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

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

MATTER OF MATTER OF H- USA LLC

DATE: SEPT. 22, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner describes itself on the Form I-129 as a "Remodeling and construction" business. It seeks to continue to employ the Beneficiary as its vice president of organizational development under the L-1A nonimmigrant classification for intracompany transferees. See Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in an executive or managerial capacity.

The Director initially approved this petition and granted the Beneficiary the requested extension of L-1A classification for the period December 10, 2009 through December 9, 2012. Following the approval, the Embassy of the [REDACTED] in [REDACTED] Venezuela, notified the United States Citizenship and Immigration Services (USCIS) of derogatory information regarding the Beneficiary's eligibility for classification under section 101(a)(15)(L) of the Act. The Director issued a notice of intent to revoke the approval (NOIR) and gave the Petitioner an opportunity to submit additional evidence in support of the petition, in accordance with 8 C.F.R. § 214.2(l)(9)(iii)(B). Upon review of the Petitioner's response, the Director revoked the approval of the petition on June 3, 2011 based on a finding that the Petitioner did not establish that the Beneficiary will be employed by the U.S. entity in a qualifying managerial or executive capacity.

The Petitioner asserts on appeal that the Director made numerous errors of fact and claims that the evidence on record establishes that the Beneficiary will be employed in the United States in a qualifying managerial or executive capacity. The Petitioner submits a brief statement and additional evidence in support of the appeal.

Upon *de novo* review, we will dismiss the appeal.<sup>1</sup> We find that the Petitioner has not met its burden to establish that the Beneficiary will be employed in a qualifying managerial or executive position. Furthermore, even if the Petitioner were to overcome the deficiencies in the record with regard to the

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<sup>1</sup> The Petitioner filed three I-129 petitions that are currently before the AAO on appeal. We reviewed the instant petition for the vice president of organizational development, along with the L-1A visa petitions for the president and managing director, [REDACTED] and the V.P./general manager, [REDACTED]

Beneficiary's managerial or executive position, we would need to remand the case to the Vermont Service Center to address additional deficiencies in the record.

## I. LEGAL FRAMEWORK

To establish eligibility for the L-1A 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 or executive capacity. *Id.*

The regulation at 8 C.F.R. § 214.2(l)(9)(iii)(A) provides that the Director may revoke the approval of a petition on notice at any time, even after the expiration of the petition, under certain circumstances. To properly revoke the approval of a petition, the Director must first issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation. 8 C.F.R. § 214.2(l)(19)(iii)(B).

## II. ISSUES ON APPEAL

### A. Managerial or Executive Capacity in the United States

The issue addressed by the Director is whether the Beneficiary will be employed in the United States in managerial or executive capacity.

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

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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.

1. Evidence of Record

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 2, 2009. The petitioner indicated that it operates a remodeling and construction business with ten employees and a gross annual income of \$448,741 through September 30, 2009.

In a letter dated November 20, 2008, the petitioner stated that the company provides services and products to the "U.S. construction industry" and that it is involved in new construction and building remodeling.<sup>2</sup> The petitioner indicated that the Beneficiary, in her proposed position as vice president of organizational development, would be responsible for directing and coordinating the company's "commercial activities to obtain optimum efficiency, economy of operations and maximize profits."

The petitioner further described the Beneficiary's duties as follows:

The Beneficiary will review and revise, as necessary, the organizational structure and financial goals of the business. As such, she will direct all financial activities of the organization, determine the scope of business operations to meet consumer demand, devise operating procedures to fit within the parent company's policy's [sic], determine the organizational structure and conduct cost analysis.

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<sup>2</sup> The petitioner also indicated that it has an ownership interest in four claimed U.S. subsidiary companies, including: [REDACTED] a seafood import company established in February 2009; [REDACTED] a stainless steel import company established in May 2009; [REDACTED] a real estate management company established in May 2008; and [REDACTED] a company established in January 2009 for the purpose of constructing a daycare center.

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She will direct the preparation of financial reports forecasting the company's business staff, during the course of the next three years of business activity, including a warehouse/stock supervisor, warehouse workers and a secretary.

The Petitioner further explained that the Beneficiary would be responsible for supervising the export coordinator, sales manager, and assistant for administration and finance. The petitioner provided an organizational chart showing the Beneficiary reporting to the vice president-general manager. Reporting to the Beneficiary were the sales manager and export coordinator. The chart depicts the administration and finance position as subordinate to the vice president – logistics, rather than to the Beneficiary's proposed position as claimed in the letter. Overall, the chart depicts ten positions including a CEO, five vice presidents, the sales manager, the export coordinator, the administration and finance position, and an assistant to the CEO and general manager.

