



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

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

MATTER OF M-T-USA, INC.

DATE: OCT. 14, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a voice over Internet protocol (VOIP) company, seeks to temporarily employ the Beneficiary as the president 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 an executive or managerial capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish that the Beneficiary would act in a managerial or executive capacity in the United States within one year of approval of the petition. Further, the Director found that the Petitioner did not demonstrate that it has sufficient physical premises to commence doing business in the United States.¹

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence meant to demonstrate that the Beneficiary would act in an executive capacity within one year of approval of the petition. Further, the Petitioner provides additional evidence indicating that it has acquired additional office space and that it now has sufficient premises to house its new office.

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

¹ Lastly, the Director concluded that the Beneficiary was not eligible to change his status and extend his stay as he had been working without authorization while in the United States on a B-2 visitor visa. We will not address the Director's denial of the extension of status request in this decision, as this issue is not properly before us on appeal. The regulation at 8 C.F.R. § 214.1(c)(5) states: "*Decision in Form I-129 or I-539 extension proceedings.* Where an applicant or petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of the Service. There is no appeal from the denial of an application for extension of stay filed on Form I-129 or I-539."

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 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 a 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:

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- (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. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity within one year of approval of the petition. The Petitioner consistently claims that the Beneficiary would be employed in an executive capacity; therefore, we restrict our analysis to this issue and will not address whether he would be employed in a managerial capacity.

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

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

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

A. Evidence of Record

The Petitioner filed the Form I-129 on November 6, 2015. On the Form I-129, the Petitioner indicated that it has two current employees in the United States and no gross annual income to date.

In a support letter submitted along with the petition, the Petitioner stated that it “is the subsidiary of [REDACTED] Bangladesh [...], an organization involved in providing to Corporate,

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Manufacturers, Business Group consistently to meet Operational and Business objectives on time and on budget with due standard.” The Petitioner stated that the foreign entity now has plans to “expand our business based on the model that we have been successful with in Bangladesh” and that the Beneficiary was appointed to lead this effort.

The Petitioner explained that the Beneficiary would perform the following duties in the United States:

- Responsible for establishment [of] total business operations and expansion of [the Petitioner]
- Increase [Petitioner] business to all States of the US, Canada, Caribbean, Latin and South America
- Making corporate business Decisions regarding promotion and growth of business.
- Develop sales and marketing and Public Relations Strategies to acquire new customers.
- Make decisions regarding capital allocations for company’s business development matters.
- Allocate budget for all functions pertaining to the Business development of the company such as promotion, marketing, etc.
- Devise marketing strategies that will increase the company’s effectiveness and profitability.
- Oversee the negotiations of lease, broadcasting contracts, equipment, intellectual property contracts with artists and other program providers, and dealing with third party vendors of programs.
- Identify opportunities for strategic alliances and partnerships that further business goals.
- Set individual targets for different Executives, and for independent contractors who provide marketing services to [the Petitioner].
- Decide salaries and bonuses for all employees within his department.
- Directly report to the Board of Directors of [the Petitioner], and its parent entity

The Petitioner submitted a business plan dated January 2015, stating that it would act as an international carrier providing “high quality VOIP service” and prepaid calling cards. The business plan indicated that the Petitioner “offers a different type of Voice over Internet Protocol (VoIP) Services and Products under the Brand name [REDACTED]”

The Petitioner further indicated that it provides “the full spectrum of whole voice capabilities, and a “dynamic network” broadening the reach of a customer’s VoIP calling area, including [REDACTED] a “licensed prepaid calling service in USA and Global, operated by [the Petitioner] since 2015.” The Petitioner stated that it “delivers quality voice traffic to more than 190 countries worldwide with the use of its own network of international gateways spanning North America, Europe and Asia.”

