



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

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

MATTER OF S-, INC.

DATE: SEPT. 8, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a computer consulting company, seeks to temporarily employ the Beneficiary as the president<sup>1</sup> 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 (1) the Petitioner did not establish that it has secured sufficient physical premises to house its new office; (2) the Petitioner did not establish that the foreign entity is doing business; and (3) the Petitioner did not submit sufficient evidence as to the financial stability of the U.S. entity and did not establish that the Beneficiary will be employed in an executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner disputes the grounds for denial, asserting that the Director applied the "existing office standard" to the petition instead of the "new office standard."

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

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<sup>1</sup> The Petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, and support letter that the Beneficiary's job title would be "President"; however, the Petitioner's business plan and proposed organizational chart state that the Beneficiary's job title would be "Chief Executive Officer" or "CEO."

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;

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- (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 TO HOUSE THE NEW OFFICE

The first issue to be addressed is whether the Petitioner established that it has secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

### A. Evidence of Record

The Petitioner filed the Form I-129 on September 10, 2015. On the Form I-129, the Petitioner states that the Beneficiary will be employed at [REDACTED] NC [REDACTED].<sup>2</sup> The Petitioner did not submit a copy of a lease agreement or other evidence related to its physical premises at this address.

In a request for evidence (RFE), the Director noted the lack of information concerning the worksite and requested that the Petitioner submit evidence to establish that it had secured sufficient physical premises for its business, including evidence such as a lease or contract between the U.S. entity and the property owner.

In response, the Petitioner stated that it had secured new office space at [REDACTED] NC [REDACTED] through a sublease agreement with [REDACTED]. The Petitioner submitted a copy of a sublease agreement with [REDACTED] showing that the Petitioner

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<sup>2</sup> The Petitioner also listed the Beneficiary's proposed address on the Form I-129 as [REDACTED] NC [REDACTED] which is substantially similar to the office location except for the city name.

We also note that according to publically available information, the property located at [REDACTED] NC [REDACTED] appears to be a residential apartment. 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 U.S. Citizenship and Immigration Services (USCIS) great flexibility in adjudicating this legal requirement. There may be cases in which a residential premises or home office would satisfy the regulatory requirements. However, the Petitioner bears the burden of establishing that its physical premises should be considered "sufficient" as required by the regulations 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. USCIS may also consider evidence that the company has obtained a license to operate the business from a residential dwelling, if required, evidence that the landlord has authorized the use of residential space for commercial purposes, evidence that the company has established separate phone lines or made other accommodations for the use of the premises by the U.S. company, or any other evidence that would establish that a residential dwelling or portion of a residential dwelling will meet the company's needs.

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leased office space beginning on February 1, 2014. The lease states that the term shall continue until terminated, but the Petitioner did not specify when the lease ended. The lease indicates that the space is authorized for two users and that it is a common co-working space. The Petitioner refers to this lease as "prior space." The Petitioner also submitted a copy of its email correspondence, dated November 2015, with a representative of [REDACTED] in which the Petitioner inquired about the availability of office space that can eventually accommodate eight to twelve people. The email from the [REDACTED] prospective landlord stated the following:

[The Beneficiary], Great to hear! We actually are changing the [REDACTED] space into a code school so [REDACTED] location would be best. I have an office that could hold 8-12 coming open in early February. You could begin there (it's at [REDACTED] in the [REDACTED]'. The office is 1827 RSF and runs \$3200/month. It includes four parking passes and has four private offices inside it. Would that be of interest?

There is no response from the Petitioner attached to this email. In its response to the Director's RFE, the Petitioner referred to this potential space as "leased space from February 2016" though no lease agreement was submitted.

In denying the petition, the Director noted that the Petitioner had not secured a sufficient office space to house the new office as of the date of filing. The Director acknowledged the business plan submitted by the Petitioner that states that the Petitioner intends to sign a lease agreement with [REDACTED] commencing on January 1, 2016. However, the Director found that the Petitioner's intention to sign a lease was not sufficient evidence that the Petitioner has met the physical premises requirements by the date of filing. The Director also noted that the Petitioner referred to a mail box address at [REDACTED] CA [REDACTED] however, this was not a sufficient office space to house the new office.