An IRS Form 941, Employer's Quarterly Federal Tax Return, for the third quarter of 2009, the quarter prior to filing, shows seven employees. The petitioner's Florida Employer's Quarterly Report (Form UCT-6) for the same quarter shows five employees as of September 2009, and includes the individual identified as the administration and finance assistant. The petitioner also provided a New Jersey Employer's Quarterly Report (Form NJ-927), on which it reported two employees for the third quarter of 2009, including the individual identified as the sales manager, although the petitioner did not claim or provide evidence of its operations in New Jersey. The petitioner did not provide any evidence of wages paid to the claimed export coordinator. Further, the petitioner's initial evidence did not include position descriptions for any employees other than the Beneficiary.

USCIS approved the petition on December 4, 2009. Subsequent to the approval, the Embassy of the [REDACTED] in [REDACTED] Venezuela, notified USCIS of derogatory information regarding the Beneficiary's eligibility for the classification under section 101(a)(15)(L) of the Act. The derogatory information was based, in part, upon statements made by [REDACTED] the Petitioner's president, to embassy officials that the U.S. construction business "had never gotten off the ground" and that it was changing its focus to import and export and various other lines of business. Further, the president provided conflicting information about the number of employees the Petitioner employed. The domestic entity was also found to have no Internet presence, and the company's telephone numbers were from residential addresses. Finally, the embassy officials indicated that repeated telephone calls to the purported affiliated business in Venezuela went unanswered.

On December 1, 2010, the Director issued a NOIR. In this notice, the Director advised the Petitioner of the embassy's findings. The Director stated that, based on the information supplied by the [REDACTED] embassy in [REDACTED] it appears that the "instant petitioning entity has not and cannot provide the qualifying employment" and instructed the Petitioner to submit additional evidence to establish the Beneficiary will be employed in a managerial or executive capacity in the United States.

In a response dated December 30, 2010, the petitioner described the United States entity's business activities as purchasing "heavy equipment and parts" for its foreign affiliate's construction project

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"well into 2011 and 2012." The Petitioner stated that the Beneficiary will be responsible for "new business development and is the U.S. liaison to the various foreign affiliates." The Petitioner's president provided a description of the Beneficiary's duties in an affidavit. The affidavit stated that the Beneficiary is the "Vice President of Business Development," performing the following duties:

- Review and revise, as necessary the organizational structure and financial goals of the business in cooperation with the president and general manager (GM). (5% per week)
- Serve as U.S. liaison with the foreign affiliate on all matters and relate information to president and GM. (10% per week)
- Keep informed of all business development of foreign affiliate on a weekly basis in order to determine possible expansion and new needs that US firm could serve. (15% per week)
- Direct all financial activities of the organization and its affiliated US operations and report weekly to president and GM. (20% per week)
- Keep abreast of trends in crabmeat industry as well as heavy equipment and parts, including needs of consumers and clients, and report weekly on developments in these industries. (5% per week)
- Determine scope of business operations to meet consumer demand, devise business and operating procedures to fit in within the affiliate's policies. (5% per week)
- Conduct ongoing cost analyses and review budgetary needs and restraints on a weekly basis. (25% per week)
- Direct preparation of financial reports forecasting the company's business staffing needs during the course of the next three years of business activity. (15% per week)
- Attend U.S. and international conferences and exhibitions of interest to the U.S. firm and represent petitioner. (when applicable)

The president further stated that the Beneficiary is a "signatory on the corporate account of [REDACTED] [REDACTED] The president explained that the Beneficiary "oversees and supervises the Export Coordinator and an assistant," but acknowledged that the export coordinator position was "recently vacated."

The Petitioner's response to the NOIR included the same list of duties and further stated:

[The beneficiary] reports directly to the president and to the GM, but otherwise has unfettered control of subordinate staff and budgets. She is a signatory on the bank account of [REDACTED] which is owned in the majority by the petitioner. She is central to all business growth and relations of the petitioner with its U.S. subsidiaries and foreign affiliates.

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An organizational chart submitted in response to the NOIR shows two positions reporting to the Beneficiary; a sales assistant and an assistant. The chart depicts the sales assistant position as "Pending to Hire" and the assistant position as occupied by [REDACTED]. The chart includes a named export coordinator, but indicates that this position reports to the logistics manager, and no longer reporting to the Beneficiary. Similarly, the sales manager position is no longer reporting to the Beneficiary, and a marketing & sales supervisor is shown reporting to the logistics manager.

The Petitioner's letter in response to the NOIR included the names of job holders and descriptions for employees. The Petitioner's letter, however, did not include a description for the "sales assistant" position depicted on the organizational chart. The petitioner also submitted copies of resumes for some of its employees. According to the resume provided for, [REDACTED] the listed as the assistant to the Beneficiary on the organizational chart in response to the NOIR, she is also the general manager of [REDACTED].