The business plan further included financial projections for the business, estimating that it would earn \$2,470,000 in revenue during the first year of operation and over \$5 million during its second year. The business plan included a personnel plan reflecting that the Petitioner planned intended to hire the following employees at the following annual salaries: a country manager (\$24,000), a head of sales (\$24,000), a head of operations (\$12,000), a finance & accounts employee (\$3600), an "admin & HR" employee (\$3600), an engineer (\$6000), a programmer (\$7200), an "office asset & peon" (\$2400), and a driver (\$1800). The personnel plan reflects that all of these positions would be filled during the initial year of operations and would receive incremental salary increases in subsequent years. The personnel plan does not identify any additional positions to be filled after the first year.

In addition, the business plan contained a table detailing anticipated operating expenses during the first year and reflected that the company would have \$149,384 in expenses and that it would make \$124,000 in "major purchases" during the first year. The Petitioner stated that "to establish the business we must need \$460,846 [and] as start-up cost \$124,000." The Petitioner indicated that "funding for the launch of the business will be provided primarily by equity from the finance investor," noting that it "is in the process of negotiating with [a] potential investor for the seed cash needed to start the business." The business plan mentions that the investor would receive no more than 50% equity in the company.

The Petitioner provided a proposed organizational chart reflecting that the Beneficiary would act as president overseeing a director who in turn would supervise a manager - network operation center (NOC), a manager - business development, a head of sales, an operational manager, and a manager - finance & billing. The chart also included an NOC support team member, an associate, two account managers, an IT manager, an NOC engineer, a software programmer, and an accountant, for a total of 15 employees, including the Beneficiary.

The Director later issued a request for evidence (RFE) advising the Petitioner that it did not submit sufficient evidence to demonstrate that its new office would support the Beneficiary in a managerial or executive capacity within one year. As such, the Director requested that the Petitioner submit a letter from the foreign entity indicating the proposed number of employees and positions to be filled during the first year, including a summary of the duties and expected education levels of these positions. The Director also asked the Petitioner to provide information on the size of the United States investment and how it would support the Beneficiary in a managerial or executive capacity within one year. Further, the Director requested that the Petitioner submit a timetable for each proposed action it would take during the first year to launch the new office.

In a response letter, the Petitioner stated that its "goal [is] to become established as the leading Telecom Engineering Service provided in North America" and that it would rely on the skills of its "world class management team" abroad, including the Beneficiary, to accomplish this. The Petitioner indicated that it "expects to require a highly qualified CFO, HR Manager, Technical Professionals, additional customer service personnel, additional sales reps, and a public relations manager."

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The Petitioner stated that the Beneficiary's "U.S. assignment will entail similar job duties as those he has at the foreign company," which it listed as follows (verbatim):

- (i) Direct and coordinate the operations of the business; (25%)
- (ii) Manage subordinate staff, assign duties and ensure they adhere to operation procedures (10%);
- (iii) Establish business plans, goals, and develop administrative strategies to improve customer service, drive sales policies and increase profitability (20%);
- (iv) Review Financial Documents or sales reports to ensure achievement of business goals (15%);
- (v) Market effective and objective decisions regarding operational choices in work procedures, inventory application, ordering and scheduling (10%);
- (vi) Forecast staffing needs and develop recruiting strategies to provide optimal staffing in all areas; (10%)
- (vii) Exercise discretion authority over hiring and firing employees (10%)

The Petitioner further explained that it "also set aside a budget amount and opened a business checking account with [REDACTED] and total turnover since its inception [is] more than \$70,000." The Petitioner noted that the foreign entity decided to "bear 80% of the salary" and "provide cash thru an inter-company payment system" in the event of any shortfall.

The Petitioner submitted a "Special Purpose Auditors' Report" from [REDACTED] dated December 25, 2015, stating that the Petitioner would be "federally incorporated and will get FCC 214 registration as a leading wholesale termination provider of high quality VOIP service worldwide and FCC 499 Retails prepaid calling card business in the USA." The report indicated that the Petitioner "will be a fast growing VoIP carrier of international long distance voice calls." The report explained that [REDACTED] had "looked into the business plan prepared by the management [of the Petitioner]" and "considered the growth pattern suggested by the management." The auditor's report estimated the Petitioner would earn \$1.2 million in revenue during the first year and that it would have three employees during the first year and five during the second year.

