



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

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

MATTER OF E-USA, LLC

DATE: OCT. 14, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a North Carolina limited liability company, is looking to open and operate a new office that assembles dosage regulation devices. Accordingly, the Petitioner seeks to temporarily employ the Beneficiary as a managing member of its new office under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not submit sufficient evidence to establish the following: (1) it secured sufficient physical premises to house its business operation; (2) the Beneficiary was employed abroad in a managerial or executive capacity; and (3) it would support the Beneficiary in the United States in a managerial or executive capacity within one year of approval of the petition.

The matter is now before us on appeal. In its appeal, the Petitioner submits a brief disputing all three grounds as valid bases for denial.

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 (1)(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.

In addition, the regulation at 8 C.F.R. § 214.2(1)(3)(v) states 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, 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 (1)(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.

## II. PHYSICAL PREMISES

The first issue to be addressed in this discussion is whether the Petitioner provided evidence to show that it meets 8 C.F.R. § 214.2(l)(3)(v)(A), which requires the Petitioner to establish that it obtained sufficient physical premises to house the new office. As with all statutory and regulatory requirements, a petitioner must establish eligibility at the time of filing and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1).

In the present matter, the evidence the Petitioner provided initially in support of the petition did not establish that it had secured the required physical premises to house its new business operation. Accordingly, the Director issued a request for evidence (RFE), which addressed this, among other evidentiary deficiencies, asking the Petitioner to provide evidence showing that it had acquired sufficient premises to house its new office operation at the time the petition was filed.

In response, the Petitioner provided an office lease showing December 1, 2015 as the date of execution.

Upon reviewing the above, the Director denied the petition, concluding that the Petitioner did not meet the filing requirement discussed at 8 C.F.R. § 214.2(l)(3)(v)(A) because the submitted office lease was executed five months after the petition was filed and therefore sufficient physical premises were not secured as of the date the petition was filed.

On appeal, the Petitioner objects to the Director's decision, contending that the denial is based on "a dubious and meaningless technicality whose application benefits nobody." The Petitioner also claims that "different premises were listed at the time of filing, with an upgrade to better premises during the wait for adjudication." The Petitioner did not, however, provide any evidence, such as a lease, to establish that the mailing address provided in the petition represented the address of a physical business premises that the petitioner had secured prior to filing. 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)).

Further, the Petitioner contends that the Director failed to take into account the "near-perfect suitability" of the business premises it secured after filing the petition. However, the suitability, or lack thereof, of the business premises that the Petitioner obtained after filing the petition is irrelevant, given the lack of probative value of a document, i.e., an office lease with a December 1, 2015 date of execution, that does not establish the Petitioner's eligibility at the time of filing.

Given the lack of evidence to establish that the Petitioner complied with the regulatory provision at 8 C.F.R. § 214.2(l)(3)(v)(A), leads us to the conclusion that the Petitioner had not secured sufficient business premises as of the date the petition was filed. Therefore, the instant petition cannot be approved.

### III. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on the finding that the Petitioner did not establish that the Beneficiary was employed abroad in a primarily executive or managerial capacity or that the Petitioner would be able to support the Beneficiary in a managerial or executive capacity within one year of the petition's approval.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

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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. Employment Abroad

The Director denied the petition, in part, based on the finding that the Beneficiary's employment with the foreign entity was not in a managerial or executive capacity. Therefore, we will address this issue in a discussion below.

1. Evidence of Record

At section 1(3) of the Form I-129 L Classification Supplement, the Petitioner stated that the Beneficiary was employed abroad by [REDACTED] a Brazilian entity. At section 1(6) of the same form, the Petitioner provided the following description of the Beneficiary's former employment abroad:

General manager of Brazil parent company. Strategic planning, supervision of development and delivery of products and services to about 150 customers including [REDACTED] the Brazilian [REDACTED]

In addition, the petitioner provided the foreign entity's work chart showing the Beneficiary at the top of the organizational hierarchy as the company's president, followed by the vice president as his immediate subordinate. The vice president is depicted as overseeing employees in four work categories – projects, administration, engineering, and sales – and the bottom tier of the chart lists nine individuals under the subheading "Technical," indicating that they are subordinate to the employee in the engineering category.

The organizational chart was accompanied by lists of the foreign entity's employees and contractors, listing each individual by name and position title and providing their respective educational levels.

After reviewing the evidence, the Director determined that the Petitioner did not establish that the Beneficiary was employed abroad in an executive capacity. Accordingly, the Director addressed this evidentiary deficiency in the RFE, instructing the Petitioner to provide a detailed description of the Beneficiary's typical job duties and to describe the foreign entity's organization in greater detail and to provide each employee's summary of duties.

