



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

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

MATTER OF C-M-O-, INC.

DATE: MAY 24, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a Florida corporation providing consulting services and operating a convenience store, seeks to temporarily employ the Beneficiary as the General Manager of its new office under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in an executive or managerial capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish that: (1) the Beneficiary's duties will be primarily executive or that its new business can support the Beneficiary's position within the first year, and (2) it has acquired sufficient physical premises to commence its operation as a consulting business and convenience store.

The matter is now before us on appeal. In its appeal, the Petitioner submits a letter and asserts that the Director erred in that the Beneficiary will be employed primarily in an executive capacity at its new office in the United States and that its physical premises will house its consulting business and convenience store at the same location.

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)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

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

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II. PHYSICAL PREMISES

The Director denied the petition based, in part, on a finding that the Petitioner did not establish that it has secured sufficient physical premises to house the new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

A. Evidence of Record

The Petitioner filed the Form I-129 on January 9, 2015, and therefore must establish that it satisfied the requirements at 8 C.F.R. § 214.2(l)(3)(v)(A) as of this date. A visa petition may not be approved at a future date after a petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978).

On the Form I-129, the Petitioner stated that it operates a “consulting business and sell [sic] of products” business and listed its physical address as [REDACTED] Florida, [REDACTED].

The Petitioner submitted a Shopping Center Lease between [REDACTED] and the Petitioner for the premises at [REDACTED] Florida [REDACTED] identified as [REDACTED] Approximate Square Footage of: 1,400.” The Lease is dated October 31, 2014, and expires three years and three months from the turn over date. The Lease is signed by [REDACTED] listed as Secretary of the Petitioner. The Shopping Center Lease specifically states the following about the premises and its permitted use:

Item 8 – Use of Premises (Section 9.0): To operate only as a convenience store and market and for no other use or purpose. Tenant acknowledges the existing exclusives granted by Landlord as more particularly set forth in Exhibit “G” attached (hereinafter “Exclusives”). Tenant shall not violate any Exclusives.

.....

Section 9.0 USE: It is understood and agreed between the parties hereto and Tenant covenants that said Premises during the continuance of this Lease shall be used and occupied solely for the purpose specific in Item 8 of the Definitions, and for no other purpose or purposes, without the written consent of Landlord

The Petitioner’s business plan specifically describes its business in the United States as follows:

Our clientele shall be constituted of small and medium American or international companies located in the State of Florida. We shall help them with starting new or developing existing export and import operations from the American suppliers to and from the South American buyers and suppliers. We shall sell consulting services and intermediate the operations of import/exports which shall be done directly from the supplier to and from the South American clients and suppliers. Our revenue shall

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come from the consulting services we shall render to the exporters and from the commissions we shall receive from the exporter or from [sic] the importer, depending on the type of agreement. We will also be generating [sic] a significant part of the revenues from the consulting in import/export and product representation of food, grain and consumable products, as well, from the net profit from the Marketing Unit we will develop in [REDACTED]. The Marketing Unit will demonstrate our capacity of business organization and control to our clients, and will in fact generate a good lump of our income.

Within the same business plan, the Petitioner listed the leased premises as its office location and stated that “[a] well-located office was already leased, large enough to accommodate our office and the Marketing Unit, and even so, we plan to grow fast, we believe that a better and larger office space will be needed in short time.”

The Petitioner submitted original photographs of its physical premises showing the inside of an unfinished building that appears to be an open floor plan requiring design and build.

The Director issued a request for evidence (RFE), advising the Petitioner that the lease agreement showed that the acquired premises can only be used to operate a convenience store and market, thus the Petitioner did not demonstrate that it secured sufficient space to house its new business that will be performing consulting services and intermediating the operations of imports and exports. The Director instructed the Petitioner to submit evidence demonstrating that it acquired sufficient physical premises to house the new office of the petitioning U.S. company.