On appeal, the Petitioner states the following:

For a new office situation, dependent on the USCIS' favorable adjudication of the L-1A petition of the person to be in charge, a fully executed lease is neither mandated by law nor is a sane business practice. To require a petitioner to legally, contractually, commit to leased space in advance of the permitted transfer of the executive/manager in charge of the operations is overreaching. Surely, [the] Petitioner's submission of a landlord's stated reservation of space sufficient for [the] Petitioner's purposes, coupled with the Petitioner's previous lease agreement with the same landlord, satisfies the 'sufficient premises' standard.

## B. Analysis

Upon review, the Petitioner did not establish that it had secured sufficient physical premises to house the new office as of the date of filing. Proof of physical premises is required initial evidence for a

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new office petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(A). A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. 8 C.F.R. § 103.2(b)(1).

When a petitioner indicates that a beneficiary is coming to the United States to open a “new office,” it must show that it is ready to commence doing business immediately upon approval. At the time of filing the petition to open a “new office,” a petitioner must affirmatively demonstrate that it has secured sufficient physical premises. Here, the Petitioner contends that its submission of an email from its previous landlord regarding potential space becoming available in February 2016, along with the Petitioner’s previous lease agreement with the same landlord, satisfies the “sufficient physical premises” standard. A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg’l Comm’r 1978). Since the Petitioner has not actually secured a physical location for its business, it has not met the eligibility requirements as of the date of filing. We note that the email correspondence does not indicate that the Petitioner responded to the landlord’s email stating that it had space becoming available in February 2016. In any event, an email about a potential opening and a post office box are not sufficient evidence of a secured physical location.

Accordingly, the appeal will be dismissed for this reason.

### III. DOING BUSINESS

The Director also denied the petition based on a finding that the Petitioner did not submit sufficient evidence to establish that the foreign sole proprietorship continues to do business, as required at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). “Doing business” is defined as the “regular, systematic, and continuous provision of goods and/or services . . . .” *See* 8 C.F.R. § 214.2(l)(14)(ii)(A) and 8 C.F.R. § 214.2(l)(1)(ii)(H).

In support of the foreign entity’s ongoing business activities abroad, the Petitioner submitted copies of the foreign entity’s audited financial statements for 2013 indicating that the foreign entity generated 108,765 Euros in 2013. The Petitioner also submitted copies of several contracts between the foreign entity and its clients, including a contract for professional services between the foreign entity and [REDACTED] covering the periods October 14, 2015, until December 15, 2015; and a “model contract,” also with [REDACTED] covering the period September 4, 2014, until October 3, 2014. The Petitioner also submitted a contract between the foreign entity and [REDACTED] for a 30 day software development project beginning June 2015. The Petitioner also submitted a copy of a “statement of work” entitled [REDACTED]. This document describes tasks that will be completed during 40 working days between April 2015 and December 2015; however, it does not specifically refer to the foreign entity. Given the temporary nature of these contracts, it is unclear whether the foreign entity is continuously providing goods or services, rather, the evidence submitted indicates that the foreign entity engages in intermittent contracts for services that are not ongoing. It is unclear if these contracts will continue and many ended prior to the filing of this petition.

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We also note that the Petitioner submitted a supporting statement indicating, “[the Beneficiary’s] leadership has grown the Company from 150,000 Euro in income in 2011 to over 500,000 Euro in annual income in this short period of time.” The Petitioner did not submit the foreign entity’s most recent tax returns or other financial documentation to substantiate this claim.

Even if we were to find that the foreign entity is continuing to do business abroad, it is unclear how these business activities will continue once the Beneficiary is present in the United States. The Petitioner claimed in its support letter that the foreign entity is “taxed as a sole proprietorship in the Netherlands” and is “owned [100%] by [the Beneficiary],” and the foreign entity’s 2012 Accountancy Report indicates that it is registered with the [REDACTED] as a sole proprietorship. The Petitioner did not submit sufficient evidence to establish that the foreign sole proprietorship will continue to do business, as required at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *Matter of United Inv. Grp.*, 19 I&N Dec. 248 (Comm’r 1984). A sole proprietorship is “[a] business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity.” *Black’s Law Dictionary* 1520 (10th ed. 2014). As the Beneficiary claims to be the owner and sole proprietor of the foreign entity, the presence of the Beneficiary in the United States raises the question of whether the foreign business will continue to do business abroad.

