



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

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

MATTER OF G-USA, LLC.

DATE: MAY 17, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology consulting business, seeks to extend the Beneficiary's temporary employment as its Chief Executive Officer 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, California Service Center, denied the petition. The Director concluded that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity in the United States.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in that the Beneficiary will be employed in an executive capacity in the United States.

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:

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- (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 sole issue addressed by the Director is whether the Petitioner established that the Beneficiary will be employed in a 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.

#### A. Evidence of Record

The Petitioner filed the Form I-129 on June 29, 2015.<sup>1</sup> On the Form I-129, the Petitioner indicated that it has three current employees in the United States and a gross annual income of \$102,500.

On the L Classification Supplement to Form I-129, where asked to describe the Beneficiary’s proposed duties in the United States, the Petitioner simply stated “Please see the attached cover letter.” However, the record does not contain a letter of support from the Petitioner at the time of filing.<sup>2</sup>

The Petitioner submitted a document titled “June 2015 Review Report,” describing its current employment as follows:

[The Petitioner] currently have [*sic*] 5 positions: 2 sales representatives, 2 copywriters and 1 software consultant.

Sales representatives are W2 employees working on part-time of 20h/w[.]

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<sup>1</sup> 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 September 25, 2014 to August 31, 2015.

<sup>2</sup> In Counsel’s cover letter, dated June 25, 2015, Counsel for the Petitioner lists “the Petitioner’s supporting letter” as evidence submitted in support of the petition.

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Software consultant is a W2 employee working fulltime.

Copywriters are outsources [*sic*] as 1099s.

An additional contracted software consultant is being examined against [the Petitioner's] projects offer that currently [the Petitioner/foreign entity] cannot supply in-house.

Contractors needs [*sic*] to be vetted and approved by [the Petitioner].

The Petitioner submitted its 2014 IRS Form 1065, U.S. Return of Partnership Income,<sup>3</sup> indicating that it earned \$102,500.00 in gross receipts or sales and paid \$0 in salaries and wages. The Petitioner also submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2015, indicating that it had zero employees the first month, three employees the second month, and two employees the third month, and paid \$3,733.08 in wages, tips, and other compensation during that period.

The Petitioner submitted its organizational chart depicting the Beneficiary as "CEO/CTO" directly supervising a CPA, [redacted] a Sales Executive, [redacted] a Sales Associate, indicated as an open position; a Sales position, indicated as a "future" position; a [redacted] and an IT Consultant, indicated as a "near future" position. According to the chart, the [redacted] directly supervises an "SEO" position, indicated as a "near future" position, and two Technical Copywriters, [redacted] and [redacted]

The Petitioner provided a list of current employees and brief position descriptions as follows:

Sales Executives

[redacted] . . .

[redacted] works part time in [the Petitioner] as a sales Executive.

. . . .

[redacted] . . . former, open position (in interviews process)

[redacted] had work part time in [the Petitioner] as Sales Executive.

. . . .

IT Consultants

[redacted] . . .

[redacted] is a talented your [*sic*] professional who works on projects as a Software consultant.

. . . .

<sup>3</sup> We note that each page of the 2014 IRS Form 1065 is labeled as "DRAFT."

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Sub-Contractors

██████████ . . .  
██████████ is a very talented copywriter that has proven herself through an extensive practical interview process.

The Petitioner submitted an Independent Contractor Agreement, dated April 10, 2015, with ██████████ indicating that she will “write articles on a given subject in the field of Cyber Security,” to be completed no more than a week after the article request has been submitted. The agreement further indicates that she will receive compensation of \$20 per hour if requested at least four articles per month or \$25 per hour if requested fewer than four articles per month, and that each article should be completed within 2-4 hours.

The Petitioner submitted another Independent Contractor Agreement, dated June 22, 2015, with ██████████ indicating that he will also “write articles on a given subject in the field of Cyber Security,” to be completed no more than three days after the article request has been submitted. The agreement further indicates that he will receive a compensation of \$40 per article, at two articles per week, and that the number of articles may change with written notice and approval from both sides.

The Petitioner submitted a copy of an undated Business Plan describing its personnel plan as follows:

[The Beneficiary] will handle: daily management and operations, employees and sub-contractors with suitable skills for the position: sales and consultants.

