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

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

MATTER OF H- USA LLC

DATE: SEPT. 26, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner describes itself as a "Remodeling and Construction; Import & Export" business. It seeks to continue to employ the Beneficiary as its president and managing director 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 February 13, 2010 through February 12, 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 and additional evidence in support of the appeal.

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

¹ The Petitioner filed three I-129 petitions that are currently before the AAO on appeal. We reviewed the instant petition for the President and Managing Director, along with the L-1A visa petitions for the V.P./General Manager, [REDACTED] and the Vice President of Organizational Development, [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)(14)(ii) provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

Finally, 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 primary issue addressed by the Director is whether the Beneficiary will be employed in the United States in a managerial or executive capacity.

(b)(6)

Matter of H-USA LLC

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.

1. Evidence of Record

The Petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 5, 2010. The Petitioner is a corporation established in 2008 under the laws of the state of Florida. The Petitioner claims on the Form I-129 that it is a joint venture of two Venezuelan companies: [REDACTED] and [REDACTED]. The Petitioner indicated that it is a remodeling/construction and

Matter of H-USA LLC

import/export company with ten employees and gross annual income of \$448,741.60 as of September 30, 2009.

The Beneficiary was initially granted a one-year period in L-1A status to open a new office in the United States. USCIS subsequently approved the instant petition granting the Beneficiary an extension of stay in L-1A status. The Director later revoked this petition extension, and the Petitioner now appeals the revocation.

In a letter dated December 8, 2009 and submitted in support of the initial petition, the Petitioner stated that the purpose of the United States business is to provide "services and products to the U.S. construction industry, with special emphasis on the business of construction and remodeling." The Petitioner further noted that it is engaged in "small and medium scale remodeling, construction, repair, and alteration of projects focusing on residential and commercial contracting." The Petitioner provided a corporate organizational chart showing four subsidiary entities: [REDACTED] and [REDACTED]

The Petitioner stated that the Beneficiary, as the managing director/president, will perform the following duties:

- Further develop, establish and direct the subsidiary's mission, financial goals, and budgets.
- Oversee hiring of senior staff, eventually including a General Manager and Project Manager, other administrative staff and warehouse workers, and ensure proper training procedures and policies.
- Establish organizational structure and delegate authority to subordinates.
- Represent organization to financial community, major potential clients, local and state government agencies, and the public.
- Oversee the investment of resources by reviewing financial statements and making projections according to current conditions.
- Determine and oversee further investment in the subsidiary, including equipment, staffing levels, marketing and publicity, and the like.
- Analyze costs and determine pricing and profit margins, and report to parent company on fluctuations.

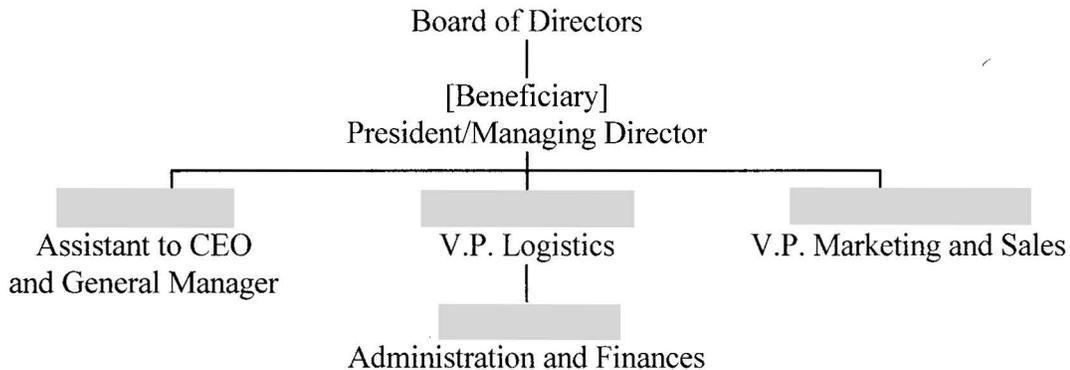
The Petitioner stated that the Beneficiary will directly oversee the work of the assistant to the CEO and general manager, the vice president of logistics, and the vice president of marketing and sales. The administration and finance assistant is jointly supervised by the Beneficiary and the vice president of logistics. The Petitioner provided names and a position description for each position. The Petitioner also stated that the Beneficiary indirectly supervises four additional employees.

The organizational chart initially submitted with the Form I-129 indicated that the Beneficiary's subordinate employees are: assistant to CEO and general manager, [REDACTED] vice president of marketing and sales, [REDACTED] vice president of logistics, [REDACTED] An

(b)(6)

Matter of H-USA LLC

administration and finance employee, [REDACTED] is placed under the vice president of logistics. The initial chart also indicates that general manager/vice president, [REDACTED] is parallel to the Beneficiary. The chart indicates that the general manager/vice president is directly responsible for vice president-food division, [REDACTED] and vice president-organizational development, [REDACTED]. The vice president-organizational development has a subordinate sales manager, identified as [REDACTED] and an export coordinator identified as [REDACTED]. The chart, with regard to the Beneficiary's subordinate organizational, structure is as follows:



The Petitioner submitted its IRS Form 941, Employer's Quarterly Federal Tax Returns, Florida Employer's Quarterly Reports, New Jersey Employer's Quarterly Reports, and payroll documents in support of the petition, among other items.