The Petitioner submitted the requested IRS Forms 941 for 2009 and 2010, and Florida quarterly wage returns for 2009 and 2010. Of all the employees claimed as the Beneficiary's subordinates in either the initial Petition or in response to the NOIR, only the export coordinator and administration and finance assistant are listed as employed as of the quarter of filing on the Florida quarterly wage returns. The sales manager identified as the Beneficiary's subordinate at the time of filing was not reported during this quarter, nor was the assistant identified in the organizational chart in response to the NOIR.

After reviewing the response to the NOIR, the Director found inconsistencies in the evidence regarding staffing levels and the vague position description provided for the Beneficiary. On this basis, the Director concluded that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity in the United States and revoked the approval of the petition.

On appeal, the Petitioner provides additional evidence and asserts that the Director based his decision to revoke the approval of the petition on "several factual and legal errors." More specifically, the Petitioner asserts that the Beneficiary supervises subordinate professional level employees and therefore the Director erred in finding that the Beneficiary will not be employed in a managerial or executive capacity.

## 2. Employment in a Managerial Capacity

Upon review of the petition and the evidence, and for the reasons discussed herein, the Petitioner has not established that that it will employ the Beneficiary in a primarily managerial or executive capacity under the extended petition.

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description

of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.*

We also review the totality of the record, including descriptions of a beneficiary's subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to understanding a beneficiary's actual role in a business.

a. The Nature of the Petitioner's Business

As a preliminary matter, the Petitioner's description of the Beneficiary's duties is severely restricted by the fact that the Petitioner has not provided relevant and probative evidence of the nature of its business. The letter submitted in support of the initial petition states that the Petitioner was established with the purpose of providing services and products to the U.S. construction industry with a special emphasis on the business of construction and remodeling. In response to the NOIR, the president's affidavit stated that after being denied the proper permits for a day care center, the company shifted its business focus to the importation of crabmeat to the U.S. and the export of heavy machinery and parts to Venezuela. On appeal, the Petitioner states that "the Petitioner never claimed...to be engaged 'in construction' per se. In fact, the Petitioner exports U.S.-made construction machinery and equipment and parts to construction and civil engineering firms primarily in Venezuela." The Petitioner further stated, however, "[W]e engage in small and medium scale remodeling, construction, repair, and alteration of projects focusing on residential and commercial contracting."<sup>3</sup> The Petitioner must resolve inconsistencies or discrepancies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Without a clear understanding of the nature of the Petitioner's underlying business, we are unable to make a determination regarding the Beneficiary's claimed managerial or executive duties within that business. The Petitioner's subordinate employees, daily duties, sales structure, and business model are factors used to determine whether the Beneficiary will be relieved of non-qualifying duties or whether the company is of sufficient size to support a managerial or executive level position. The actual duties themselves 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).

b. The Beneficiary's Job Duties

Regarding the Petitioner's description of the Beneficiary's job duties, the initial description of the Beneficiary's duties was broadly drawn. Duties such as "review and revise the organizational structure and financial goals of the business," directing "all financial activities of the organization,"

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<sup>3</sup> We note that the Petitioner has not provided a copy of a Construction Industry License as required for the State of Florida. Furthermore, the Director requested a copy of the U.S. company's current valid business licenses for city, county, state and federal authorities. In response, the Petitioner provided a copy of its Business Tax Receipt for 2010-2011 showing a classification of "IMPORT/EXPORT."

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and determining "the scope of business operations to meet consumer demand," did not provide sufficient information regarding what the Beneficiary would do on a day-to-day basis to support the initial approval of the petition. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The Petitioner has failed to provide any detail or explanation of the Beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In response to the NOIR, the petitioner submitted a slightly more detailed list of the Beneficiary's duties with percentage of time spent performing each. Most of the position description was essentially the same as the vague position description submitted at the time of filing and thus not responsive to the director's request for a "comprehensive" description that would assist USCIS in determining the Beneficiary's actual duties. In his affidavit, the president stated that the Beneficiary's duties included directing financial activities of the organization and its U.S. affiliate operations, keeping abreast of trends in the crabmeat industry as well as heavy equipment and parts, conducting cost analysis, directing preparation of financial reports, and determining the scope of business operations to meet consumer demand. These duties provided little or no additional insight into what the Beneficiary primarily does on a day-to-day basis or how she carries out her objectives as vice president of organizational development. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). 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).

We note that in response to the NOIR and on appeal the Petitioner appears to be expanding the Beneficiary's duties to include some responsibility for the claimed subsidiary [REDACTED]. The record, however, does not include any documentation demonstrating ownership of the claimed subsidiary. The electronic articles of incorporation for [REDACTED] indicate that the corporation is authorized to issue 1,000 shares; however, the record is void of evidence to establish the actual number of shares issued and the ownership of those shares. There is also no evidence that the Petitioner was compensated for such services in the past by this entity, or that the Beneficiary was authorized to be employed by [REDACTED] pursuant to an individual or blanket petition.

c. The Employment and Remuneration of Employees

Although not claimed by the Petitioner on appeal, we will discuss whether the Beneficiary will manage subordinate supervisory, professional, or managerial employees.