The Petitioner has not identified who will run the business in his absence or how the foreign entity will continue to operate a software consulting business once the Beneficiary transfers to the United States. While the Petitioner did submit an organizational chart indicating that the foreign entity has eight other employees, along with brief employee job descriptions, the Petitioner did not submit sufficient evidence of this staffing such as payroll summaries, wage and tax statements, or employee personnel records. Without such evidence, we cannot conclude that the foreign entity has the employees in place to operate the business once the Beneficiary transfers to the United States. Furthermore, in its business plan, the Petitioner states, “[the foreign entity] will continuously support [the Petitioner] by providing funding, education and training as well as by transferring already established United States clients to the Company in order to facilitate provision of services.” The Petitioner does not indicate how the foreign entity will continue to operate such that it can provide funding, education, or training to the Petitioner, or who will provide these services. The Petitioner has also not identified the “established United States clients” who will be transferred to the Petitioner in the United States, or which clients will remain with the foreign entity. Without such evidence, the petition cannot be approved. Accordingly, the appeal will be dismissed for this additional reason.

#### IV. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY WITHIN ONE YEAR

The Director also denied the petition based on a finding that the Petitioner did not establish that the Beneficiary will be employed in an executive capacity within one year of approval. The Petitioner

claims, in response to the Director's RFE, that the position in the United States is managerial. On appeal, the Petitioner states that the Director "fail[ed] to adjudicate the Petitioner's contention that the proffered position is managerial in nature."

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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in

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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

According to the Petitioner, it was established in September 2013 to expand operations in the United States in order to provide clients with big data analysis software development and software engineering and architecture consulting services. In its supporting statement, the Petitioner stated the following:

Since starting in the Netherlands in 2011 we've had new customers joining every year, rewarding us with a 74% year over year growth. International customers include [redacted] and [redacted]. In Europe they include the [redacted] the [redacted] and [redacted]. Projects outside of Europe are with [redacted] and the [redacted] in [redacted]. For the past two years we have been making in-roads into the US market and intend to finalize a relationship with the [redacted] location in [redacted]. We generate revenue from consultancy and support, strengthened by a growing open-source community.

The Petitioner's statement indicated that the Beneficiary will serve as its "President" and submitted a "Proposed & Current" organizational chart, dated August 18, 2015, depicting the Beneficiary as CEO. The chart also lists [redacted] CFO, along with a "Project & Consultancy Team" and a "Sales Team" that are unfilled. There are also two individuals ([redacted] Client Services Manager, and [redacted] Interaction Designer) that are noted and both appear to report to the Beneficiary. The Petitioner also submitted [redacted] resume which lists her employer as [redacted] NV from February 2013 to present.

The Petitioner also submitted an employee chart describing its employees and their respective duties. The chart lists the Beneficiary, President/CEO; [redacted] Interaction Designer; [redacted] Business Development; and [redacted] Account Manager.<sup>3</sup>

The Petitioner also submitted a chart of projects. Most of the projects are "spearheaded" by the foreign entity, with the exception of two: [redacted] and [redacted]. The chart indicates that the Petitioner has provided evidence of these client relationships stating that, [redacted] proposal sent to [redacted] and "Correspondence with [redacted]"

The support letter also provided the following list of proposed job duties as follows:

<sup>3</sup> The Petitioner did not explain why two of the employees' titles are different on each chart.

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- Plan, develop, organize, implement, direct and evaluate the Company's fiscal function and performance.
- Participate in the development of the Company's plans and programs as a strategic partner.
- Evaluate and advise on the impact of long range planning, introduction of new programs/strategies and regulatory action.
- Enhance and/or develop, implement and enforce policies and procedures of the organization by way of systems that will improve the overall operation and effectiveness of the corporation.
- Establish credibility throughout the organization and with the shareholder and company partners as an effective developer of solutions to business challenges.
- Provide technical financial advice and knowledge to others within the financial discipline.
- Improve the budgeting process on a continual basis through evaluation and changes to processes and procedures on financial issues impacting budgets.
- Provide strategic financial input and leadership on decision-making issues affecting the organization; i.e. evaluation of potential alliances acquisitions and/or mergers and benefits and investments.
- Optimize the handling of bank and deposit relationships and initiate appropriate strategies to enhance cash position.
- Recruit, hire and fire the best human capital talent available, and seek out industry partners as necessary to supplement company proposals, projects and operations.
- Develop a reliable cash flow projection process and reporting mechanism, which includes minimum cash threshold to meet operating needs.
- Act as an advisor from the financial perspective on any contracts into which the Company may enter.

In the RFE, the Director requested, among other items, evidence to demonstrate how the company will grow to be of sufficient size to support a managerial or executive position and a more detailed description of the Beneficiary's proposed position to demonstrate that it will be in a managerial or executive capacity within one year.

