on appeal the Petitioner states that the Beneficiary also qualifies as a function manager, it does not articulate what the Beneficiary’s proposed duties at the U.S. company are as a function manager and does not provide a breakdown indicating the amount of time the Beneficiary will devote to duties that would clearly demonstrate that she will manage an essential function of the U.S. company. The Petitioner may contend that the Beneficiary manages the marketing function of the U.S. company, but the list of duties provided for the Beneficiary’s position initially showed that she performs the duties associated with the function and later are modified in an attempt to show that she primarily performs as a general manager. Absent a detailed description of the Beneficiary’s actual managerial duties, and evidence to show that her subordinate will relieve her from performing non-qualifying operational and administrative duties, the record does not establish that the Beneficiary will be employed in a qualifying managerial capacity in the United States.

We note that a company’s size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa petition for classification as a multinational manager or executive. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company, or a “shell company” that does not conduct business in a regular and continuous manner. *See, e.g., Family Inc.*, 469 F.3d 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15.

The Petitioner cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989) to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding

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that a beneficiary will act in a primarily managerial or executive capacity. First, we note that the Petitioner has not furnished evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*

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

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial capacity in the United States under the extended petition.

III. U.S. COMPANY DOING BUSINESS AND PHYSICAL PREMISES

The Director denied the petition based on a finding that the Petitioner did not establish that it is a qualifying organization doing business in the United States. Specifically, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines that term as:

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

The Director also denied the petition based on a finding that the Petitioner did not provide evidence of sufficient physical premises to conduct operations.

A. Evidence of Record

On the Form I-129, where asked to list the address where the Beneficiary will work, the Petitioner listed [REDACTED] Florida [REDACTED]. The Petitioner submitted a Commercial Lease Agreement with Fixed Term, dated May 1, 2014. The agreement leases the Petitioner one office space, located at [REDACTED] Florida [REDACTED]. The leased premises are specifically described as one suite, designated as office space, with the dimensions of 15’ long and 15’ wide.

The Petitioner submitted its registration of a fictitious name, [REDACTED] with the Florida Department of State, Division of Corporations, on October 31, 2014, listing the Petitioner’s mailing address as [REDACTED] Florida [REDACTED]. On the same registration, the Petitioner listed its own address as [REDACTED] Florida [REDACTED] as the owner of the fictitious name.

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The Petitioner submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, for the third quarter of 2014, listing the Petitioner's address as [REDACTED] Florida [REDACTED]

The Petitioner submitted its bank statements from July 2014 to December 2014, ranging in balance from \$22,520.99 in July, \$17,872.27 in August, \$17,818.20 in September, \$16,378.02 in October, \$29,836.21 in November, and \$5,577.96 in December. The Petitioner's bank statement for July 2014 listed its mailing address as [REDACTED] Florida [REDACTED] and its bank statements for August 2014 to December 2014 listed its mailing address as [REDACTED] Florida [REDACTED]

The Petitioner submitted several invoices as [REDACTED] which are not dated⁵ and list its address in [REDACTED] Florida. The Petitioner also submitted two invoices as [REDACTED] listing its address in [REDACTED] Florida. The Petitioner submitted a Proposal for [REDACTED] dated August 14, 2014, on [REDACTED] letterhead, but signed as [REDACTED]. The proposal is only signed by the Petitioner and dated September 3, 2014. The Petitioner submitted a Marketing Proposal to [REDACTED] dated October 10, 2014, as [REDACTED]. The proposal is not signed by either party. The Petitioner submitted a Letter of Intent and Proposal on financial process analysis project to [REDACTED] dated November 3, 2014, as [REDACTED]. The letter is not signed by either party. The Petitioner submitted a letter from [REDACTED] to the Petitioner, dated December 10, 2013, for services in account management by the Petitioner, to commence on January 1, 2014. The letter is not signed by either party.

The Petitioner submitted copies of photographs it claimed to be its leased office space. The photos consist of what appears to be a conference table with two laptops side by side and one individual sitting at each. There is also a photo of a single desk located in a different room outside of the conference table room with magazines and laptop.