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, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to supervise and control the work of other supervisory, professional, or

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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)(2). 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).

The record is inconsistent with respect to describing and documenting the number and types of subordinate employees supervised by the Beneficiary. In the letter submitted in support of the initial petition, the Petitioner stated that the Beneficiary will supervise the export coordinator, sales manager, and assistant for administration and finance. On the Petitioner's organizational chart submitted at the same time, however, the Petitioner shows the administration and finance assistant position reporting to a V.P. logistics, rather than to the Beneficiary. Furthermore, in response to the NOIR, the petitioner stated that the Beneficiary will oversee the export coordinator and an assistant, but noted that the position of export coordinator was "recently vacated." At the same time, the petitioner submitted an organizational chart depicting the Beneficiary's sole subordinate as an "assistant," and indicated a vacant sales assistant position that would also report to her. This same chart indicated that the export coordinator reports to the logistics manager, rather than to the Beneficiary.

Additionally, in response to the NOID, the Beneficiary's subordinate "assistant," is depicted elsewhere in the record as an assistant to the general manager and CEO, but states in her own resume that she is the general manager of the petitioner's claimed subsidiary, [REDACTED]. Regardless, the record contains no evidence of any wages paid to this individual [REDACTED], either at the time of filing or in its most recent quarterly wage reports.

Furthermore, the employee listed as the sales manager in the petitioner's initial organizational chart is on the Employer's Quarterly Report for the state of New Jersey for the third quarter of 2009. The petitioner, however, does not explain how employees reported in New Jersey are part of their operations in Florida or even acknowledge having any operations located in New Jersey. Therefore, it is not clear how the Beneficiary would maintain control of such employees' duties on a day-to-day basis, or, how they relieve the Beneficiary of non-qualifying functions. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

We also note inconsistencies in the submitted evidence related to the Petitioner's staffing levels and wages paid. For instance, the Petitioner's IRS Form 941 for the first quarter of 2010 shows that 11 employees were compensated total wages of \$64,758.02 in this quarter. The Florida Department of Revenue Employer's Quarterly report, however, shows that eight to nine employees were compensated a total of \$44,387.21 during that same quarter. Further, the Petitioner attests on the Form I-129 (also filed in this same quarter) that it employs ten employees. Again, the Petitioner

must resolve inconsistencies or discrepancies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Additionally, the IRS Form W-3 states that the Petitioner issued a total of 10 IRS Forms W-2 in 2009. The IRS Form W-3 and corresponding IRS Forms W-2 represent that the company paid \$110,649.49 in wages, tips, and other compensation in 2009. The company's 2009 IRS Form 1120, however, indicates that the Petitioner paid \$66,583 in salaries and wages and \$38,000 for the compensation of officers, totaling \$106,583.

On appeal, the Petitioner claimed that the inconsistencies in the wages reported on tax documents were the result of an accounting error and, in support of this assertion, it submitted an IRS Form 1120X, Amended U.S. Corporation Income Tax Return reflecting \$72,648 in salaries and wages and \$38,000 in officer compensation. There is no evidence, however, that the amended tax return was actually filed with the Internal Revenue Service (IRS), and the return has not been signed by an officer of the company. Absent such documentation, there is insufficient independent and objective evidence in the record to show that the reported wages were an accounting error. Again, the Petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

The inconsistent evidence in conjunction with the differing organizational charts do not provide a sufficient understanding of whom the Petitioner employed and what employees were and would continue to be subordinate to the Beneficiary.

Moreover, as discussed above, the Petitioner has not provided a consistent description of the nature of its business activities. Of the Petitioner's three iterations of its business model, the organizational chart does not show how any of these business lines are supported by sufficient staffing. First, if the Petitioner performs construction work, there is no staff tasked with performing construction services. If the Petitioner imports crabmeat, there is no subordinate staff to perform warehousing, sales, importation of the goods, or marketing duties, among others. If the Petitioner exports construction equipment, there is an export coordinator, but again no sales staff, warehouse staff, purchasing staff, or marketing staff. Thus, the Petitioner has not demonstrated that it has sufficient staff to relieve the Beneficiary from performing non-managerial or non-executive duties. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).<sup>4</sup>