[The Beneficiary] has an extensive experience in the IT Services business which will come in play when interviewing candidates for an IT consultant job, and he will have the final decision for hiring and firing employees.

First 12 month:

For cold calling 2-3 sales associates will be hired at 50-60% position as cold calling can be exhausting. Their salary will be basic wage + commotion based [*sic*][.]

1-2 IT networked-skilled employees will be hired as our IT consultants in the field of network security.

2 sub-contractors will be contracted for more IT services (Cloud computing, virtualization and more).

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

The Director issued a request for evidence (RFE), 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 explaining that the Beneficiary will be employed in an executive capacity in the United States as his primary job duties are “directing the management of the company and establishing its goals and policies.” The Petitioner went on to describe the Beneficiary’s job duties as follows:

As the CEO and CTO of the New Office the Beneficiary was responsible for the following of Executive decisions:

- 1) Set business strategies and goals to position the business in the right direction (15% of time)
  - Establish business goals and set strategies for the Company in the U.S.;
  - Make decisions on new business streams and ventures;
  - Approve business plans;
  - Collaborate on the research and development of new IT projects and policies for the North American market;

....
- 2) Define opportunities and make decisions for the business (25% of time)
  - Meeting with strategic partners, establishing business relationships and making investment decisions;
  - Negotiating contracts for business and approve contracts;
  - Travel to target businesses, and to banking and business professionals to obtain financial evaluations of income from target businesses;
  - Traveling for market expansion and new business relationships;

....
- 3) Lay down policies, ensuring their implementation (15% of time)
  - Collaborate with CPA and Lawyers to set up the business and obtain the necessary permits, licenses, and comply with LLC obligations laying down effective policies;
  - Establish goals and business and legal policies in coordination with legal professionals;
  - Establish and share company values with employees and customers in the West Coast market;
  - Ensure compliance with U.S. safety regulations, and business policies;

....
- 4) Analyzing, planning and developing U.S. operations by making executive level decisions (25% of time)
  - Analyze operations and financial status;

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- Make critical business decisions on accepting or rejecting business opportunities;
  - Evaluate and work on deal structuring reports, and market trends. Review reports prepared by team, approve or make changes to finalize;
  - Set up the U.S. Company Budget;
  - Direct and oversee financial and budgetary actions;
  - Review reports on budgets for the company and for its projects;
- 5) Direct the management of the company through the team of workers and independent contractors (20% of time)
- Set up, structure and supervise the management team in the United States;
  - Manage the team members;
  - Hiring independent contractors;
  - Set the working environment in the U.S. company.

The Petitioner submitted a document titled Company Statement, describing the Beneficiary's position in the United States and its personnel as follows:

[The Petitioner] had officially opened as a California based LLC on March 2014 but started official operations only on November 2014 with marketing operations implemented on mid-February 2015.

The last months of 2014 were spent to build processes, training, job offers and descriptions for [the Petitioner's] employees directed by [the Beneficiary].

The Company decided to launch the marketing campaign in February 2015, as the end of the year is usually not the ideal time to start marketing and doing business: companies usually do not acquire new solutions at the end of the year.

[The Petitioner] started the Hiring process on January 2015 which lead marketing efforts to officially be launched in February 2015.

....

[The Beneficiary] is currently working to expand the company's business by increasing partnership opportunities and engagements which currently has a potential for high success.

....

In 2015, the Company had grown in 5 new positions, 4 partnerships, and awareness and is projected to exceed sales in more than 90% and all this with only 6 months of marketing.

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The expected timeline to reach our expansion and growth goals for 2015 and 2016 is the following:

- Hire a sales manager/business developer by end of 2015.
- . . . .
- Hire another BSM consultant as full time employee by early 2016
- Hire a tech consultant for project as a subcontractor by early 2016

. . . .

CEO's Duties and Achievements

In May 2015, the CEO, [the Beneficiary] implemented a strategic change in the marketing vision of the company, transferring the focus from targeting individual customers to targeting business partners.

[L]earning from his experience, [the Beneficiary] had decided that, to be introduced to customers by someone they already trust would be a more effective strategy. . . .

The focus shifted to the partner program was built by [the Beneficiary] who introduced it to his contacts. A new bonus for sales associate was announced with an incentive on appointment setting with potential partners.