The Petitioner provided a revised proposed organizational chart reflecting the company's projected hiring during the first three years. The chart indicated that during the first year, there would be a five-tier structure which would include the Beneficiary, a director, a vice president - network operation, a manager - finance and billing, and an accountant. Projections for the second year showed that the company would hire a head of sales subordinate to the Beneficiary, an operational manager below the Director, an IT manager subordinate to the vice president - network operation, a manager-business development and an associate employee subordinate to the accountant. The chart also reflected year three hiring plans, indicating that the company would hire several operational employees at this time, including "support team-1, network operation centre," an "NOC engineer," a software programmer, an account manager, and a customer service employee.

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Along with the proposed organizational chart, the Petitioner submitted duty descriptions for the Beneficiary and other proposed members of the organization, including a "Director and Company Secretary," an employee devoted to "Human Resources, Technology and Administration," and a vice president. The Petitioner set forth the following duties for the Beneficiary as president and CEO:

- formulating and successfully implementing company policy;
- directing strategy towards the profitable growth and operation of the company;
- developing strategic operating plans that reflect the longer-term objectives and priorities established by the board;
- maintaining an ongoing dialogue with the chairman of the board; putting in place adequate operational planning and financial control systems;
- ensuring that the operating objectives and standards of performance are not only understood but owned by the management and other employees;
- closely monitoring the operating and financial results against plans and budgets;
- taking remedial action where necessary and informing the board of significant changes;
- maintaining the operational performance of the company;
- monitoring the actions of the functional board of directors;
- assuming full accountability to the board for all company operations;
- representing the company to major customers and professional associations;
- building and maintaining an effective executive team.

The Petitioner provided a different version of its business plan, also dated January 2015, in response to the RFE. The plan stated that the Petitioner "expects to require a highly qualified CFO, HR manager, additional customer service personnel, additional sales reps, and a public relations manager." The plan indicated that the Petitioner will have strong profits based on \$5 million in sales by Year 3" and that it "is currently seeking funding in the amount of \$500,000 as a three-year loan for the purpose of increasing market share, opening up additional retail locations, hiring additional staff, and effectively advertising and promoting its services." The plan explained that the Petitioner would sell "cellular and two way radio service through progressive retail locations and outside sales representatives," and it stated that it had "established partnering relationships with leading companies in the industry and customers," including [REDACTED] and [REDACTED]. The Petitioner indicated that it has "been involved in selling cellular networking service and accessories" and that it "carries the latest in wireless technology from two of the major wireless networking companies in the industry."

In addition, the business plan explained that the Petitioner "was capitalized with financing arranged through first round investors in the amount of \$100,000," funds which were used to acquire "inventory, developing equipment and a[n] initial product and service line, and creating supportive marketing materials." The Petitioner asserted that the company would "do very well" in comparison to other start-up companies, stating that it had a goal of capturing 5% of the market in North America during the first year. The Petitioner referenced "strategic partnerships with leading companies in the industry," indicating that it had partnered with [REDACTED] and [REDACTED].

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In denying the petition, the Director stated that the Beneficiary's duties were generalized and did not establish that he would act in a managerial or executive capacity within one year. The Director found that the Petitioner did not demonstrate that the Beneficiary would oversee other supervisors or professional subordinates. The Director indicated that it was not clear that the Petitioner would have employees after the first year to provide goods and services and relieve him from performing non-qualifying operational tasks.