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<sup>4</sup> We agree with counsel, however, that the seemingly low wages reported on IRS Form W-2 for 2009 did not reflect a full year of payments to the Petitioner's employees. We therefore withdraw the Director's finding that the wages paid during that part of 2009 were not commensurate with that of bona fide managerial, executive, or professional employees. We do not, however, find that this factual error was material. That is, it does not change the fact that the record failed to demonstrate that the Beneficiary will be employed in a managerial or executive capacity. Specifically and as discussed in greater detail herein, the Petitioner did not provide a detailed description of the Beneficiary's actual duties and did not resolve apparent inconsistencies in the record with respect to its staffing levels.

d. Subordinate Employees Are Not Employed in Professional, Managerial, or Supervisory Positions

Even if the Petitioner had established that it had staff available to relieve the Beneficiary from performing non-managerial or executive duties, which it did not, the Petitioner has not demonstrated that the Beneficiary's claimed subordinates are employed in professional, managerial, or supervisory positions.

When examining the managerial or executive capacity of a beneficiary, we review the totality of the record, including evidence to substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy. Artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial capacity position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the Beneficiary's subordinates are supervisors, managers, or professional level positions.

Of all the employees claimed as the Beneficiary's subordinates in either the initial Petition or in response to the NOIR, only the export coordinator and administration and finance assistant were employed as of the quarter of filing on the Florida quarterly wage returns.

Assuming that the Beneficiary supervises and controls the work of the export coordinator and administration and finance assistant, the Petitioner did not establish that either of these positions are managerial, supervisory, or professional level position. The Petitioner did not provide position descriptions for these employees at the time of filing and the position description provided in response to the NOIR did not establish that the positions were professional level positions.

Regardless of which employees the Beneficiary may or may not supervise, it is not clear from the Petitioner's description of the Beneficiary's duties how any of the claimed subordinate positions relate to the Beneficiary's responsibilities as vice president of organizational development. The position description for the "assistant" position describes her as the "Personal Assistant to the GM and to President/CEO." The description does not discuss duties in relation to the work performed for the Beneficiary or the financial or business function of the organization. In the organizational chart submitted in response to the NOIR, the Petitioner indicates that the export coordinator reports to the vice president of logistics (whose title was later changed to "logistics manager"). Finally, the revised position description submitted for the Beneficiary in response to the NOIR does not include any duties in which she is supervising subordinate positions. The position description submitted in the initial petition states that she will supervise three subordinate level positions although again, it is not clear which of her duties relate to the supervision of subordinates.

The totality of the record does not support a conclusion that the Beneficiary's subordinates, if any, are supervisors, managers, or professionals. Instead, the record indicates that the Beneficiary's subordinates perform the actual day-to-day tasks of operating the import/export business. The petitioner has not provided evidence of an organizational structure sufficient to elevate the Beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the Beneficiary's position does not qualify as primarily managerial under the statutory definitions.

Based on the foregoing, the petitioner has not supported a claim that the Beneficiary will be primarily responsible for supervising subordinate managers, supervisors, or professionals. The record does not clearly define the Beneficiary's duties, the structure of the organization, the number and types of employees supervised by the Beneficiary, or the scope of the petitioner's business.

e. Employment as a Function Manager

For similar reasons, the record does not support the petitioner's claim that the Beneficiary will, in the alternative, manage an essential function of the organization. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed position description that clearly explains the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

Even though the petitioner claims on appeal that the Beneficiary directs and manages the "business development" function, it is unclear who performs non-qualifying duties associated with the functions the Beneficiary is claimed to manage. As noted above, the Petitioner has not provided any consistent and credible evidence as to whom the Beneficiary actually supervised at the time of filing. Additionally, the Petitioner has not provided evidence that any of these claimed subordinates performs duties that would relieve the Beneficiary from performing non-qualifying duties associated with her area of responsibility.

Therefore, it is reasonable to conclude that either the Beneficiary is performing the lower level business development tasks herself, or she does not actually manage the business development function as claimed by the petitioner. In either case, we are left to question the validity of the petitioner's claim and the remainder of the Beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the Beneficiary is performing the finance and business function, we note that 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm’r 1988).

The Petitioner has not provided any evidence to demonstrate how the Beneficiary’s efforts in managing the claimed affiliated U.S. operations overlap with, or are supported by, any staff of the petitioning company. In the initial submission, the Petitioner included a corporate organizational chart and description of other related entities operating in the United States. The Petitioner did not submit any organizational charts for these operations, or provide evidence that these related entities are actually staffed. Furthermore, the Petitioner has not provided any evidence to establish ownership of the claimed affiliated entities. Without a clear description and evidence of the scope and nature of the petitioner's operations, hawse have no context in which to consider the Petitioner's claim that the Beneficiary's functional responsibilities extend beyond the petitioning company to its claimed subsidiary operations.