In response to the RFE, the Petitioner submitted a letter from the foreign entity, dated May 26, 2015, stating that the petitioning U.S. company “will bring services of consulting for other companies but at the same time we will be approaching the market as a retail store, where we expect to help companies from overseas [sic] and national companies be able to commercialized [sic] their products and having our team of Consulting guide by [the Beneficiary] we can offer them services of exporting to other countries including Venezuela.”

The Petitioner also submitted a letter from [REDACTED] dated May 27, 2015, stating the following about the use of the leased premises:

[REDACTED] is the owner/landlord of a shopping center in which [the Beneficiary] executed a guaranty of a lease of [the Petitioner] located at [REDACTED] FL [REDACTED]. She represented that she is the Treasurer of the tenant, which is reflected on [REDACTED]. She has also represented that she will be operating an administrative office at the same location as the market.

The Director denied the petition concluding, in part, that the Petitioner did not establish that it had secured sufficient physical premises to house the new office at the time the petition was filed. In denying the petition, the Director found that the letter from the landlord, submitted in response to the

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RFE, was not sufficient to show that the Petitioner acquired sufficient space to house all intended employees as well as four separate divisions of its new business. The Director found that it appeared that the acquired space was specifically for a convenience store and market.

On appeal, the Petitioner asserts that it will have offices at the acquired premises to carry out its consulting services, and states as follows:

At that space the subsidiary will be conducting business of a supermarket but it has an area design to conduct as well the consulting service that we will be offering, the company has plan an expansion of the company in the future to relocate the consulting office to their own space, in this time we are combining both of this services in the same location as part of the approach that we can have with our clients who are involve in the importation of products and the exportations as well some of our employees will be spending more time out of the office visiting clients, assisting to fairs, preparing themselves and bringing to the clients the service that they need but sometimes they don't have the time to go and look for it, that's when our company can provide them with the service in their own space and time.

The Petitioner submits original photographs of the acquired premises showing [REDACTED] in a shopping center clearly identified as the Petitioner's convenience store/market, along with photos of the cash registers and fully stocked aisles. The Petitioner also submits original photographs of three desks, one with a laptop computer, and a larger desk with a desktop computer, telephone, and printer. However, the actual physical location of these desks cannot be determined.

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 it had secured sufficient physical premises to house the new office prior to filing the petition.

If a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally* 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a Petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the Beneficiary in a managerial or executive position within one year of approval.

We acknowledge that the regulations do not specify the type of premises that must be secured by a Petitioner seeking to establish a new office. The phrase "sufficient physical premises" is broad and somewhat subjective, leaving flexibility in adjudicating this legal requirement. However, the Petitioner bears the burden of establishing that its physical premises should be considered "sufficient" as required by the regulation at 8 C.F.R. § 214.2(l)(3)(v)(A). To do so, it must clearly

identify the nature of its business, the specific amount and type of space required to operate the business, its proposed staffing levels, and evidence that the space can accommodate the Petitioner's growth during the first year of operations.

Here, the Petitioner submitted its lease for a convenience store/market retail space. The lease specifically states that the premises shall be used exclusively as a convenience store and market. The landlord's letter simply stated that the Beneficiary represented that she will be operating an "administrative office" at the same location as the market, but did not clarify that the leased premises contained such a space or that the "administrative office" would be related to the Petitioner's consulting business. The lease does not describe actual premises and does not specify that office space is available. The photos submitted for the Petitioner's leased premises show three desks and minimal office equipment, but the actual physical location of this office space is not identified, nor is the photographed office space identified as office space exclusively for the petitioning U.S. company.