The Petitioner submitted an updated organizational chart, depicting the Beneficiary at the top tier of the hierarchy as its CEO/CTO, directly supervising a CPA, [REDACTED] a Sales Department headed by a "Sales/Biz Dev Manager," an open position, and an IT Department headed by an "IT Manager," an open position to be hired in the next two years. The chart indicates that the Sales/Business Development Manager directly supervises "Agents/Partners," identified as "contractors," a Sales Executive, [REDACTED] a Sales Associate, an open position, and a position simply listed as "Sales," and identified as "future." The IT Manager directly supervises "Freelance Consultant/s," identified as "on demand," an "IT Consultant," identified as "near future," a Software Consultant, [REDACTED] an "SEO," identified as "near future," and two Technical Copywriters, [REDACTED] and [REDACTED]

The Petitioner submitted an almost identical list of its employees in the United States along with a brief list of responsibilities for each position as previously submitted in support of the petition. The list included a "Sales/Business Development Manager," an open position requiring a Bachelor's degree in Business Administration; a "Sales Executive," [REDACTED] hired February 17, 2015, and said to be filling two positions, a morning and afternoon shift, at 40 hours per week;<sup>4</sup> a "Sales Associate," a previously filled but currently open position where the previous employee worked

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<sup>4</sup> We note that the Petitioner specifically stated that the Sales Executive position filled by Aaron O'Brien is designed to work part-time at 20 hours per week; however, [REDACTED] is currently working two shifts, which require him to work 40 hours per week.

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part-time at 20 hours per week; an "IT Manager." to be filled in the next two years requiring a Bachelor's/Master's degree in Computer Science or equivalent, plus management experience and experience in computer networking or system administration for at least three years, and a "Software Consultant," [REDACTED] hired April 6, 2015, and working full-time. The list also included its outsourced contracts, such as [REDACTED] a search engine optimization account manager who optimizes internet search results; [REDACTED] a Technical Copywriter, hired March 23, 2015, and working part-time; and [REDACTED] a Technical Copywriter, hired June 18, 2015, and working part-time.

The Petitioner submitted its IRS Form 941 for the second quarter of 2015 indicating that it had three employees the first month and two employees the second and third months, and paid \$14,630.40 in wages, tips, and other compensation during that period.

The Director denied the petition on October 1, 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 it appeared the Beneficiary does not manage supervisory, managerial, or professional employees as the Petitioner did not describe how the Beneficiary supervises its claimed employees and independent contractors on a day-to-day basis. The Director further found that the Beneficiary did not have managerial employees to direct that will run the day-to-day operations of the business. The Director found that it appears the Beneficiary has a single professional subordinate and the record did not establish that most of the Beneficiary's time will be devoted to supervising a Software Consultant.

On appeal, the Petitioner submits a brief, dated October 30, 2015, asserting that the Beneficiary will be employed in an executive capacity in the United States. The Petitioner contends that "the day-to-day tasks of the business are performed by the company's subordinate employees and contractors rather than the executive. The evidence shows that the CEO is setting [the] business' strategies, positioning the business in the right direction . . . implementing [the] company's policies, investigating business development opportunities and negotiating with partners, [and] making executive-level decisions that bind the company."

The Petitioner asserts that the Director erred in considering whether the Beneficiary will be employed in a managerial capacity. The Petitioner states that the Director inferred, in her decision, that in order to be considered an executive, the Beneficiary must also fall under the definition of manager, particularly when it comes to having a subordinate level of managerial employees for the Beneficiary to direct. The Petitioner contends that the Beneficiary will be employed in an executive capacity and that an executive is not required to supervise a large number of personnel or have managerial or professional staff as subordinates as long as the Petitioner shows that the day-to-day functions of the business are carried out by other people while the executive can focus on his functions. The Petitioner further contends that the subordinate employees are not required to be on the Petitioner's U.S. payroll in order to be legitimately included in the Petitioner's organizational hierarchy and, therefore, the independent contractors should be given weight by USCIS. The Petitioner provides the same list of employees provided in response to the RFE and an almost

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identical list of duties for the Beneficiary's continued employment in the United States, also provided in response to the RFE.<sup>5</sup>

In support of the appeal, the Petitioner submits duplicate copies of evidence previously contained in the record, as well as copies of "referred customer agreements" and an expense report, all of which post-date the filing of the petition. The Petitioner also submits copies of email correspondence between the Petitioner and the Beneficiary, as well as statements of earnings for its employees.