In its appeal, the Petitioner asserts that the Beneficiary will act in an executive capacity within one year of launching its operations. The Petitioner provides an additional support letter from its Director stating that the Beneficiary's "outstanding performances have contributed to securing several major deals with big telecommunication companies such as [REDACTED] and [REDACTED]. The Petitioner submits another duty description for the Beneficiary as follows:

[The Beneficiary's] role as the President will be supervising and controlling the USA operations of our company at our New York office. He will evolve new strategies and programs to expand our Telecom business and thus to contribute to the expansion of our business in the United States. He will work closely with the company's senior management in the development and growth of these deals in the US marketplace. He will evaluate and review the current trade deals. His proposed duties in the U.S. will include: 1) Supervising a team of managers who manage the operations of the networks for start-up markets and new technologies 2) Completely handling the responsibilities of all the operations in the United States which include the following: a) Supervising a team of top management personnel who run the day-to-day operations at Corp. in the United States. b) Providing key strategic technology and project management directives to stay ahead in the Telecommunications industry. c) Manage finance operations, Personnel and Human Resources development policies. d) Set guidelines for quality management, technical support management, and attended Telecommunications compliance workshops. 3) Report back to the parent company in Bangladesh. 4) Identify potential deals.

The Petitioner further states on appeal that the Beneficiary "will direct the overall operations and will NOT be overseeing the primary performance of subordinates' tasks." The Petitioner indicates that the company will "hire an additional ten employees for our subsidiary office within one year, including Vice President, Director, Vice President Network Operations, Manager Finance & Billing, Accountant, Head of Sales, Operational manager, IT Manager, Manager Business Development and Associate Staff."

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 would be employed in an executive capacity within one year of approval of the new office petition.

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 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 a beneficiary 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. 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. *See generally* 8 C.F.R. § 214.2(l)(3)(v). The Petitioner must describe the nature of its business, its proposed organizational structure, 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.*

When examining the managerial or executive 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 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 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.

In the current matter, the Petitioner has provided multiple vague duty descriptions that do not convey in detail the Beneficiary’s duties during and after the first year of operation. For instance, the Petitioner submitted various broadly stated duties that could be applicable to any executive acting in any industry such as him being “responsible for establishment [of] total business operations,” increasing business, “making corporate decisions,” making “decisions regarding capital allocations,” “devis[ing] marketing strategies,” “identify[ing] opportunities for strategic alliances,” managing subordinate staff and assigning duties, establishing business plan, goals, and administrative strategies, “develop[ing] recruiting strategies,” formulating and implementing company policy, “developing strategic operating plans,” putting in place “operational planning and financial control systems,” ensuring that operating objectives and standards of performance are understood and owned by management, amongst other vague tasks. In each case, the Petitioner does not specifically articulate or document operations the Beneficiary will establish, corporate decisions he will likely make, capital he will allocate, marketing strategies he will implement, plans, goals, and strategies he

will establish, recruiting he will manage, policies, operating plans, or financial control systems he will institute.

On appeal, the Petitioner provides yet another duty description for the Beneficiary. Although this description includes some references to the Petitioner's type of business, it still is not adequately specific to convey his actual day-to-day tasks during and after the first year. For instance, the Petitioner states that the Beneficiary will "supervise a team of top management personnel," provide "key strategic technology and project management directives," "manage finance operations, personnel and human resources development policies," "set guidelines for quality management, technical support management," and "attend Telecommunications compliance workshops." However, the Petitioner still does not specify the Beneficiary's actual day-to-day tasks or the top management personnel he will supervise, key strategic or project management directives he will likely set, finances he will oversee, quality management, personnel and human resources policies he will establish, or telecommunications compliance workshops he will attend. Reciting a 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. Conclusory assertions regarding a beneficiary's employment capacity are not sufficient. The actual duties themselves will reveal the true nature of the 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).

Overall, the position description alone is insufficient to establish that a Beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the Petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended managerial or executive capacity. The Petitioner has the burden to establish that it would realistically develop to the point where it would require the Beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the Petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

As noted, on appeal, the Petitioner contends that the Beneficiary will act in executive capacity within one year. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and a beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as an owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Here, the Petitioner has submitted several different hiring and personnel plans for its initial year of operations and has not offered any explanation for the discrepancies between these plans. For this reason, we cannot determine whether there would be sufficient staff to relieve the Beneficiary from significant involvement in the day-to-day operations within one year, so that he would reasonably be able to focus primarily on the broad goals and policies of the company.