Further, according to the Salary Expenses projected for the first year in the Petitioner's business plan, it will have a total of 11 employees that would require office space. Given this number of expected employees, it is unclear where the Petitioner will house its employees as a new office. The Petitioner did not describe its existing physical premises nor did it explain how the premises would be sufficient for it to conduct its business. When the Director advised the Petitioner that this evidence was not sufficient and requested additional information, rather than provide the additional information requested by the Director, the Petitioner simply submitted a letter from the landlord stating that the Beneficiary represented that she will be operating an "administrative office" at the same location as the market. The Petitioner, again, did not provide an explanation or clarification regarding its physical premises and where it will house its listed employees. 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)).

Doubt cast on any aspect of the 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.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that it had acquired sufficient physical premises to house the new office as of the date of filing the petition. For this reason, the appeal will be dismissed.

III. EMPLOYMENT IN AN EXECUTIVE CAPACITY IN THE UNITED STATES

The Director denied the petition, in part, based on a finding that the Petitioner did not establish that the Beneficiary will be primarily employed in an executive capacity in the United States or that its new business will support an executive position within the first year of operations.¹

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

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

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. See section 101(a)(44)(C) of the Act.

A. Evidence of Record

On the Form I-129, the Petitioner indicated that it operates a "business consulting and sell [*sic*] of products" business with zero current employees and a gross annual income of \$0. The Petitioner intends to employ the Beneficiary as its General Manager. On the L Classification Supplement to Form I-129, where asked to describe the Beneficiary's proposed duties in the United States, the Petitioner stated as follows:

The position proposed to [the Beneficiary] is the General Manager of our American subsidiary. The General Manager shall be directly responsible for directing the professional division managers. She will have all the authority to make any kind of decision in the company, we know because of all of her experience in our company in Brazil she is the person for this position. As a General Manager she will be responsible [*sic*] of hire employees, direct and execute every project with the quality

¹ The Petitioner does not claim that the Beneficiary will be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in an executive capacity.

and standars [sic] that we have, she will be in contact with our Board of Director to report updates.

In its letter of support, dated December 18, 2014, the Petitioner stated that the U.S. company's structure will consist of four divisions under the direction of the General Manager: Consulting Division, Marketing Division, and Operations/Services Division.² The Petitioner described each division and their corresponding responsibilities as follows:

- The Consulting Division shall be responsible for the identification of the client needs, project planning, identification of direction and development, produce creative concepts and designs, agreements and contracts, and procurement of products.
- The Marketing Division shall be responsible for the marketing strategies, policies, and services, customer relationship management, and customer care services.
- The Operations/Services Division shall be responsible to guide and conduct the overall company business, supporting any other division demand or need. This division will provide support for the Marketing and Consulting division with additional financial analysis, evaluation, and report generation. It also provides research and analysis of organization's objectives. It also manages and analyzes statistical information affecting financial and accounting programs.

In the same letter of support, the Petitioner described the Beneficiary's proposed position and job duties as follows:

As the General Manager, [the Beneficiary] shall have the full authority to hire and fire employees at any level of the organization. She shall be directly responsible for directing the division managers, who shall direct the department managers, who shall manage the supervisors and all employees and contract employees of the company as well as the third-party employees and contract employees working under our responsibility.

Once approved by USCIS, [the Beneficiary] shall exercise her General Manager authority directly subordinated to the Board of Directors. As her objective as the General Manager, [the Beneficiary] shall lead the organization to the goals that ensure its satisfactory results in terms of profitability, continuity, and customer satisfaction. She shall exercise the full authority delegated by the Board of Directors, under the general supervision from that same board and to report the progress and status of the organization in attaining goals and objectives negotiated, agreed, and established with the Board of Directors.

² The Petitioner only provided information for the three listed divisions; it is unclear whether the "Operations/Services Division" accounts for two divisions within its proposed organizational structure.