In the RFE, the Director noted inconsistencies in the U.S. company's address and the appearance of comingling between the U.S. company, the [REDACTED] and [REDACTED]. The Director also noted that the evidence did not contain any indication that the Petitioner had attempted to market the foreign entity's products. The Director further noted that the petition lists [REDACTED] Florida as the site where the Beneficiary works, but Google Maps shows that this is a warehouse, and the photographs of the office space show empty desks and an area devoid of paperwork or other business materials. The Director instructed the Petitioner to clarify the inconsistencies and provide evidence that the U.S. company is doing business in the United States and that it has secure sufficient physical premises to house its office.

In response to the RFE, the Petitioner submitted a letter stating that it listed the incorrect address on the Form I-129. The Petitioner states that the [REDACTED] Florida address was a

⁵ While all of the invoices are undated, invoices 00001 to 00012 list fees for services provided to [REDACTED] from January 1, 2014 to June 30, 2014.

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temporary location while the U.S. company commenced its operations. The Petitioner stated that its correct address is [REDACTED] Florida, which is office space rented from [REDACTED] a current client of the Petitioner, and has been its central location for business operations as of May 1, 2014. The Petitioner stated that the fictitious name registration was done while it was operating out of the office located in [REDACTED] Florida and transitioning to the new location in [REDACTED] Florida. The Petitioner stated that, due to this transition, it listed its employee's home address as the mailing address on the fictitious name registration to avoid a potential loss of mail.

The Petitioner submitted additional invoices as [REDACTED] which are not dated and no longer list an address. The Petitioner also submitted one invoice as [REDACTED] listing its address in [REDACTED] Florida. The Petitioner submitted an addendum to a project with [REDACTED] dated April 7, 2015, and signed by both parties. The Petitioner submitted an addendum to another project with [REDACTED] dated June 24, 2015, and signed by both parties. The Petitioner submitted an Agreement for Services with [REDACTED] dated June 19, 2015, and signed by both parties. The Petitioner submitted a Proposal to [REDACTED] dated March 2, 2015, which is not signed by either party. The Petitioner submitted a Proposal to [REDACTED] dated June 12, 2015, which is only signed by the Beneficiary on behalf of the Petitioner. The Petitioner submitted a Proposal to [REDACTED] dated July 14, 2015, which is signed by both parties.

The Petitioner submitted its bank statements from January 2015 to June 2015, ranging in balance from \$13,053.09 in January, \$7,251.37 in February, \$6,564.93 in March, \$5,034.36 in April, \$10,301.92 in May, and \$10,257.42 in June, and listing the Petitioner's mailing address as [REDACTED] Florida [REDACTED]

The Petitioner submitted its 2014 IRS Form 1120, U.S. Corporation Income Tax Return, indicating that the Petitioner earned \$59,493 in gross receipts or sales during that period, but had a final taxable income of -\$11,770, and listing the Petitioner's address as [REDACTED] Florida [REDACTED]. The Petitioner's 2014 IRS Form W-3, Transmittal of Wage and Tax Statements, and IRS Forms 941 for the fourth quarter of 2014 and the first and second quarters of 2015, also list its address as [REDACTED] Florida [REDACTED].

The Petitioner submitted copies of new photographs it claimed to be its leased office space. The photos consist of what appears to be a conference table with two laptops side by side, paperwork strewn about, including envelopes with the foreign entity's name and logo on the front, and one individual sitting at each. There is also a photo of a single desk located in a different room outside of the conference table room with a laptop and a third individual sitting at it.

In denying the petition, the Director found that the Petitioner did not establish that the U.S. company is doing business and did not provide evidence of sufficient premises for its operations. The Director noted all of the undated invoices and found that most of the evidence presented was prospective. The Director also noted that the leased office space was 15' wide and 15' long and found that this space was not sufficient to house additional employees.

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On appeal, the Petitioner states that the Director did not take into account that the U.S. company did not operate for a full 12-month period and that the Beneficiary had entered the United States to open a new office, which takes time. The Petitioner also states that the size of its office space meets the Petitioner's current needs and the Director did not take into account the nature of the Petitioner's business. The Petitioner noted that the lease allows the Petitioner full use of a reception area and other common areas and stated that it provides marketing consulting services and proposals and campaign ideas are generated at the Petitioner's office and implemented by clients at their places of business. Thus, the Petitioner has sufficient physical premises to house its continued business.