In response, the Petitioner provided the following:

- **Strategic Planning: 30%**  
Evaluating data concerning company strengths and weaknesses. Making the big decisions about the company's future. Deciding on product mix, which customers to

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pursue, improving company performance, expanding markets, setting and monitoring financial goals.

**Selected accomplishments:**

- Saved \$600,000 by incorporating continuous process improvement, business process outsourcing, and cost reduction strategies.
- Generated \$900,000 in incremental revenue by new products and new services.

• **Supervising Production: 20%**

Recruiting and cultivating top-notch talent through effective training and personalized, talent-based placement. Developing and incorporating solid process for new technology, project management, billing, and manpower planning.

**Selected accomplishments:**

- Created more than five new products and services.
- Retained more than \$250,000 through successful planning and execution of “roadmap” used to increase service options and maximize operational excellence.
- Saved \$190,000 with optimization of processes through the acquisition of new equipment for the manufacture.

• **Supervising Marketing: 10%**

Monitoring and improving personnel in sales department, including all aspects involved in creating a complete presentation of the organization’s image via website, advertising, and trade shows.

**Selected accomplishments:**

- Increased employee productivity 30% by introducing incentive[-]based sales compensation plans.
- Achieved 28% statewide overall improvement in customer satisfaction.
- Leveraged market impact and drove growth by implementing new market segmentation strategies.
- Solid growth of 15% of earnings year-over-year.

• **Supervising Human Resources: 10%**

Monitoring and improving personnel doing the selection, training, and performance evaluation of company employees and contractors. Profitability and employee development.

**Selected accomplishments:**

- Achieved 95% YOY employee retention by creating a driven, engaged workforce environment.
- Awarded top human resources recognition for employee development and retention through proactive recruitment, training, and personalized placement based on employee aspirations and talents.
- Created [REDACTED] development program for training and professional development.

- **Supervising Financial Matters: 30%**

Monitoring and improving personnel handling bidding, payables, receivables, investments, and daily cash flow.

**Selected accomplishments:**

- Reduced budget variance from 25% to 2% by devising comprehensive capital/expense budgeting procedures.
- Improved budget development accuracy by introducing automated forecasting tools and incorporating statistical process controls from previous manual system.

The Director determined that the submitted job description was vague and provided little insight as to the Beneficiary's daily job duties. The Director also found that the Petitioner did not provide sufficient information about the Beneficiary's subordinates, nor evidence establishing a complex organizational hierarchy that warranted and was able to support the Beneficiary in an executive position. The Director therefore denied the petition, concluding that the Petitioner did not establish that the Beneficiary was employed abroad in an executive capacity.

## 2. 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 was employed in abroad in a managerial or executive capacity.<sup>1</sup>

When examining the managerial or executive capacity of the Beneficiary, we will look first to the description of the job duties. See 8 C.F.R. § 214.2(l)(3)(iv). Published case has determined that the duties themselves will reveal the true nature of the beneficiary's employment. *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). Therefore, we look for a job description that clearly describes the job duties the Beneficiary performed.

The definitions of managerial and executive capacity each have two parts. First, the Petitioner must show that the Beneficiary performed 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 was *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the company's other employees. See *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

Looking to the job description the Petitioner provided in its RFE response, we concur with the Director in finding that the Petitioner provided job duties that are overly vague and provide insufficient information as to what tasks the Beneficiary performed during his employment abroad. For instance, the claim that 30% of the Beneficiary's time was spent evaluating the company's

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<sup>1</sup> While the Director made his findings within the context of the statutory definition of executive capacity, our decision will reflect consideration of the statutory definitions of managerial and executive.

strengths and weaknesses, making decisions about products and customers, and establishing financial goals does not provide an adequate understanding of what underlying tasks those job responsibilities entail and what role the foreign entity's support staff assumed in allowing the Beneficiary to meet those responsibilities. The job description is similarly deficient in describing how the Beneficiary supervised production, an activity that consumed another 20% of his time. While the Petitioner indicated that selecting the right employees and training them was integral to supervising production, it is unclear how these tasks, which are generally associated with tasks performed by human resources personnel, can be deemed as fitting within the scope of an executive capacity position. More importantly, the Petitioner indicated that the Beneficiary created new products and services as part of his supervisory role with regard to production. However, the Petitioner did not establish that creating products and services are accomplishments that are indicative of job duties carried out in an executive capacity.