The Director approved the instant petition on January 6, 2010.² 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 the Beneficiary 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 Beneficiary provided conflicting information about the number of employees the Petitioner employed. The Petitioner 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 [REDACTED] 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.

² Although the petition requested an extension of three years, the approval extended the Beneficiary's L-1A classification for a two year period. See 8 C.F.R. § 214.2(l)(15)(ii) (limiting an extension of authorized stay in L-1A status to "increments of up to two years").

(b)(6)

Matter of H-USA LLC

The Petitioner submitted a timely response to the NOIR on January 3, 2011 and provided the following documents: (1) an affidavit from the Beneficiary; (2) a corporate diagram; (3) another position description for the Beneficiary, including the percentage of time spent on each duty; (4) employer state quarterly tax returns for the third and fourth quarters of 2009 and the first three quarters of 2010; (5) education credentials for the Beneficiary; (6) resumes and position descriptions for U.S. employees, including the percentage of time spent on each duty; (7) IRS Forms 941, Employer's Quarterly Federal Tax Return, for the third and fourth quarters of 2009 and the first, second, and third quarters of 2010; (8) IRS Forms W-2 and Form W-3 for 2009; (9) photographs of its physical premises; (10) its U.S. bank account information; (11) business invoices for the purchase of heavy machinery and machine parts; and (12) its 2009 IRS Form 1120, U.S. Corporation Income Tax Return.

The updated organizational chart submitted in response to the NOIR indicates that the Beneficiary directly oversees a logistics manager identified as [REDACTED] who in turn oversees export coordinator, [REDACTED] and marketing and sales supervisor, [REDACTED]. The updated organizational chart indicates that warehouse/shipping assistant, [REDACTED] is subordinate to the marketing and sales supervisor, [REDACTED]. The chart also changes the structure under [REDACTED] the general manager/vice president. The chart indicates [REDACTED] vice president of business development, is subordinate to the general manager/vice president and has a subordinate assistant identified as [REDACTED]. The chart indicates that an additional sales assistant position is also subordinate to the vice president of business development, but that the position is currently vacant.

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 qualifying 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 and managerial level employees and therefore the Director erred in finding that the Beneficiary is not 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 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 either in an executive or 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 December 8, 2009, letter submitted in support of the initial petition stated 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 Beneficiary submitted an affidavit dated December 30, 2010, stating 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."³ 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 Petitioner repeatedly provided an overly broad description of those duties in the initial submission, in response to the NOIR, and on appeal. For example, the Petitioner stated that the Beneficiary will "develop,

³ 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."

(b)(6)

Matter of H-USA LLC

establish, and direct the mission financial goals, and budgets of the Petitioner and the companies it operates”; “oversee the investment of resources”; “oversee management of the Petitioner’s affiliated US companies”; and “establish and revise organization structure.” While these broad and generalized responsibilities suggest that the Beneficiary has authority over the company’s policies and activities, they offer little insight into what he will actually do on a day-to-day basis as the Petitioner’s president and managing director. Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990).

We note that, in response to the NOIR, the Petitioner provided percentages for the Beneficiary’s initial described duties. Due to the initial job description’s lack of sufficient detail, however, the percentages did not provide any additional insight into what the Beneficiary does or would do on a day-to-day basis. As such, the Petitioner’s description of the Beneficiary’s job duties does not sufficiently establish what proportion of the Beneficiary’s duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

In response to the NOIR and on appeal, the Petitioner expanded the Beneficiary’s duties to include overseeing “management of petitioner’s affiliated US companies” including [REDACTED] and others. The Petitioner, however, has not provided sufficient evidence to establish its ownership or control over these separate business entities.⁴ As each company is a distinct entity, with no documentation to establish ownership and control, the Petitioner has not established that the time the Beneficiary spends or would spend on the management of the Petitioner’s claimed subsidiaries, including [REDACTED] and [REDACTED] can be considered in determining the Beneficiary’s employment in a managerial or executive capacity for the Petitioner. There is also no evidence that the Petitioner has been compensated for such services in the past by these other entities or that the Beneficiary is or was authorized to be employed by them pursuant to an individual or blanket petition.

⁴ The record does not include any documentation demonstrating ownership of the Petitioner’s claimed subsidiaries. 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. Similarly, the articles of incorporation for [REDACTED] indicate that the company’s officers are [REDACTED] and [REDACTED] and that the issuance of 100 shares of company stock is authorized, but there is no evidence to indicate the actual ownership.