### 3. Employment in an Executive Capacity

The statutory definition of the term “executive capacity” focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and his or her 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 primarily spend his or her time directing the management and establishing the goals and policies of that organization. *Id.* Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on establishing the broad goals and policies of the organization rather than performing or directly supervising the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they “direct” the enterprise as the owner or sole managerial employee. The beneficiary must also exercise “wide latitude in discretionary decision making” and receive only “general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.” *Id.* Due to the overall lack of evidence as well as the inconsistencies in the Beneficiary’s position description and subordinate staffing described above, the Petitioner has not shown that its organization is of sufficient size and structure to support an executive level position.

### 4. Conclusion

Due to the Petitioner’s inconsistent description of its business operations, vague position descriptions, and insufficient and contradictory information regarding staffing levels, the Petitioner has not met its burden to show that the Beneficiary will be employed in a managerial or executive capacity position as defined by the Act and its implementing regulations. 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

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### III. ADDITIONAL ISSUES

Even if the Petitioner were to overcome the deficiencies in the record with regard to the Beneficiary's managerial or executive position, we would need to remand the case to the Vermont Service Center to address additional deficiencies in the record, specifically with respect to whether: (1) the Petitioner is or will be doing business as required; (2) whether the Petitioner has a qualifying relationship with a foreign entity; (3) the foreign entity continues to conduct business abroad; and (4) the Beneficiary's qualifying managerial or executive employment with the foreign entity.

#### A. Doing Business in the United States

The Petitioner has not established that it is a qualifying organization as specified in the regulations. The regulations define a qualifying organization as one doing business as an employer in the United States. *See* 8 C.F.R. § 214.2(l)(1)(ii)(2). "Doing business," is defined as the regular, systematic, and continuous provision of goods or services. *See* 8 C.F.R. § 214.2(l)(14)(ii)(A) and 8 C.F.R. § 214.2(l)(1)(ii)(H). Despite claims that it began operating in June of 2009, the Petitioner has not provided sufficient evidence to show that it has been doing business since June of 2009 and continues to do so to date.

As stated above, the first issue is that the Petitioner has not provided a consistent and credible description of its current business. The Petitioner has claimed the following throughout the duration of this petition and appeal: (1) the provision of construction services and products to the United States, including engaging in the construction business and offering remodeling services; (2) the exportation of heavy equipment to Venezuela and importation of crabmeat to the United States; and (3) the exportation of construction equipment.

We note that the Petitioner has submitted numerous invoices for the purchase of heavy equipment and machinery as well as shipping statements to the foreign parent company. The Petitioner, however, has not provided any bill of sale or shown payment made by the parent company, or any other end-client, to the United States Petitioner. In addition, the Petitioner provided many bank statements from its [REDACTED] account. The statements, however, show checks cashed and some other minimal activity, but do not provide further information regarding what other entities are making payments and providing income to the Petitioner.

The Director noted in the revocation decision that the Petitioner's photos cast doubt on the validity of the United States operations. Specifically, the Director noted the following with respect to the submitted photographs:

The interior warehouse photos show automobiles, an almost empty work area, and a person who appears to be cleaning up the same space using a forklift. Two other unidentified people are shown at work at counters along a side wall of the warehouse, but no clearly discernible product is highlighted. The office photographs show three

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people at work at computer desks. No properly identified workers or customers are pictured, as requested.

On appeal, the Petitioner states that the NOIR did not request the Petitioner to identify the workers in the photographs. The Petitioner generally states that the photos show “employees, products, activities” in the office and the warehouse.

We agree with the Petitioner’s assertion that the NOIR did not request the Petitioner to identify the workers in the submitted photographs. We note, however, that the photographs do not provide any detail regarding the Petitioner’s business operations. The photographs show minimal equipment which is purportedly the Petitioner’s basis of business operations. Furthermore, it is not clear how the automobiles fit into the Petitioner’s business model of exporting heavy machinery. The Petitioner has not responded to the Director’s comments in this regard.

Due to the Petitioner’s minimal evidence of ongoing operations, inconsistent business description, and photographs depicting little to no business operations, the record does not establish it is or will be doing business as required.

#### B. Qualifying Relationship and Doing Business Abroad

“Doing business” means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad. 8 C.F.R. § 214.2(l)(1)(ii)(H). To qualify for an L classification, the foreign entity must continue to actively engage in the regular, systematic, and continuous provision of goods while the Beneficiary is temporarily assigned to work in the United States. Here, the Petitioner has not established that the foreign entity continues to do business abroad.

On the Form I-129, the Petitioner asserts that it is a joint venture between the Beneficiary’s foreign employer, [REDACTED] and another entity, [REDACTED]. The record establishes the Petitioner’s relationship with the foreign employer as asserted. The question raised by the Director in the NOIR, however, is whether the Beneficiary’s foreign employer, [REDACTED] continues to do business as claimed, noting that attempted calls to the claimed affiliated entity in Venezuela went unanswered.