The Petitioner submits a Letter of Intent and Proposal to [REDACTED] dated October 3, 2015, which is not signed by either party.

The Petitioner submits an addendum to a project with [REDACTED] dated September 15, 2015 and signed by both parties. The Petitioner submits a Proposal to [REDACTED] dated November 2, 2015, which is not signed by either party. The Petitioner submits invoices ranging in dates from February 20, 2015 to November 3, 2015. The Petitioner also submits bank statements from August, September, and October of 2015. All of the invoices and bank statements list the Petitioner address as [REDACTED] Florida [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: (1) the U.S. company continued doing business in the United States for the year preceding the filing of the petition; and (2) it has acquired sufficient physical premises to conduct its business.

As a preliminary matter, we note that the Petitioner is not a new office and therefore not subject to the physical premises requirement at 8 C.F.R. § 214.2(l)(3)(v)(A). The evidence of record indicates that the petitioning U.S. company was established as a limited liability company in Florida on December 9, 2013. Pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(F), "new office" means an organization which has been doing business in the United States through a parent, branch, affiliate or subsidiary for less than one year. However, we observe that the "physical premises" requirement that applies to new offices serves as a safeguard to ensure that a newly established business immediately commence doing business so that it will support a managerial or executive position within one year. *See* 52 FR 5738, 5740 (February 26, 1987). After one year, USCIS "will determine, in [its] discretion, whether the new office is 'doing business' when an extension of the petition is adjudicated." *Id.*; *see also* 8 C.F.R. § 214.2(l)(14)(ii). A petitioner is not absolved of the requirement to maintain "sufficient physical premises" simply because it has been in existence for more than one year. In order to be considered a qualifying organization, a petitioner must be doing business in a regular, systematic and continuous manner. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (H). Inherent to that requirement, the petitioner must possess sufficient physical premises to conduct business. Here, the lack of sufficient

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business premises and the conflicting evidence of record does not establish that the Petitioner has been and will be doing business in a manner that will support the Beneficiary's claimed position.⁶

At the time of filing, the Petitioner claimed to be doing business in [REDACTED] Florida. However, the Commercial Lease Agreement was dated May 1, 2014, nine months prior to the filing of the petition, for office space in [REDACTED] Florida. The Petitioner's fictitious name registration, dated October 2014, also lists the Petitioner's address in [REDACTED] Florida. Additionally, the first set of invoices submitted by the Petitioner, doing business as [REDACTED] presumably from 2014, list its address in [REDACTED] Florida and the invoices submitted, doing business as [REDACTED] list its address in [REDACTED] Florida. The Petitioner did not provide an explanation for this inconsistency, and in response to the RFE, simply stated that it used the [REDACTED] Florida address to register its fictitious name as a temporary address while it transitioned to the [REDACTED] Florida office. The Petitioner did not explain why it was still transitioning to its [REDACTED] Florida office five months after executing the Commercial Lease Agreement or why its invoices doing business as [REDACTED] list a different address. The Petitioner also did not provide evidence that it had ever leased the claimed temporary office space in [REDACTED] Florida. 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) (quoting *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The Petitioner's documentation also contained a third address at [REDACTED] in [REDACTED] Florida. The Petitioner's tax documents and bank statements all list the address in [REDACTED] Florida as its mailing address. Several of the Petitioner's invoices submitted on appeal, doing business as [REDACTED] also list the [REDACTED] Florida address for the Petitioner. The Petitioner did not clarify the origin of this address or explain why this address appears in its documentation approximately one year or more after executing the Commercial Lease Agreement for office space in [REDACTED] Florida. Further, the Petitioner did not explain why some of its invoices, doing business as [REDACTED] list the [REDACTED] Florida address and some list the [REDACTED] Florida address. The Petitioner has not indicated that has conducted business at this address at any time. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *See, Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, the photographs submitted showing its leased premises in [REDACTED] Florida are not indicative of an office space that can house new employees or allow the Petitioner to grow. However, at issue are the inconsistencies pertaining to the Petitioner's actual physical premises and where it conducts its business. Not only is there a question about its physical premises at the time of filing, there is also the issue of its physical premises during the period it was supposed to be doing business in the U.S. as a new office. The Petitioner has provided inconsistent evidence pertaining to its actual business location throughout the record, and as such, we cannot determine that the Petitioner has acquired sufficient physical premises to house its business operations.