In support of the petition, the Petitioner provides a projected organizational chart reflecting fifteen employees, including the Beneficiary, a director, a network operation center manager, a business development manager, a head of sales, and operational manager, a finance and billing manager, a network operation center support employee, an associate, two account managers, an engineer a software programmer and an accountant. However, in the accompanying business plan the Petitioner twice states that it will hire a total of nine employees in the first year, including a country manager, a head of sales, a head of operations, a finance & accounts employee, an administrative and human resources employee, an engineer, a programmer, an office assistant, and a driver.

Further, in response to the RFE, the Petitioner indicated that it would hire only five employees during the first year, including the Beneficiary, a Director, a vice president - network operation, a manager of finance and billing, and an accountant. At the same time, the Petitioner submitted a second business plan which stated that the company "expects to require a highly qualified CFO, HR manager, additional customer service personnel, additional sales reps, and a public relations manager." Finally, the "Special Purpose Auditor's Report," prepared for the Petitioner by an accounting firm indicated that the company would only hire three employees during the first year and grow to a total of 12 employees by the end of 2019.

On appeal, the Petitioner now states that it would hire ten employees during the first year. Overall, the Petitioner has claimed that it will hire three, five, nine, ten, or fifteen employees during its initial year of operations and we cannot determine which, if any, of these figures represents the Petitioner's actual anticipated staffing level for the upcoming year. The unresolved discrepancies in the Petitioner's proposed positions and hiring plans leave question as to its actions during the first year and whether it would likely support the Beneficiary in an executive capacity within the year. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In fact, to the extent the Petitioner provided specifics regarding its hiring plans during the first year, these leave question as to whether it will hire sufficient operational level employees to support the Beneficiary in an executive capacity. For example, the Petitioner's initial business plan, the only one of the submitted staffing plans that included proposed salaries and financial objectives, included a personnel table reflecting that only the Beneficiary and "head of sales" would earn more than \$12,000 per year, while the remaining employees would earn salaries commensurate with part-time employment for the first five years of operations. Another version of the Petitioner's hiring plan indicated that the company would hire four executive level employees and an accountant during the first year and indicated that it would not hire operational staff, such as support teams, engineers, software programmers, and account managers, until the third year. Finally, another projection

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indicated that the company would have only three employees by the end of its initial year in operation. None of these hiring plans suggest that the Petitioner would hire sufficient lower-level employees to relieve the Beneficiary from primarily performing non-qualifying operational tasks within the first year.

Further, the Director requested that the Petitioner submit duty descriptions and expected educational credentials for each of its proposed positions. However, the Petitioner did not submit this requested evidence. In fact, the Petitioner provided duty descriptions for only two executive positions subordinate to the Beneficiary, one of which, the employee devoted to "human resources, technology and administration," is not reflected on the accompanying organizational chart. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Once again, the Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

In addition, the Petitioner made various assertions regarding its current operations and projected plans that it has not substantiated with supporting evidence. For instance, the Petitioner stated that it has certain proprietary technologies it will introduce to the United States, including an asserted [REDACTED] technology and [REDACTED] but it provides no documentation that it or the foreign employer owns or licenses any proprietary technologies or products. The Petitioner states that it is already providing technologies and operating VOIP networks in the United States and over 100 countries worldwide, and that it has partnered with companies such as [REDACTED] and [REDACTED] and [REDACTED]. However, the Petitioner has not corroborated these statements with evidence that it already provides networks or services, or with evidence that it has already partnered with large telecommunications companies in the United States. In addition, the Petitioner indicates that it will open and operate retail stores in the United States, but does not clarify what would be sold in these stores. In fact, the Director asked the Petitioner to articulate specific actions it would take during the first year to launch the business along with a timetable for these actions, but it did not provide this information, submitting only unsupported assertions regarding already existing operations. 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 Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Furthermore, the Petitioner has not established the size of the United States investment as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The Petitioner provides conflicting statements regarding the foreign entity's required investment in the new venture. The Petitioner stated that the foreign entity has already invested \$70,000 in the new venture and that it will cover any cost overruns during the launch of the company, while later it indicated that it will require \$500,000 in funding, and elsewhere states that it has gained \$100,000 in funding from "investors." In its initial business plan, the Petitioner stated that it required \$460,846 to "establish the business" and indicated that this would be gained "primarily from the finance investor." The Petitioner explained in another part of the record that it was "in the process of negotiating with [a] potential investor for the seed cash