In response to the RFE, the Petitioner submitted a copy of its business plan which explains that, "the company will aim to establish itself in three distinct markets, based on the proven success of its foreign affiliate: law enforcement, renewable energy, and consulting services." The business plan states:

[The foreign entity] had recognized the need for law enforcement related software in the United States, and has thus developed its [redacted] which [the Petitioner] will offer to law enforcement agencies and vigilant municipalities such as the [redacted] and the [redacted] among others. [The

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foreign entity] has also recognized an opportunity to expand its energy regulatory knowledge to the United States. [The Petitioner] will be marketing energy ratings software technology in a Software-as-a-Service form, to clients in the [REDACTED] – and later to the [REDACTED]. Moreover, [the Petitioner] will partner with its overseas affiliate to provide vast experience in big data analytics and software architecture consultancy.

The Petitioner's business plan also included a chart of the Beneficiary's proposed duties which is reproduced below (verbatim):

In Year 1, [the Beneficiary] will be responsible for overseeing the following:

| Tasks  | Personnel   | % Time |     |
|--|---|--------|-----|
| <b>Software Development Department</b>   | Software Engineers and Business Development Consultants | 60%    |     |
| <ul style="list-style-type: none"><li>Review and analyze development and testing of the Company's products.</li></ul>  |   | 10%    |     |
| <ul style="list-style-type: none"><li>Direct, design and implement strategic plans in a cost-effective and time-efficient manner.</li></ul>  |   | 10%    |     |
| <ul style="list-style-type: none"><li>Manage plans to ensure successful on-time completion of development phases</li></ul>   |   | 10%    |     |
| <ul style="list-style-type: none"><li>Stay alert to new trends.</li></ul>  |   | 10%    |     |
| <ul style="list-style-type: none"><li>Determine staff requirements, hire personnel, oversee training of new personnel activities and reports of lower level personnel submitted by managers.</li></ul> |   | 10%    |     |
| <ul style="list-style-type: none"><li>Direct and analyze IT consulting services</li></ul>  |   | 10%    |     |
| <ul style="list-style-type: none"><li>Direct, design and implement strategic plans in a cost-effective and time-efficient manner.</li></ul>  |   | 10%    |     |
| <b>Administrative Department</b>   |   |        | 20% |
| <ul style="list-style-type: none"><li>Establish and communicate</li></ul>  |   |        | 3%  |

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|--|---|-----|
| goals and objectives   | Chief Financial Officer and<br>Part-time Accountant |     |
| • Work on the set up of a strategy for being time efficient and, therefore, reduce costs |   | 5%  |
| • Plan a weekly meeting to coordinate the operations of the company                      |   | 2%  |
| • Perform financial forecasts and analysis   |   | 2%  |
| • Prepare customs documents  |   | 3%  |
| • Prepare financial statements   |   | 5%  |
| <b>Sales and Marketing Department</b>  |   | 30% |
| • Direct the Company's sales processes   | Client Services Managers and<br>Sales Advisors      | 10% |
| • Develop new innovative marketing campaigns to increase the customer base               |   | 5%  |
| • Direct a competitive analysis  |   | 5%  |
| • Promote the Company in target clients segments through social media                    |   | 10% |

The Petitioner's business plan also included a summary of the Petitioner's hiring projections. The Petitioner stated that in its first year, it will hire one Client Services Manager, four Software Engineers, one Sales Advisor, one Business Development Consultant, one Corporate Secretary, and one Part-time Accountant in addition to its Chief Executive Officer.

A "U.S. Internal Organizational Chart" in the business plan lists the Beneficiary as CEO and [REDACTED] as CFO along with the following positions: (1) Sales Advisors, (2) Business Development Consultants, (3) Client Services Managers, (4) Software Engineers, (5) Part-Time Accountant, (6) Corporate Secretary, (7) Human Resources Manager, and (8) Corporate Legal Counsel."

The business plan included a personnel plan that listed the anticipated payroll expenses for the first five years of operation. In the first year, the Petitioner stated that it expected to hire ten total employees and incur \$537,917 in total payroll expenses. The total payroll expense estimates are expected to rise to \$3,614,459 over the subsequent five years.