⁶ The Director erroneously referred to the petitioning U.S. company as a "new office." The Director's decision simply states that the leased premises, being 15' wide and 15' long, are not sufficient to house additional employees at the U.S. company.

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On appeal, the Petitioner addresses the Director's findings and states that the leased office space includes the use of additional common areas and is sufficient to carry out its business. However, the Petitioner also submits additional invoices and bank statements listing the third [REDACTED] Florida address for the Petitioner without any explanation or clarification on the use of that address. Again, the Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *See, Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The Petitioner also has not submitted sufficient evidence in support of the U.S. company's business operations during the year preceding the filing of the petition, February 2014 to February 2015. First, the Petitioner submitted bank statements starting in July 2014 to December 2014, all with ending balances less than \$30,000.00. All but one of the deposits made to the Petitioner's account during that period are not identified and simply titled "deposit." The Petitioner did not discuss the origin of the deposited funds or demonstrate that the funds were earned by the U.S. company for the provision of goods or services. There is a single deposit on November 14, 2014 titled "funds transfer - wire from [REDACTED] in the amount of \$17,980.00. The invoices submitted at the time of filing were not dated, but the first 12 invoices list fees for services to [REDACTED] from January 1, 2014 to June 30, 2014, and the Petitioner provided a letter from [REDACTED] seeking to hire the Petitioner for accounting services beginning on January 1, 2014. However, the letter from [REDACTED] is not signed by either party and the Petitioner did not submit evidence that the invoices were paid at any time. The Petitioner also submitted additional proposals it presented to other companies, all of which are not signed and appear not to be executed by the parties.

In response to the RFE and on appeal, the Petitioner submitted bank statements and proposals, some of which were signed, but all of which were dated after the filing date of February 2015. The additional invoices submitted in response to the RFE still did not include a date of invoice or a date of service in the description, and although the invoices submitted on appeal did include a date of invoice, they were all dated after February 2015. Thus, these documents establish operations after the required period. The Petitioner's 2014 IRS Form 1120 showing \$59,493 in gross receipts or sales earnings and -\$11,770 in final taxable income is not sufficient to establish that the petitioning U.S. company was doing business on a regular, systematic, and continuous basis during the required period.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not demonstrated that the petitioning U.S. company has been doing business as defined by the regulations or that it has acquired sufficient physical premises to conduct its business operations.

IV. FOREIGN EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

Beyond the decision of the Director, the Petitioner has not established that the Beneficiary was employed by the foreign entity in a managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

A. Evidence of Record

In its letter of support, the Petitioner briefly described the Beneficiary's position at the foreign entity and stated that she has been employed as the foreign entity's Marketing Executive since August 10, 2011, where she oversees a marketing team and has been responsible for setting and implementing its marketing strategy. The Petitioner submitted an organizational chart for the foreign entity showing the Marketing Executive directly subordinate to the Managing Director. The Marketing Executive appears to supervise a General Coordinator Commerce and National Sales & Agencies Manager, in conjunction with the Managing Director. The Marketing Executive also appears to supervise the Sales & Marketing Assistant, in conjunction with the General Coordinator Commerce, and the Agencies Executive, in conjunction with the National Sales & Agencies Manager. The organizational chart does not list the names of individuals in the respective positions.

The Petitioner submitted a document titled, "Top Level Descriptions for [the Foreign Entity's] Organizational Hierarchy," describing the Beneficiary's position abroad, stating that the marketing executive is in charge of monitoring trends in consumer behavior, prices, and communication to create targeted campaigns to react to specific market changes; constantly and closely works with the General Coordinator for Commerce and National Sales Managers to coherently implement and execute all strategies as approved by the Management Team; monitors trade channels, vendors and end consumers; is responsible for monitoring the competition in domestic manufacturing and importers of finished wood products and substitutes; and creates and coordinates communications campaigns using different media, pricing strategies, collateral material, and promotional activities. The document also states that the Sales and Marketing Assistant reports directly to the Foreign Sales and Factory Manager, and the Agencies Executive reports directly to the National Sales and Agencies Manager. The document does not provide a position description or list of job duties for these positions.