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needed to start the business.” However, at no point does the Petitioner definitively articulate or document the foreign entity’s planned investment in the new company and how this amount is sufficient to develop the company during the first year to support the Beneficiary in an executive capacity.

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.

III. PHYSICAL PREMISES

As discussed, the Director also denied the petition based on a finding that the Petitioner did not establish that it has acquired sufficient physical premises to conduct its business. *See* 8 C.F.R. § 214.2(l)(3)(v)(A). In denying the petition, the Director pointed to the fact that the Petitioner had secured only 144 square feet of office space, noting that this did not appear sufficient for its proposed expansion during the first year. On appeal, the Petitioner submits an amendment to its lease, indicating that it has secured an additional 360 square feet of space at its current leased location.

Upon review, we find that the Petitioner has submitted adequate evidence to establish that it has more likely than not acquired sufficient physical premises to launch its business. The evidence submitted on appeal supports the Petitioner’s claim that it had room to expand at its original location. As such, the Director’s decision as to this issue will be withdrawn.

IV. QUALIFYING RELATIONSHIP

Further beyond the decision of the Director, the evidence of record does not establish that the Petitioner has a qualifying relationship with the Beneficiary’s foreign employer.

To establish a “qualifying relationship” under the Act and the regulations, a petitioner must show that the beneficiary’s foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with “branch” offices), or related as a “parent and subsidiary” or as “affiliates.” *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

On the L Classification Supplement to Form I-129, the Petitioner identified the Beneficiary’s last foreign employer as [REDACTED] and stated that the U.S. company is a branch office of the foreign entity. The Petitioner submitted a “Memorandum of Association” for the foreign entity, dated in 2010, indicating that it has 10,000 outstanding shares owned as follows: [REDACTED] (4000 shares), the Beneficiary (3500 shares), [REDACTED] (2000 shares), and [REDACTED] (500 shares).

The Petitioner provided a corporate resolution dated October 1, 2015, indicating that its shares were distributed in the following percentages: the Beneficiary (55%), [REDACTED] (10%), [REDACTED]

(b)(6)

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██████████ (10%), ██████████ (10%), and ██████████ (10%). The Petitioner further provided a share certificate number 101 reflecting that 100% of its shares are owned by the foreign entity.

In the RFE response letter, the Petitioner stated that “[the Beneficiary], also owns 100% of the shares of the U.S. entity.” Finally, in an additional support letter provided on appeal, the Petitioner further indicates that “[the foreign entity] owns 100% of the stock of [the Petitioner].”

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. See *Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology Int'l*, 19 I&N Dec. at 595.

Here, the Petitioner has submitted conflicting statements and evidence with respect to its ownership. For instance, the Petitioner states in the Form I-129 that it is a branch office of the foreign entity, and elsewhere, that it is 100% owned by the foreign entity. However, a corporate resolution dated October 1, 2015, states that the company is majority owned by the Beneficiary with the remaining shares distributed among four other shareholders. The Petitioner further states elsewhere in a support letter that it is 100% owned by the Beneficiary. Therefore, these conflicting assertions and evidence leave question as to the Petitioner's actual ownership. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 582, 591-92.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that it has a qualifying relationship with the foreign entity.

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 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.

ORDER: The appeal is dismissed.

Cite as *Matter of M-T-USA, Inc.*, ID# 12402 (AAO Oct. 14, 2016)