[The Beneficiary's] duties include but are not limited to the following:

- Oversee all daily management activities to ensure that the company's operation systems are in place;
- Identify, implement, follow-up, and report all policies, objectives, and goals to the Board of Directors;
- Gather data, analyze information, prepare presentations for meetings with division management;
- Presentation of statements, reports, and documents to demonstrate goal achievement and plans;
- Indirect supervision of employees;
- Indirect supervision of all day-to-day activities;
- Direct supervision of division managers;
- Evaluate performance, enforce rules, and approve expenditures within each division;
- Develop management strategies and internal norms and procedures;
- Recruit, interview, select, and retain quality employees;
- Analyze incoming data reports and taking appropriate actions, determine areas needing improvement;
- Verify that the company fulfills with all state and federal regulations[; and]
- Learn new developments, increase the knowledge, and enrich the expertise to anticipate opportunities[.]

The Petitioner also submitted a letter from the foreign entity, dated December 17, 2014, briefly describing the Beneficiary's proposed duties in the United States as follows:

[The] General Manager shall be directly responsible for directing the professional division managers. The General Manager will ultimately be directly and indirectly responsible for all the employees and contract employees, at all organizational levels. [She] shall have the authority to grant powers of attorney on behalf of the company, in any matter directly related to its commercial activities, as well as to delegate any of [her] authorities to managers and supervisors of [her] division.

The Petitioner submitted a business plan describing the Beneficiary's proposed position in the United States as follows:

[The] General Manager is responsible for defining the goals, objectives, and policies of the company, in the short, mid, and long terms; directing all the management and operational aspects of the company; and exercising the full authority delegated by the Board of Directors, under its general supervision. The managers under the authority of the General Manager shall manage the supervisors and all the employees of the company, conducting the day-to-day operations of the company, under the General Manager's supervision and responsibility.

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The business plan included a chart of Salary Expenses projected for its first year of operations. The chart indicates that the Petitioner will have a total of 11 employees in its first year for a total of \$337,826.67 in salary expenses. The listed employees for the first year of operations are: General Manager, Marketing Division Manager, Domestic Sales Agent, Customer Service Representative, Development Division Manager, Business Specialist, Product Rep Agent, Logistic Consultant, Services Division Manager, General Business Consultant, and Planning Specialist.

The business plan included a projected organizational chart for the U.S. company depicting the Beneficiary as the General Manager, reporting to the Board of Directors. As the General Manager, the Beneficiary would supervise a Marketing Division Manager, an Operation/Services Manager, and a Consulting Division Manager. The Marketing Division Manager would supervise a Domestic Sales Agent and a Customer Service Representative, the Operation/Services Division Manager would supervise a Business Specialist, a Product Representation Agent, and a Logistics Consultant, and the Consulting Division Manager would supervise a General Business Consult. and a Planning Specialist.

The business plan also included job duties, along with the percentage of time devoted to each, for the General Manager, Marketing Manager, Domestic Sales Agent, Customer Service Representative, Operations/Services Manager, Business Specialist, Product Representation Agent, Logistics Consultant, Consulting Manager, General Business Consult, and Planning Specialist. The list of proposed job duties for the Beneficiary's position of General Manager is as follows:

Directs and Plans the management of the organization. Establishes the goals and policies of the organization.	(20%)
Supervises and control the work of other supervisors, professional, or managerial employees, and some independent contractors.	(15%)
Coordinates activities of business or departments concerned with production, pricing, sales, or distribution of products.	(15%)
Analyzes operations to evaluate performance of the company. Determines areas of potential cost reduction, program improvement, or policy change.	(10%)
Review reports submitted by staff members to recommend approval or to suggest changes[.]	(10%)
Negotiates or approves contracts and agreements with suppliers, distributors, federal and state agencies, and other organizational entities.	(10%)
Directs and coordinates the company's financial and budget activities to fund operations, maximize investments, and increase efficiency.	(5%)
Confers with board members and staff members to discuss issues, coordinates activities, and resolve problems.	(5%)
Approves budgets, including those for funding and implementation of programs.	(5%)
Creates report to the Organization's Board of Directors monthly.	(5%)