The Petitioner asserts in response to the NOIR and on appeal that it continues to do business through an affiliated entity [REDACTED] which has a civil construction project valued at \$20 million USD to build the [REDACTED]. But the Petitioner must show that it has a qualifying relationship with the claimed affiliated venture, [REDACTED] and that this venture continues to do business as required. As explained below, the Petitioner does not establish that the foreign employer has a qualifying relationship or continues to do business as required through the affiliated entity, [REDACTED]. Accordingly, the record does not establish that the Petitioner’s foreign employer, [REDACTED] continues to do business as required.

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1. Record of Evidence

With the Form I-129, the Petitioner provided the following evidence of [REDACTED] business operations: Venezuelan tax documents from 2006 and 2008; reference letters dated February 26, 2008 from business associates and banks attesting to the foreign entity's business operations; translated copies of the opening and closing balances of its bank accounts; and payroll documents.

Most documents in the record show the business operations of the [REDACTED] are prior to the filing of this petition, specifically pre-dating 2008.<sup>5</sup> Of the three contracts to be completed after 2008, two contracts are solely for work to be performed by another entity, [REDACTED]. The third contract states that [REDACTED] and [REDACTED] associated in the form of a consortium named [REDACTED] are to complete construction works for a third party contractor between July 15, 2009 and January 15, 2010. The contract is signed by the Beneficiary, as representative for [REDACTED] but is unsigned by the contractor's representatives.

In the NOIR, the Director notified the Petitioner that attempts to call the foreign entity during normal business hours were unsuccessful.

In response to the NOIR, the Petitioner submitted an affidavit from the Beneficiary claiming that at the time of the consular interview in Venezuela in February 2010, the foreign entity had formed a joint venture with [REDACTED] called [REDACTED]. The Beneficiary claims that the joint venture has a \$20 million construction contract for the [REDACTED] in [REDACTED] state, and although the foreign entity's original office remains open, the foreign entity was in the process of relocating the majority of its staff to [REDACTED] state. The Beneficiary states that the new address is [REDACTED] Venezuela."

In response to the NOIR, the Petitioner submitted a partial translation of a document purporting to form [REDACTED] as a joint venture between the managing director of [REDACTED] and [REDACTED] in his capacity as president of [REDACTED]. It appears that only a portion of the original document is included as the document ends mid-sentence on page three. The translation provided is less than a half page, and does not include the responsibilities and liabilities of the parties. The contract and a registration of fiscal information indicate that the company's address is [REDACTED]

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<sup>5</sup> The Petitioner provided a spreadsheet that lists [REDACTED] assigned works and contracts from January 12, 2004 through March 5, 2007 and translated copies of contracts for work to be performed by [REDACTED] and [REDACTED] during 2008.

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The Petitioner also submitted a subcontract agreement from [REDACTED] identifying [REDACTED] as the subcontractor. The original contract is forty pages in length, however, the translation provided is less than one page.

The Director noted in the revocation that evidence of the “alleged presence and operation of the foreign entity is in the Spanish language with no translations.” The Director also noted that photographs of the foreign company do not show specific business signs, employees, or customers to identify the business and that no probative evidence was submitted affirming the operation of the foreign entity.

The Petitioner asserts that the NOIR did not request that the Petitioner submit photos of the foreign affiliate, and that the photos were submitted to show the presence of the foreign affiliate at the [REDACTED] construction site.

## 2. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the record does not establish that the foreign entity is doing business abroad, or otherwise doing business through any qualifying claimed joint venture.

As a preliminary matter, the evidence of record does not support a finding that the foreign entity is doing business as [REDACTED] the Beneficiary’s claimed foreign employer on the Form I-129. As stated above, the Petitioner has not provided any valid contracts for the period requested in the name of [REDACTED] nor has it otherwise shown how it will continue to do business as this entity. The unanswered phone calls and statements from the Beneficiary in response to the NOIR regarding a changed office location cast doubt on whether this entity continues to operate at all. Furthermore, the most recent lease the Petitioner submitted for this entity ended May 1, 2009.

The Petitioner, therefore, must show that it conducts its operations abroad through one of the claimed joint ventures. As an initial matter, the Petitioner has submitted documents relating to two different entities. In the initial submission, the Petitioner submitted contracts and documents relating to a joint venture named [REDACTED]. In response to the NOIR, however, the Petitioner submitted information relating to a joint venture named [REDACTED].

The Petitioner has not established that either joint venture is a valid, legal entity and has a qualifying relationship with the Petitioner. The record contains a translated contract dated January 26, 2006 between the the managing director of [REDACTED] and [REDACTED] representing [REDACTED] creating a consortium, named [REDACTED] however, the original document is not included in the record. In response to the NOIR, the Petitioner also submitted a partial translation of a document purporting to form [REDACTED]. The Petitioner’s partial translation of the documents is insufficient for the purposes of these proceedings. The regulation requires that “[a]ny document containing foreign language submitted to USCIS shall be

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accompanied by a *full* English language translation which the translator has certified as complete and accurate..." 8 C.F.R. § 103.2(b)(3) (emphasis added).