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The business plan also included a sales forecast that included unit sales and direct unit costs. The forecast for the first year anticipated \$941,000 in total sales including \$680,000 in sales of the [REDACTED] (34 units) and \$81,000 in sales of [REDACTED] (54 units). The sales projections also included \$144,000 in consultancy fees, and \$36,000 in revenue generated by a software architecture consulting contract between the Petitioner and the [REDACTED]. Regarding anticipated revenue, the business plan also stated that “the Company’s sales are expected to grow from \$941,000 in Year 1 to \$6,128,000 in Year 5.” In describing the financial status of the foreign entity, the Petitioner’s business plan stated, “At the end of the 2013 fiscal year, [the foreign entity] generated total net value of 108,765 Euros, which is equivalent to \$149,070.75.”

Regarding the initial investment needed, the Petitioner stated that, “[the foreign entity] has thus far invested \$20,000 into [the Petitioner]. Within Year 1, the foreign affiliate company will invest an additional \$80,000.”

In response to the RFE, the Petitioner also submitted an updated “Proposed & Current” organizational chart dated October 20, 2015, listing the Beneficiary as CEO along with [REDACTED] CFO, and [REDACTED] Client Services Manager. There are three divisions listed – “Project & Consultancy Team,” “Sales Team,” and “Support Staff” – and nine positions other than the CEO, CFO, and Client Services Manager – “Interaction Designer,” “Big Data Developer,” “Sales Advisor,” “User Interface Developer,” “Infrastructure Specialist,” “Business Development Consultant,” “Accountant,” “Corporate Secretary,” and “Corporate Counsel.”

The Director denied the petition, stating that the Petitioner did not establish that the Beneficiary will be employed in an executive capacity within one year of approval.

On appeal, the Petitioner states that the information provided in the previously submitted business plan is sufficient to establish that the U.S. operations would support a managerial or executive position within one year and that the Director “fails to adjudicate the Petitioner’s contention that the proffered position is managerial in nature.”

## B. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity within one year of the petition’s approval.

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 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.*

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 either in an executive or managerial capacity. *Id.* 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 proposed organizational structure, the duties of the Beneficiary’s proposed subordinate employees, the Petitioner’s timeline for hiring additional staff, the presence of other employees to relieve the Beneficiary from performing operational duties at the end of the first year of operations, the nature of the Petitioner’s business, and any other factors that will contribute to a complete understanding of a beneficiary’s actual duties and role in a business. The Petitioner’s 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).

Here, the Petitioner submitted two different sets of proposed job duties for the Beneficiary. In the duties listed in the support letter and reiterated on appeal, the Petitioner indicates that the Beneficiary will not perform any software development tasks. Rather, the tasks include general statements indicating that the Beneficiary will be responsible for “fiscal function and performance,” “long range planning,” “budgeting process,” and “strategic financial input and leadership.”

In the second description, which was contained in the business plan, the Petitioner indicated that the Beneficiary will spend (60%) of his time performing duties related to software development including, “Review and analyze development and testing of the Company’s products,” “Direct, design and implement strategic plans in a cost-effective and time-efficient manner,” “Manage plans to ensure successful on-time completion of development phases,” and “Stay alert to new trends.” The Petitioner indicated that the Beneficiary will spend 10% of his time on personnel management tasks such as “determining staff requirements,” “hiring personnel,” and “overseeing training of new personnel through staff, and monitoring management personnel activities and reports of lower level

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personnel submitted by managers.” The chart indicates that the Beneficiary will oversee the software engineers and business development consultants. The Petitioner also indicated that the Beneficiary will spend 20% of his time on administrative department tasks and 20% of his time on sales and marketing tasks. These departments did not specifically include personnel management duties, though the chart did list additional personnel for these departments including the “Chief Financial Officer and Part-time Accountant,” and “Client Services Managers and Sales Advisors.”

Given the considerable differences in the proposed job duties, we are unable to determine exactly what tasks the Beneficiary will perform on a daily basis, and who will relieve him from performing the day to day tasks of running a software development and consulting company. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm’r 1998). 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).

The list of duties submitted in the support letter and reiterated on appeal also do not contain percentages of time devoted to each task, making it unclear how much time the Beneficiary will devote to each task. This is important because absent a clear and credible breakdown of the time spent by the Beneficiary performing his duties, we cannot determine what proportion of those duties would be managerial or executive. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

We also note that if the Beneficiary will primarily perform the tasks stated in the support letter and on appeal, we are unable then to determine who will be responsible for sales and marketing and performance of the Petitioner’s software applications and consulting services that are projected to reach \$941,000 in the first year of operation. At the time of filing, the Petitioner stated that it employed one individual, the CFO, in addition to the Beneficiary. The Petitioner has not adequately explained how it expects to reach nearly one million in total sales in its first year of operation.