The Petitioner then submitted a document titled "Time Spent by the Beneficiary to Executive Duties and Non Executive Duties (During the First Year)." The document outlines the Beneficiary's proposed duties and percentages of time devoted to each as follows:

Executive:

- (30%) – Formulate, direct and coordinate commercial activities and policies to promote products and services.
- (20%) – Direct the hiring, training, and performance evaluations of commercial and sales staff and overseeing their daily activities under the Board of Director's general supervision.
- (15%) – Establish the goals needed to reach the objectives of the Commercial division and accomplish the expectations of the Board of Directors.
- (10%) – Evaluate the financial aspects of commercial and sales, such as budgets, expenditures, sales promotions and special events, and return-on-investment and profit-loss projections.
- (5%) – Identify, develop, and evaluate sales/marketing strategies, based on knowledge of establishment objectives, market characteristics, and cost and markup factors.

Non-Executive:

- (10%) – Consult with buying personnel to gain advice regarding the types of products or services expected to be in demand, along with competition market strategies.
- (5%) – Coordinate and participate in promotional activities and trade shows, working with developers, advertisers, and production managers, to market products and services.
- (5%) – Other managerial task[.]

The Petitioner also submitted a document titled "Executive and Technical Skills to be Performed by the General Manager." The document lists the Beneficiary's duties under Business Management exactly as the statute at section 101(a)(44)(B) of the Act. The document also lists additional skills required for the Beneficiary to perform her proposed duties in the United States.

The Petitioner submitted a Work Schedule for the General Manager listing basic duties Monday through Friday from 9:00 a.m. to 5:00 p.m. The work schedule indicates that the Beneficiary will devote 53.8% of her time to meetings with management, 13.8% of her time to meetings and contacts with clients and potential clients, 12.5% of her time to meetings with suppliers and business partners, 10% of her time to analysis, evaluation, and preparation, 5% of her time to virtual meetings with the foreign entity, and 5% of her time to other meetings and contacts.

In the RFE, the Director advised the Petitioner that a review of the Beneficiary's duties are vague and broad and do not detail the Beneficiary's hourly duties. The Director further noted that the Petitioner did not provide a timeline for hiring the additional listed employees or what the educational requirements will be. The Director instructed the Petitioner to submit evidence demonstrating that the Beneficiary's proposed position in the United States will be in an executive capacity.

In response to the RFE, the Petitioner submitted a letter from the foreign entity, dated May 26, 2015, expanding slightly and altering the percentages of time devoted to each of the duties previously listed for the Beneficiary's proposed position as follows:

During her temporally [*sic*] transfer to the subsidiary [the Beneficiary] will have the next duties as executive of the same during this first year of operations in the United States:

Executive:

- (40%) – Formulate, direct and coordinate company and policies activities to pursuit the business plan [*sic*], defined in conjunction with the board of directors, with products and services: through this duty we expect that from the begging [*sic*] she will set up some guides to ensure that the company staff will work with the same ethic and parameter, to be organize and reach excellent standards of the company for our clients.
- (20%) – Direct the hiring and firing, conduct performance evaluations of immediate managed professionals, department heads, review overall personnel and departments performance and overseeing their daily activities under the Board of Director's general supervision. Evaluate direct managed professionals based on objectives against effective results: for this first year [the Beneficiary] will have to responsibility to hire the staff and the professionals that will employees [*sic*], she has already established the profile that will be needed in the subsidiary and what kind of professional she will hire for the manager positions of the divisions.
- (15%) – Establish the goals needed to reach the objectives of the Company and accomplish the expectations of the Board of Directors. It's important for us and for her that the business plan can be accomplish, that's why before we decided to open this subsidiary we did a research on the market and the possibilities that we will have with this, the Board of Directors knows that the first year of operations of any company is the hardest but at the same time [the Beneficiary] had done before here in Venezuela [*sic*] and she reached every goal that we had in the first year.
- (10%) – Evaluate the financial aspects of budgets, expenditures, research and development appropriations, and return-on-investment and profit-loss projections. [The Beneficiary] will be in charge of verify [*sic*] that the

divisions are on budget and will have the responsibility of establish and manage the budget for the different activities and projects of the same, its very important to stick to this budget to ensure that the company reach the financial goals proposed in the business plan, for this she will have to evaluate every department needs and keep on track with the developments that are on so she can ensure the success of the company.