Next, the Petitioner focused on the Beneficiary's responsibilities in monitoring personnel in the sales department, which appears to have been comprised of a single individual, and monitoring and improving staff in general through training and performance evaluations. While these job duties cumulatively comprised 20% of the Beneficiary's time, it is unclear how they can be deemed as executive-level tasks or why the Beneficiary had a role in performing them when the foreign entity's organizational chart expressly shows a vice president separating the Beneficiary from the rest of the company employees. In other words, the chart appears to be inconsistent with this job description, which indicates that the Beneficiary had a direct role in overseeing the company's staff and affecting their performance. It is unclear what specific role was assumed by the Beneficiary's immediate subordinate, who was depicted as the company's vice president and purportedly served as the direct manager or supervisor over the employees who carried out four key functions, including sales, engineering, administration, and projects. Similarly, the Petitioner did not establish that the Beneficiary's role in monitoring and improving personnel who carry out various operational and administrative tasks fits the criteria of executive capacity.

While the Beneficiary undoubtedly assumed the top-most position and made numerous discretionary decisions that affected the foreign entity, his placement within the foreign entity's organizational hierarchy and his discretionary decision-making authority are not sufficient to establish that the nature of the Beneficiary's underlying job duties were those of an executive.

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (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 a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

The statutory definition of 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 the 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.*

Here, there is little evidence to support the conclusion that the Beneficiary was employed abroad in an executive capacity. First, as previously mentioned, the foreign entity was not comprised of a complex organizational hierarchy. Rather, the organizational chart shows a single employee – the company’s vice president – separating the Beneficiary from the employees who actually carried out the company’s operational and administrative tasks. However, despite the separation that was artificially created by the foreign entity’s organizational chart, the Beneficiary’s job description indicates that the Beneficiary had a direct supervisory role over the foreign entity’s personnel and rather than focusing his time on directing the management of the organization, which, again appears to have been comprised of only the vice president, the Beneficiary appears to have been actually managing the entire operation along with its staff. As the Petitioner neglected to provide summary job descriptions of the foreign entity’s staff, it is unclear precisely what role, if any, the vice president actually had in relieving the Beneficiary from having to carry out the nonexecutive functions. That said, the lack of job descriptions for the foreign entity’s personnel hinders our ability to fully evaluate what job duties the support staff carried out and how their efforts affected the Beneficiary’s ability to focus his time primarily on executive functions.

Finally, while there is no indication that the Petitioner’s claim regarding the Beneficiary’s position abroad incorporated the statutory definition of managerial capacity, we find that even if the Petitioner had made such a claim, the evidence of record is not sufficient to support it.

The statutory definition of “managerial capacity” allows for both “personnel managers” and “function managers.” See section 101(a)(44)(A)(i) and (ii) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. The statute plainly states that a “first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor’s supervisory duties unless the employees supervised are professional.” Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(4). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

In light of the deficiencies cited above with regard to the Beneficiary’s job description and the lack of information pertaining to the foreign entity’s support personnel, we cannot conclude that the Beneficiary was employed either as a personnel manager, such that he would have spent his time

primarily on managing supervisory, professional, or managerial subordinates, or that he assumed the role of a function manager, such that he would have largely refrained from managing others and, instead, focused his time primarily on managing an essential function of the organization.

## B. U.S. Employment

The Director also denied the petition, in part, based on the determination that the Petitioner did not establish that it would support the Beneficiary in a managerial or executive capacity within one year of the approval of the petition.

### 1. Evidence of Record

In response to section 1(7), Form I-129 L Classification Supplement, which asked the Petitioner to provide a description of the Beneficiary's proposed job duties, the Petitioner indicated that the description of the Beneficiary's employment abroad at section 1(6), Form I-129 L Classification Supplement, should be applied. The foreign job description indicated that the Beneficiary was employed as a general manager and that his main concerns included strategic planning and supervising the development and delivery of products and services to customers.

The Petitioner also provided an executive summary, which includes a brief discussion of the Petitioner's investment and its business purpose. The Petitioner indicated that in order to deploy the initial phase of its operation, it would need to employ one administrative employee and two employees who will assemble machines and equipment.

In the RFE, the Director informed the Petitioner that the record does not contain sufficient evidence demonstrating that the new office will support the Beneficiary in a managerial or executive position within one year of the petition's approval. Therefore, the Director asked the Petitioner to provide a more specific business plan discussing timetables and business benchmarks over the course of the Petitioner's initial year of operation. The Director instructed the Petitioner to describe how it plans to achieve growth and expansion of the new office by stating what the Beneficiary and any other business staff will do in order to ensure that the Petitioner is fully operational within one year of the petition's approval and by providing a personnel plan demonstrating how the Petitioner will gain the ability to relieve the Beneficiary from having to primarily perform nonmanagerial or nonexecutive job duties at the end of that one-year time period.