Without a full translation of the document, we are not able to determine the nature, scope, parties, and terms of the joint venture or "consortium." In the case of a 50-50 joint venture, where each of two corporations (parents) owns and controls 50 percent of a third corporation (joint venture), a subsidiary relationship is created for purposes of section 101(a)(15)(L) of the Act under certain conditions. See *Matter of Siemens Medical Systems, Inc.*, 19 I. & N. Dec. 362, 364 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); 8 C.F.R. § 214.2(l)(1)(ii)(K).<sup>6</sup> Without a full translation of the document, we are unable to determine if the joint venture meets the definition of a qualifying organization.

Even if the Petitioner could show a qualifying relationship with either entity, [REDACTED] or [REDACTED] the Petitioner has not provided sufficient evidence to show that the foreign entities are doing business as required. Specifically, the 2009 contract for work to be performed by [REDACTED] is unsigned by representatives of the other party, and does not appear to be a valid contract. Furthermore, the latest contract related to this claimed joint venture ended January 15, 2010, or ten days after the filing date. The Petitioner has not submitted any additional evidence of business activity related to [REDACTED]

Regarding [REDACTED] the Petitioner claims on appeal that the "vital aspects" of the contract for its work on the [REDACTED] have been translated; however, certified translations have not been provided for parts of the contract. The Petitioner also submitted a subcontract agreement from [REDACTED] identifying [REDACTED] as the subcontractor. The original contract is forty pages in length, but the translation provided is less than one page. As stated above, the regulation requires that "[a]ny document containing foreign language submitted to USCIS shall be accompanied by a *full* English language translation which the translator has certified as complete and accurate..." 8 C.F.R. § 103.2(b)(3) (emphasis added).

The Petitioner has not demonstrated that it has a qualifying relationship with a foreign entity. In addition, even if it had documented a qualifying relationship with a foreign entity, the Petitioner has not established that the claimed foreign entity continues to do business as required. For this additional reason, even if the Petitioner were to overcome the deficiencies in the record with regard to the Beneficiary's managerial or executive position, we would need to remand the case to the Vermont Service Center to address this additional deficiency in the record.

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<sup>6</sup> In order to meet the definition of a "qualifying organization," there must be three corporations: two parent companies, and a third corporation established as the joint venture. *Id.* The joint venture must be formed as a corporation or other legal entity. 8 C.F.R. § 214.2(l)(1)(ii)(G). A business created by a contract as opposed to one created under corporation law is not be deemed a "legal entity" as used in section 101(a)(15)(L) of the Immigration and Nationality Act. *Matter of Hughes*, 18 I&N Dec. at 294; see also *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970).

C. Managerial or Executive Capacity with the Foreign Employer

The evidence of record does not establish that the foreign entity employed the Beneficiary in a qualifying managerial or executive capacity. The only description of the Beneficiary's duties abroad was provided in a letter in support of the initial petition. The description was vague and provided minimal specifics on what the Beneficiary did on a day-to-day basis in her position as the foreign entity's general manager. Duties such as: "oversee the overall operations, administration and supervision of activities"; "establishes and maintains appropriate systems of measuring necessary aspect of operations management;" and making sure that "off of the company's activities are in compliance and integrated with organizational requirements," do not give a clear picture of what the Beneficiary does on a day-to-day basis. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her/his daily routine. The actual duties themselves will reveal the true nature of the employment. *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). Furthermore, the Petitioner has not provided any of the Beneficiary's subordinates' position description or educational requirements to show that the Beneficiary supervised and controlled the work of other supervisory, professional, or managerial employees.

Due to the vague position description provided for the Beneficiary's employment abroad and lack of evidence regarding subordinate employees the record does not show that the Beneficiary was employed for at least one continuous year of full-time employment in a managerial or executive position with the foreign employer. For this additional reason, even if the Petitioner were to overcome the deficiencies in the record with regard to the Beneficiary's managerial or executive position, we would need to remand the case to the Vermont Service Center to address this additional deficiency in the record.

IV. CONCLUSION

Based on the foregoing discussion and in light of the unresolved discrepancies noted above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States. Accordingly, we find that the Director appropriately revoked the approval of the petition pursuant to 8 C.F.R. § 214.2(l)(9)(iii)(A)(5): "Approval of the petition involved gross error." 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.

**ORDER:** The appeal is dismissed

Cite as *Matter of H- USA LLC*, ID# 123535 (AAO Sept. 22, 2016)