- (5%) - Evaluate company strategies, based on knowledge of establishment objectives, market characteristics, and cost and markup factors, take the required executive decisions. Having a define market source and knowing our priorities [the Beneficiary] directing her manage team can ensure that the business of the company is stable and will be in the position of taking decisions in behalf of good being of the company, making changes and adaptations that the market ask to be able to set up the company in the market position that is important for the success of this one.

Non-Executive:

- (5%) - Consult with personnel to gain advice regarding the types of products or services expected to be in demand.
- (3%) - Coordinate and participate in promotional activities and trade shows, working with developers, advertisers, and production managers, to market products and services.
- (2%) - Other managerial tasks.

The Petitioner also submitted the same work schedule and lists of proposed job duties and required skills previously submitted.

The Director denied the petition concluding, in part, that the Petitioner did not establish that the Beneficiary will be employed in an executive capacity in the United States within one year of approval of the new office petition. In denying the petition, the Director noted that, although specifically requested in the RFE, the Petitioner did not provide any information relating to the timeline for hiring the listed individuals or the educational requirements for the positions. The Director further noted that the Petitioner did not provide sufficient evidence to show any type of consulting business in the United States. The Director found that based on the Petitioner's intended employees' duties, including those of the Beneficiary, and the scope of its business, it did not demonstrate that the Beneficiary's duties will be primarily executive and that its new business can support the Beneficiary's position within its first year of operations.

On appeal, the Petitioner submits a letter, dated November 10, 2015, asserting that the Beneficiary is the executive with the responsibility of managing and controlling the U.S. company and that she is directly in charge of the selection of the new employees at this point while the managers are also being selected. The Petitioner further states that in order for the Beneficiary to accomplish her

duties and company goals, she will have to work side by side with the managers she will hire and have weekly meetings to review the process and the job they are doing.

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 within one year of approval of the new office petition.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial/executive responsibility cannot be performed in that first year. The "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally* 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

As previously noted, the Petitioner has consistently asserted that the Beneficiary will be employed in an executive capacity at its new office in the United States. 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 within one year of approval of the petition.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in

discretionary decision making” and receive only “general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.” *Id.* While the definition of “executive capacity” does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner’s burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization.

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 managerial and executive 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*, 940 F.2d 1533.

The Petitioner characterized the Beneficiary’s role as the General Manager of its new office in the United States, and provided a broad description of her proposed job duties that does not establish that she will be employed in an executive capacity. The Petitioner first provided a vague list of proposed job duties for the Beneficiary’s position, but did not indicate how such duties qualify as executive in nature. For instance, the Petitioner specifically stated that the Beneficiary will gather data, analyze information, and prepare presentations for meetings with division managers; present statements, reports, and documents to demonstrate goal accomplishments and plans; verify that the company abides by all state and federal regulations; and learn new developments, increase the knowledge, and enrich the expertise to anticipate opportunities, but has not demonstrated how these particular tasks are executive in nature. Then, the Petitioner’s business plan provided a second list of proposed job duties for the Beneficiary’s position, accompanied by the percentages of time she would devote to each duty. According to this second list of proposed job duties, the Beneficiary would devote 50% of her time to directing and planning the management of the organization, establishing its goals and policies, supervising and controlling the work of subordinate employees and independent contractors, and coordinating activities concerned with production, pricing, sales, or distribution of products. Although the Petitioner included percentages of time the Beneficiary will devote to the listed duties, it did not include any additional details or specific tasks related to each duty, nor did the Petitioner indicate how such duties qualify as executive in nature. Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d Cir. 1990). It appears, here, that the Petitioner is repeating the language outlined in the statutory definition of executive. Conclusory assertions regarding the Beneficiary’s employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not