In response, the Petitioner provided an eight-part business plan consisting of an executive summary, a market analysis, a marketing plan, an operational plan, a financial plan, forecasting scenarios, a strategic evaluation, an analysis matrix, and a business plan evaluation.

After reviewing the evidence, the Director determined that the Petitioner did not fully explain how it will conduct its business or establish that the nature of the business is such that will support the Beneficiary in a primarily managerial or executive capacity within one year of the petition's approval. The Director found that the Petitioner did not provide documentation establishing how the

new office would grow and achieve its projected business goals or what the Beneficiary and his staff would do to get the Petitioner to a fully operational status within one year of approval.

## 2. 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 the United States in a managerial or executive capacity within one year of approval of the petition.

As stated in our earlier discussion of the Beneficiary's employment abroad, when examining the managerial or executive capacity of the Beneficiary, we 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 performed by the Beneficiary and indicate whether such duties are in a managerial or executive capacity. *Id.*

The definitions of managerial and executive capacity each have two parts. First, the Petitioner must show that the Beneficiary performs and 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 is and 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.

In addition, it is important to note that when a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for or assisting with the set-up of operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial or executive responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

In the present matter, we find that the Petitioner did not provide sufficient evidence to establish that it would have the ability to support the Beneficiary in a managerial or executive position within one year of approval of the petition.

As indicated above, it is critical to consider the Beneficiary's proposed job duties and the organizational structure within which he would perform those duties in order to assess the Petitioner's eligibility. The Director expressly noted that the Petitioner's original submissions

lacked information about the duties of the Beneficiary and any other staff. While the Beneficiary is not expected to carry out primarily managerial or executive tasks during the Petitioner's first year of operation as a new office, a discussion of the Beneficiary's job duties and those of any other staff the Petitioner plans to employ during its first year of operation would nevertheless serve as one of several critical components in determining the likelihood that the Petitioner will become fully operational and be able to relieve the Beneficiary from having to primarily perform nonmanagerial or nonexecutive duties one year after the petition's approval. Here, the Petitioner did not provide a description of the Beneficiary's job duties or the job duties of the projected support staff during its first year of operation. In fact, while the Petitioner included a "Personnel Requirement" list at section 4.4 of the business plan, it did not provide a timeline for hiring an administrative assistant, an assembler of machines, an administrative manager, and a sales person, which are the four positions that the Petitioner listed in its hiring plan.

We further note that section 5.9 of the business plan lists the monthly labor costs for employing an administrative assistant, a machine assembler, an administrative manager, and an operational leader. However, this section, like section 4.4, also lacks a hiring time line and, to the extent that section 5.9 includes an operational leader as part of the hiring plan, it is inconsistent with section 4.4 of the plan, which did not include an operational leader. The Petitioner also neglected to provide hiring projections going beyond the first year of operation. As such, we are unable to determine how the Petitioner's personnel plan will change going forward and what staffing composition it foresees as necessary to relieve the Beneficiary from having to allocate his time primarily to nonmanagerial and nonexecutive tasks. While no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, each petitioner must establish that the non-qualifying tasks its beneficiary would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

We also find that further explanation is needed to allow for a meaningful understanding of the information provided in section 5.2(B) of the business plan, where the Petitioner created charts containing calculations of accounts receivable, suppliers and shopping calculations, calculation of inventory and stock requirements, and "[c]alculation of net need for working capital in days." The Petitioner did not explain how to interpret the various calculations or clarify how to apply these figures within the scope of the Petitioner's business income and expenses. For instance, the accounts receivable chart at section 5.2(B) Step 1 includes four columns – "medium term sales," "%," "number of days," and "average weighted days" – which were used to calculate the "[t]otal medium term." The Petitioner did not explain how this data should be interpreted or the significance of the data in understanding the Petitioner's business operation. The Petitioner included the same four columns in the chart at Step 2 titled "Suppliers – mid-term shopping calculation." However, it is unclear how these calculations are to be applied or how they add to an understanding of supplier costs within the scope of the business operation.