The Petitioner has also submitted inconsistent accounts of its staffing at the time of filing. In its initial filing, the Petitioner submitted a marketing brochure that lists three current employees in addition to the Beneficiary: [REDACTED] (Big-data awesomeness),” [REDACTED] (Finance! Support!),” and [REDACTED] (Start-up professional).” The Petitioner also submitted its Form 1120 U.S. Corporation Income Tax Return for 2014 which indicates that it paid \$2,301 in wages and had zero gross receipts or sales. Also in the initial filing, the Petitioner submitted a “Proposed & Current” organizational chart, dated August 18, 2015, depicting the Beneficiary as CEO. The chart also lists [REDACTED] CFO, along with a “Project & Consultancy Team” and a “Sales Team” specifically naming two individuals ([REDACTED] Client Services Manager, and [REDACTED] Interaction Designer) that both appear to report to the Beneficiary. This is inconsistent with a second “Proposed & Current” organizational chart that was submitted in response to the RFE. The second chart adds three additional support staff positions: “Accountant,” “Corporate Secretary,” and “Corporate

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Counsel.” [REDACTED] is listed as the Client Services Manager, however, [REDACTED] is not listed on the second chart.

The most recent projected organizational chart submitted with the business plan lists only two named employees: the Beneficiary and its CFO.<sup>4</sup> In its business plan, the Petitioner indicated that “it has already hired its Chief Financial Officer. Since the two “Proposed & Current” charts differ regarding who has been hired and the positions that the Petitioner intends to fill, we are unable to determine exactly what support staff exists to relieve the Beneficiary from performing day to day tasks of the business. 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).

Moreover, even if the Petitioner’s business were to grow and allow for hiring to occur at planned levels, the evidence in the record demonstrates that the Beneficiary would continue to perform the non-qualifying duties of software development and consultancy along with other marketing and sales related duties listed above, well beyond the one-year time frame. The Petitioner has not demonstrated that any of the planned subordinate staff would take over these non-qualifying duties, which according to the Petitioner’s business plan, make up over 60% of the Beneficiary’s responsibilities.

Furthermore, the record does not include sufficient probative information on the nature of the entity and its financial goals. According to the Petitioner’s business plan, it anticipates \$941,000 in total sales including \$680,000 in sales of the [REDACTED] (34 units) and \$81,000 in sales of [REDACTED] (54 units). The sales projections also include \$144,000 in consultancy fees, and \$36,000 in revenue generated by a software architecture consulting contract between the Petitioner the [REDACTED]. This contract is included in the record and represents \$36,000 of the projected \$941,000 in revenue expected in the Petitioner’s first year of operation. The Petitioner also submitted documents evidencing the Petitioner’s relationship with [REDACTED] and [REDACTED]. As discussed above, the [REDACTED] contract does not refer specifically to the Petitioner, the [REDACTED] document is a proposal only and the [REDACTED] contract ended prior to the filing of this petition. While the Petitioner states that it has current contracts with [REDACTED]

[REDACTED], these contracts have not been submitted. It is not clear if they are continuing, or if they will be assigned from the foreign entity to the Petitioner. It is also not clear if these contracts are included in the \$941,000 sales projections for the first year of operation that the Petitioner included in its

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<sup>4</sup> The foreign entity’s organizational chart which is part of the Petitioner’s business plan lists 8 employees in addition to the Beneficiary who is listed as “Managing Director.” This organizational chart lists one [REDACTED] who is identified as a “Big Data Specialist.” Even if the marketing brochure refers to the foreign entity’s employees, that list of employees significantly differs from the foreign entity’s organizational chart located in the Petitioner’s business plan at page 7.

business plan. Therefore, the Petitioner's assertion that it can cover its costs solely through revenue from new projects generated in the United States, without support from the parent company, is not persuasive.

The Petitioner has not sufficiently explained its business model or provided a realistic view of its financial structure to support its forecast. The regulations require the Petitioner to present a credible picture of where the company will stand in one year, and to provide sufficient evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position within that time. Without a documentation supporting the Petitioner's financial objectives for the first year of operations, it is not possible to conclude that the Petitioner will be able to support a qualifying managerial or executive position within a twelve-month period. 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).

Based on these deficiencies, we find that the Petitioner has not established that it will be able to support the Beneficiary in a primarily managerial or executive capacity by the end of the first year of operations. Accordingly, the appeal will be dismissed for this additional reason.

#### 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 S-, Inc.*, ID# 18233 (AAO Sept. 8, 2016)