satisfy the Petitioner's burden of proof. *Id.* at 1108; *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The Petitioner then provided a third list of proposed job duties, in a separate document, outlining the executive and non-executive duties the Beneficiary would perform, which also included the percentages of time the Beneficiary would devote to each duty. According to this third list of proposed job duties, the Beneficiary would devote 80% of her time to executive duties. However, the Petitioner did not provide any additional tasks associated with each duty or indicate how such listed duties are executive in nature. For instance, the Petitioner specifically stated that the Beneficiary will devote 50% of her time to formulating, directing, and coordinating commercial activities and policies to promote products and services, and directing the hiring, training, and performance evaluations of commercial and sales staff and overseeing their daily activities under the Board of Director's general supervision. These duties do not provide any insight as to what the Beneficiary will actually do during the course of her daily routine. The Petitioner also provided a Work Schedule for the Beneficiary's proposed position that outlines what the Beneficiary's typical day, for one week, would look like at the new office in the United States. According to the Work Schedule, the Beneficiary would devote 90% of her time every week to internal and external meetings and 10% of her time every week to "analysis, evaluation, and preparation." The provided Work Schedule contradicts the lists of proposed job duties provided by the Beneficiary and does not account for the majority of the listed duties. This is significant as it raises concerns about the validity of the information provided, as it pertains to the Beneficiary's proposed position, and further does not establish that she will be primarily employed in an executive capacity. Doubt cast on any aspect of the 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. at 591. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *See id.* at 591-92.

In response to the RFE, the Petitioner provided a fourth list of proposed job duties for the Beneficiary's position that slightly updated the third list discussed above. The Petitioner adjusted the percentages of time the Beneficiary would devote to executive and non-executive duties, increasing her executive duties to 90% and updated the time the Beneficiary would devote to formulating, directing, and coordinating commercial activities and policies to promote products and services from 30% to 40%. The Petitioner also vaguely expanded each duty to make the Beneficiary's position appear more executive and added a sentence or two to each proposed executive job duty that does not further establish that she will be employed in a primarily executive capacity. This additional information did not provide any insight as to the Beneficiary's actual tasks or how such duties will be executive in nature. For example, the Petitioner adds that the Beneficiary will set up guides for the company staff, evaluate subordinates based on "objective against effective results," and verify that divisions are on budget. 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 the original duties of the position, but rather added new generic duties to the job description.

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 proposed duties at the U.S. company to demonstrate that these duties will qualify her 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 the Beneficiary will primarily direct the management of the organization and 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 daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

As noted above, the Petitioner did not submit a detailed description of the Beneficiary's proposed position sufficient to establish that the Beneficiary's daily routine will consist of primarily executive duties, rather than on providing the services or producing the products of the organization. In fact, the descriptions of the duties provided, particularly those described in the "Business Management" section of the document titled "Executive and Technical Skills to be Performed by the General Manager," are virtually identical to those described at section 101(a)(44)(B) of the Act. Again, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5.

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

The Petitioner has not submitted evidence that it has, or will have, staff that will relieve the Beneficiary from performing non-qualifying operational and administrative duties at the U.S. company within one year of approval of the petition. Although the Petitioner may not be required to demonstrate that the Beneficiary has subordinate employees who will assist her, 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

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the Beneficiary has, or will have, subordinate employees that will relieve her from performing non-qualifying duties within one year of approval of the petition.