In the RFE, the Director advised the Petitioner to submit the names of the foreign supervisory/professional employees who were managed by the Beneficiary, their position descriptions and the educational requirements for their positions, and copies of their educational credentials.

In response to the RFE, the Petitioner submitted a letter from the foreign entity, dated July 28, 2015, stating that the Beneficiary was employed at the foreign entity from August 10, 2011, to March 19, 2014, as its Marketing Executive. The letter further states that the foreign entity employed the Beneficiary "to advise the board on marketing related areas and to create and run the company's Marketing Department." The Petitioner submitted a second letter from the foreign entity, dated July 29, 2015, stating that the foreign entity is "in the process of assigning the marketing day-to-day operations to a Sales Assistant" and that the Beneficiary will still be participating in upper level marketing decisions through conference calls and travel while the Sales Assistant carries out the day-to-day marketing activities and coordination with departments and vendors.

Although not a ground for denying the petition, the Director briefly noted that, although the Petitioner did submit a list of foreign employees, it did not state the educational requirements for their

positions or provide copies of the educational credentials. The Director further noted that the Petitioner did not provide evidence that the Beneficiary was managing professional or supervisory employees.

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 foreign entity employed the Beneficiary in a managerial or executive capacity. In the instant matter, the Beneficiary's position title abroad was Marketing Executive, but the Petitioner did not specify whether she was employed in a managerial or executive capacity at the foreign entity.

The Petitioner characterized the Beneficiary's role at the foreign entity as Marketing Executive and provided a broad and vague list of job duties for her position abroad that does not establish that she has been primarily employed in a managerial or executive capacity. The Petitioner noted, in part, that the Beneficiary oversees the marketing team, has been responsible for setting and implementing the foreign company's marketing strategy, and is responsible for monitoring trends, but did not provide any information detailing what the marketing strategy is, what specific tasks are involved in setting and implementing that strategy, or how much of the Beneficiary's time is devoted to it. This is significant because, although the Petitioner states that the foreign entity has a marketing department and the Beneficiary oversees the marketing team, it appears that the Beneficiary herself carried out these non-qualifying marketing duties, and as such, was providing a service of the foreign entity. The Petitioner also stated that she worked closely with other managers to implement and execute all marketing and business development activities, but did not indicate how such duties qualify as managerial or executive, or provide additional details to demonstrate that the Beneficiary did not primarily perform a service of the foreign entity.

The Petitioner stated that the Beneficiary was hired at the foreign entity, in part, to create and run the company's marketing department. However, the foreign entity's organizational chart does not list a marketing department or even marketing subordinates for the Beneficiary to delegate non-qualifying operational marketing tasks to. The Sales & Marketing Assistant position is actually subordinate to the Foreign Sales & Factory Manager, not the Marketing Executive. This is significant because it appears that the Beneficiary carried out all of the marketing-related duties of the foreign entity, which are not managerial or executive in nature. Although requested in the RFE, the Petitioner did not provide any information related to the Beneficiary's subordinates abroad in order to establish that she was relieved from performing non-qualifying operational and administrative duties or that she managed professional, managerial, or supervisory employees. *See* section 101(a)(44)(A)(ii) of the Act.

The Petitioner also did not establish that the Beneficiary was primarily employed in an executive capacity abroad and did not demonstrate that her duties 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 foreign position sufficient to establish that the Beneficiary's daily routine consists of primarily executive duties, rather than on providing the services of the organization. Other than an unclear organizational chart, the Petitioner has not

submitted evidence that it has staff that relieves her from performing non-qualifying operational and administrative duties at the foreign entity. Although the Petitioner may not be required to demonstrate that the Beneficiary has subordinate employees who assist her, it is necessary to demonstrate that someone other than the Beneficiary carries out the day-to-day routine duties required to continue operations. Here, the Petitioner has not sufficiently demonstrated that the Beneficiary has subordinate employees that relieve her from performing non-qualifying duties at the foreign entity.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary has been employed by the foreign entity in a managerial or executive capacity.

V. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of M-M-G- LLC*, ID# 16835 (AAO June 29, 2016)