Finally, the Petitioner submits a copy of a Professional Services Agreement, dated October 15, 2015, demonstrating that the Petitioner contracted the services of an additional Software Consultant contractor, [REDACTED] who would work on a full-time basis as the "[REDACTED] Tools Lead." The Petitioner also submitted a new list of its employees in the United States, which adds one responsibility to the Software Consultant, [REDACTED] stating that he supervises the technical copywriters who are writing topics on cyber security at the petitioning U.S. company. The newly-hired contractor, [REDACTED] is also included on this list.

#### 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.

As a preliminary matter, in light of the Petitioner's references to the requirement that USCIS apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

....

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

....

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<sup>5</sup> On appeal, the Petitioner added and removed several words within the list of duties; however, the context of the duties remains the same.

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Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “more likely than not” or “probably” true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing “more likely than not” as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

*Id.*

We apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. The adjudication in the current matter requires that we determine whether the Petitioner has established by a preponderance of the evidence that the Beneficiary will be employed in an executive 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 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). 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.

The fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be “primarily” of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act. While the Beneficiary may exercise discretion over the Petitioner’s day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, the position descriptions alone are insufficient to establish that his actual duties, as of the date of filing, would be primarily managerial or executive in nature.

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As previously noted, the Petitioner has consistently asserted that the Beneficiary will be employed in an executive capacity in the United States. On appeal, the Petitioner specifically states that the Director erred in considering the Beneficiary's position managerial, in addition to executive. As such, we will focus our analysis of the Beneficiary's proposed position and proposed job duties on whether or not the Beneficiary will be employed in an executive capacity.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and a beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as an owner or sole managerial employee. A 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 a petitioner to establish that the beneficiary will supervise a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary will carry out the day-to-day, non-executive functions of the organization.

In the instant matter, the Petitioner first characterized the Beneficiary's role as Chief Executive Officer and briefly stated in its business plan that the Beneficiary will handle the daily management and operations, employees and sub-contractors, and sales and consultants. The Petitioner's organizational chart listed the Beneficiary at the top tier of the hierarchy as "CEO/CTO." Although the Petitioner referenced a letter of support, the record did not contain such a letter at the time of filing.

In response to the RFE, the Petitioner stated that the Beneficiary will be employed in an executive capacity, primarily directing the management of the company and establishing its goals and policies. The Petitioner provided a description of the Beneficiary's duties, stating that, as the CEO and CTO, he will devote at least 50% of his time to defining opportunities, analyzing, planning, and developing U.S. operations and making executive-level decisions for the business; the remaining 50% of his time will be divided among setting business strategies and goals, laying down policies, and directing the company through employees and contractors. 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 executive in nature. For instance, the Petitioner specifically stated that the Beneficiary will collaborate with a CPA and lawyers, but it did not provide any evidence that it has hired such professional staff to assist the Beneficiary, or how that particular task is executive. The Petitioner refers to its management team in reference to the

Beneficiary's direct subordinates; however, the Petitioner has not shown that it employs any department managers. The Petitioner also specifically stated that the Beneficiary will ensure compliance with U.S. safety regulations, but has not established how that particular task is executive in nature. Finally, the Petitioner vaguely stated that the Beneficiary will review reports prepared by the team and reports on budget, but did not indicate who would be preparing such reports, or again, how these particular tasks are executive in nature. The Petitioner also included some vague and undefined tasks, such as "set the working environment in the U.S. company" and "establish and share company values with employees and customers in the West Coast market," which do not establish that the Beneficiary will be employed in an executive capacity. 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).

Here, although the Petitioner asserts that the Beneficiary will be employed in an executive capacity, it has not provided sufficient information detailing the Beneficiary's duties at the U.S. company to demonstrate that these duties will qualify him as an executive. These general statements do not offer any clarification as to the Beneficiary's actual proposed duties in the United States, and fall considerably short of demonstrating that that the Beneficiary will direct the management of the organization or establish its goals and policies, for example. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The Petitioner has not provided sufficient detail or explanation of the Beneficiary's activities in the course of her/his daily routine. The actual duties themselves will reveal the true nature of the employment. *Id.* at 1108.