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 to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. USCIS* 469 F.3d at 1316 (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d at 42; *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, 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., *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In the instant matter, the Petitioner stated that it will provide consulting services for other companies and also operate a retail convenience store. The Petitioner leased retail space and has begun operations as a 24-hour convenience store in [REDACTED] Florida. However, the Petitioner has not provided any information about its retail store, such as who will manage the retail store, what duties the Beneficiary will perform related to the retail store component of its operation, if any, how many current or proposed employees will be hired to operate the 24-hour convenience store, the timeline for hiring the retail store employees, or what duties the Beneficiary's current proposed subordinates will perform relating to the retail store. Further, although requested in the RFE, the Petitioner did not provide a timeline for hiring the current proposed subordinates listed in its business plan. Other than a vague list of salary expenses for the first year of operations, contained in the business plan, the Petitioner has not indicated when it plans to hire any of the Beneficiary's proposed subordinates. This is also significant because, again, the Petitioner must demonstrate that the Beneficiary will have subordinate employees to relieve her from performing non-qualifying duties, relating to the consulting services and the retail store, within one year of approval of the petition. Here, the Petitioner has not demonstrated that the Beneficiary will be relieved from performing day-to-day routine tasks associated with managing each component of the businesses within one year of approval of the petition. As such, it appears that the Beneficiary, as the sole employee of the actual petitioning U.S. company, will be providing services or producing products on behalf of the Petitioner.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary will be employed in an executive capacity in the United States within one year of approval of the new office petition. Accordingly, the appeal will be dismissed.

IV. FOREIGN EMPLOYMENT IN AN EXECUTIVE CAPACITY

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

On the L Classification Supplement to Form I-129, where asked to describe the Beneficiary's duties abroad for the three years preceding the filing of the petition, the Petitioner stated that the Beneficiary has been exercising full authority over all the management of the system division, has been responsible for directing, controlling, and supervising the company's activities, and has the authority to hire and fire employees at any level of the division, as well as to select, hire, contract, and dismiss contractors, sub-contractors, and business partners. The Petitioner also stated that the Beneficiary performed her duties within a wide spectrum of limits for the decision-making process, requiring only very general supervision from the Board of Directors.

The Petitioner also submitted a letter from the foreign entity, stating that the Beneficiary has occupied the executive position of Systems Director since 1999 and describing her job duties abroad identical to the description on the L Classification Supplement form.

The Petitioner submitted the Beneficiary's resume, stating that she was the Systems Director of the foreign entity and listing job duties, such as responsible for the definition and accomplishment of the company policies, goals and objectives; responsible for the entire managerial and operational services of the department's decisions and activities; and responsible for hiring and firing the managers and other key professionals for all the areas of the company.

The Petitioner submitted the foreign entity's organizational chart depicting the Beneficiary as the System Director, reporting to the Vice President and General Manager. The chart indicated that the Beneficiary supervised a Marketing Department with Sales Agents, an Inventory Department with a Warehouse Supervisor, and an Operations Department with Branch Supervisors and Administrative Agents of Branches. No additional details about the Beneficiary's division or the departments she supervised was provided.

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 an executive capacity.³

The Petitioner characterized the Beneficiary's role as Systems Director at the foreign entity and provided a broad and vague list of job duties, listed above, for her position abroad that does not establish that she has been primarily employed in an executive capacity. The Beneficiary's resume also listed some of her job duties at the foreign entity, and on appeal, the Petitioner briefly

³ The Petitioner asserts that the Beneficiary has been employed abroad in an executive capacity.

referenced the Beneficiary's position at the foreign entity and stated that she has been the executive responsible for the management of the company.

Despite the Petitioner's assertions that the Beneficiary has been employed in an executive capacity, the Beneficiary's foreign position has not been shown to be executive in nature, and the Petitioner has not demonstrated that the Beneficiary's duties primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. 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 or producing the products of the organization. Other than an organizational chart and blanket assertions that the Beneficiary has professional and supervisory subordinates, 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. At this time, 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 qualifying executive capacity. For this additional reason, the petition cannot be approved.

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 C-M-O-, Inc.*, ID# 16843 (AAO May 24, 2016)