Next, we look to section 5.13 of the business plan, where the Petitioner stated that \$168,000 would be its “Breakeven” point after the first year of operation. However, it is unclear how this information fits with the section 5.12 chart on the Petitioner’s statement of income. Namely, the chart indicates that the Petitioner anticipates total revenue from sales to total \$228,000 with a net operating profit of \$36,960. In light of these income projections, it is unclear how the Petitioner arrived at the “breakeven” amount and whether that amount is based on the gross revenues or the net income. We further note that the Petitioner’s calculation of fixed costs in the chart at section 5.11 does not match the total fixed cost figure that was used in section 5.12 to calculate the statement of income. While the chart in the former section states that fixed monthly costs will total \$8300, the statement of income chart indicates that the fixed costs will be \$8400, for a difference of \$100 between the two charts.

Lastly, the Petitioner provided a “Summary of Initiatives” section followed by a more detailed description of each initiative and the personnel required to carry out the initiative. In its discussion of the third initiative – start of sales and marketing activities – the Petitioner indicated that a sales staff would be tasked with marketing and selling its products and services. However, only section 4.4 of the business plan actually included projections for hiring a “salesman” and the only information about the sales expense was included in the chart at section 5.7, which indicates that the Petitioner plans to incur a 5% commission expense. There is no indication that the Petitioner plans to pay a base salary or wages to its sales person. As such, it appears that the sales staff would not be compensated (outside of the 5% sales commission) for carrying out peripheral tasks, like attending trade shows and tending to the Petitioner’s website. The Petitioner also indicated that the production staff – comprised of an engineering, a purchasing, and a production department – would carry out the fourth initiative associated with manufacturing, testing, and delivering the Petitioner’s products to its customers. However, as the Petitioner did not list the job duties that would be assigned to the staff it seeks to hire during its first year of operation, it is unclear who would be responsible for carrying out the engineering, production, or purchasing tasks. While the Petitioner also made references to a “management staff” and an “external staff” as resources who would help execute initiatives five and six, respectively, the Petitioner did not indicate which positions would comprise a management and an “external” staff, when such staffing positions would be filled, or what job duties they would carry out.

On appeal, the Petitioner refers to “the years of successful sales abroad” and the potential use of the Petitioner’s products. The Petitioner argues that the Director does not have proper understanding of the nature of the products the Petitioner offers and that the Director did not take into account its list of potential customers or the purchase order in the amount of \$45,000. However, neither the list of potential clients nor the existing purchase order is sufficient to overcome the numerous deficiencies in the Petitioner’s business plan.

In light of the above analysis of the Petitioner’s business plan, we find that the Petitioner did not provide sufficient evidence to substantiate that it would advance to a stage of development wherein it would have the capability of relieving the Beneficiary from having to devote considerable portions of his time to nonmanagerial or nonexecutive tasks within one year of the petition’s approval, and

the Beneficiary would therefore be unable to allocate his time primarily to job duties that are in a managerial or executive capacity.

#### IV. EMPLOYER-EMPLOYEE RELATIONSHIP

In addition, while not addressed by the Director, two remaining issues to be examined are (1) whether the Petitioner established that the Beneficiary and the foreign entity had an employer-employee relationship at the time of the Beneficiary's claimed employment abroad and (2) whether the Petitioner would have such a relationship with the Beneficiary in the United States.

Section 101(a)(15)(L) of the Act states that only aliens who were "employed" abroad and are coming to the United States "to continue to render services to the same employer or to an affiliate or subsidiary thereof" will merit classification as an intracompany transferee. 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, where he will be temporarily employed in a managerial or executive capacity. This is in contrast to provisions in the Act, such as section 101(a)(15)(E), which permits the alien to file a nonimmigrant petition on behalf of himself or herself provided that the alien meets certain other conditions regarding a treaty trader or treaty investor.

The factors of ownership and control are critical in determining whether the Beneficiary had an employer-employee relationship with his employer abroad and whether he would have such a relationship with the Petitioner. See *Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538 U.S. 440, 451 (2003) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992)).

In the matter at hand, the record indicates that while the foreign entity directly owns the Petitioner, the Beneficiary directly owns the majority of and controls the foreign entity, thereby resulting in his indirect ownership and control of the Petitioner. The record indicates that the Beneficiary assumed the top-most position within the foreign entity's organization and that the same would be true of the Beneficiary's proposed position with the Petitioner. Thus, by virtue of owning and controlling both the Petitioner and the foreign entity that owns the Petitioner, and absent other evidence relevant to an employer-employee analysis, the record does not establish that the Beneficiary had or would have the requisite employer-employee relationship with either entity. This issue must be addressed in any future filings.

#### 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, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013). Here, that burden has not been met.

*Matter of E-USA, LLC*

**ORDER:** The appeal is dismissed.

Cite as *Matter of E-USA, LLC*, ID# 27081 (AAO Oct. 14, 2016)