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 Petitioner has not demonstrated that the Beneficiary's duties primarily focus on directing the management of the organization and establishing the goals and policies of the organization. Although the description of the Beneficiary's job duties allocates time to supervising the "management team," the Petitioner has not demonstrated that it has hired any of the listed department managers, such as the "Sales/Business Development Manager" or the "IT Manager." As such, the Petitioner has not submitted evidence that the Beneficiary's subordinate employees will relieve him from performing non-qualifying operational and administrative duties at the U.S. company.

The Petitioner submitted a list of current employees, indicating that it had one Sales Executive and one Software Consultant subordinate to the Beneficiary.<sup>6</sup> Its IRS Form 941 for the second quarter of 2015, the time of filing the petition, also indicated that it two employees at the end of that period. The Petitioner also provided independent contractor agreements indicating that it hired two Technical Copywriters on a part-time basis. Its initial organizational chart indicated that the Beneficiary had six direct subordinates, one of which was shown to supervise a future position and the two contracted Technical Copywriters. Its second organizational chart, submitted in response to the RFE, indicated that the Beneficiary had three direct subordinates, two of which were newly listed positions corresponding to newly listed departments within the organization. The Petitioner altered its organizational structure and added two new department head positions who would directly supervise the positions previously listed as subordinate to the Beneficiary. Ultimately, the Petitioner simply added an additional level of management in order to show that the Beneficiary will supervise a managerial or supervisory level of employees. However, 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 a beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. A petitioner must establish that the position offered to a beneficiary, when the petition was filed, merits classification as a 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, a 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 its organizational hierarchy, but rather altered its entire organizational structure.

Further, on appeal, the Petitioner shows that it has hired an additional contracted consultant after the denial of the petition. However, given that the contractor was hired after the denial of the petition, we cannot consider the new consultant's employment when determining whether the Beneficiary has sufficient subordinates to relieve him from performing non-qualifying tasks. 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. at 249.

Furthermore, the bare and vague description of the Beneficiary's subordinates' duties does not demonstrate that they will relieve the Beneficiary from performing the tasks necessary to produce a product or provide a service of the Petitioner. Although the Petitioner has shown to employ someone in the position of Sales Executive and Software Consultant, it has not described the positions or provided a list of job duties sufficient to demonstrate that they relieve the Beneficiary from performing non-qualifying tasks, such as sales, negotiations, and actual IT consulting. We note that a company's size alone, without taking into account the reasonable needs of the organization,

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<sup>6</sup> The Petitioner indicated that the Sales Executive position is intended as part-time, although its current employee in that position is working two shifts for full-time employment, and the Software Consultant position is full-time.

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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. v. USCIS* 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 does not believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15.

Here, the Petitioner has not submitted evidence that it has staff that will relieve the Beneficiary from performing non-qualifying operational and administrative duties at the U.S. company. On appeal, the Petitioner contends that, as an executive, the Beneficiary is not required to supervise subordinate employees. Although it is true that an executive is not required to supervise a subordinate staff comprised of managers, supervisors and professionals, the lack of subordinate employees is highly relevant because if the U.S. company does not have lower-level employees to perform the routine daily tasks of providing a service or producing a product of the business, it must fall on the Beneficiary to perform those tasks. 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. At this time, the Petitioner has not sufficiently demonstrated that the Beneficiary has subordinate employees that will relieve him from performing non-qualifying duties while employed at the U.S. company.

On appeal, the Petitioner refers to an unpublished decision in which we found that USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, which we have done in this case. The Petitioner further refers to another 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. However, the Petitioner has not furnished any evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. 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.

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. Nor has the petitioner demonstrated that it sufficient subordinate employees to perform the tasks necessary to operate the Petitioner’s business, such that the Beneficiary would be relieved from engaging in such a role.

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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 predominantly managerial or executive position.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary will be employed primarily in a managerial or executive capacity in the United States. For this reason, the appeal will be dismissed.

### III. DOING BUSINESS

Beyond the decision of the Director, the Petitioner has not established that it has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the Beneficiary’s status.

The Petitioner acknowledges in its Company Statement that although it officially opened as a California-based limited liability company in March 2014, it did not commence official operations until November of 2014, and did not begin the launch of its marketing operations until mid-February 2015. The new office petition was approved on September 25, 2014. Thus, pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the Petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, the petitioner has not established that it was doing business from September 2014 through August 2015. For this additional reason the petition may not be approved.

### IV. 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 G-USA, LLC.*, ID# 16538 (AAO May 17, 2016)