Additionally, the record contains inconsistent information regarding the ownership of [REDACTED] and [REDACTED]. The Petitioner’s 2009 and 2010 Form 1120 indicates that the Petitioner owns 66% of [REDACTED] and 100% of [REDACTED] however, the company relationship chart and December 8, 2009 letter in support of the petition indicate that the Petitioner owns 90% of [REDACTED] and 60% of [REDACTED]. A Form 1065 provided for [REDACTED] also indicates his ownership, in an individual capacity, of 33.333% of [REDACTED]. 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 591-592.

c. The Employment and Remuneration of Employees

On appeal, the Petitioner claims that the Beneficiary supervises professional and managerial level employees and that the Petitioner was sufficiently staffed at the time of filing to relieve the Beneficiary from performing non-qualifying duties. Specifically, the Petitioner claims that both the Marketing Manager and Logistics Manager are both professional and managerial level positions.

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 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).

Based on the submitted evidence, the Petitioner’s organizational chart submitted with the initial filing reflects staffing levels as of the filing date. The chart submitted in the initial petition indicates that an assistant to the CEO and general manager; a vice president of logistics; and a vice president of marketing and sales are directly subordinate to the Beneficiary. An administration and finance position is shown as subordinate to the vice president of logistics.

The organizational chart submitted in response to the NOIR, however, creates an additional level of hierarchy by placing a vice president of marketing and sales and his subordinate assistant under the Beneficiary’s subordinate vice president of logistics. Based on the federal and state employer quarterly tax returns, however, it appears that the Beneficiary’s subordinate employees at the time of filing are the same as those listed on the initial organizational chart. Furthermore, the position of Assistant Warehouse/Shipping, shown on the organizational chart submitted in response to the NOIR, does not appear to have existed as of the date of filing. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), (12). The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg’l Comm’r 1978). Our analysis, therefore, will be based on the organizational chart submitted at the time of filing.

We 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 claims 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 would be subordinate to the Beneficiary.

Even assuming that the staffing levels at the time of filing are those listed on the initial organizational chart, it is not clear who performs the actual day-to-day duties of the company. At the time of filing, Petitioner claimed to employ the Beneficiary as president/managing director, a general manager/vice president, four vice presidents, a sales manager, an assistant to the CEO and general manager, and an administration and finances employee. Of the number of employees listed on the Form I-129, the Petitioner asserts that seven of ten employees were managerial or supervisory level positions, leaving three employees to perform the actual day-to-day duties of the company.

Moreover, as discussed, 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 a V.P.-Food Division and sales manager, but 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 and sales manager, 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 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).⁵

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 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 a 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 or managers. As stated above, the Petitioner claimed that seven out of ten of its employees are managerial or supervisory positions, leaving only three employees to perform the actual day-to-day duties of the company. On the other hand, the organizational chart submitted at the time of filing shows that the only claimed subordinate supervisory position is the vice president of logistics who in turn supervises the administration and finances position. In either case, the Petitioner has not demonstrated that the vice president of logistics will act in a managerial or supervisory capacity. In fact, the Petitioner's initial description of the vice president of logistics position indicates the opposite. Specifically, it includes mainly non-supervisory duties such as "receiving, checking and inspecting all materials requested" and ensuring "correct labeling and packaging of finished goods," as well as working with "vendors and the materials departments regarding returns and material issues," among others. In addition, the description of the vice president of logistics' subordinate position states that she will be managing "all employees, contractors and sub-contractors." But the Petitioner has not provided any evidence related to these additional workers, e.g., W-2s, 1099s, invoices, checks, or bank statements. Furthermore, her

⁵ 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 bone 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 has been and would continue to 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.

description does not include any duties related to the administration and finance work associated with her title.

In addition, the Petitioner has not shown that the Beneficiary's subordinates qualify as professional level positions. The Petitioner has not established how the duties stated above for the vice president of logistics qualify as professional in nature.⁶ Similarly, the inconsistencies in the Petitioner's description for the vice president of marketing and sales casts doubt on whether the position is professional level. Specifically, the position description for this position in the initial filing states that the position is responsible for: developing pricing strategies; identifying, developing, and evaluating marketing strategies; evaluating the financial aspects of the services and products provided; and coordinating all sales and marketing aspects. The resume provided for the employee in this position, however, indicates that he is employed by the Petitioner as a sales representative and that his responsibilities include the sale of parts and accessories for vehicles and heavyweight machinery. 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 591-92.⁷ Absent such evidence, the Petitioner has not established that the vice president of marketing and sales is a professional level subordinate employee.

Overall, the Petitioner has not demonstrated that the Beneficiary's subordinates' duties are managerial, supervisory, or professional in nature. Based on the lack of evidence presented as well as the position descriptions and inconsistencies in the record related to the Petitioner's staffing, we find the record does not contain sufficient, credible evidence of an existing organizational structure that would elevate the Beneficiary's supervisory duties to those that are higher than a supervisor of non-professional, non-managerial, or non-supervisory employees. Therefore, the Petitioner has not demonstrated that the Beneficiary would continue to act in a qualifying managerial capacity.

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

⁶ In evaluating whether the Beneficiary manages professional level employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Cf. 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

⁷ Furthermore, the record does not contain education credentials for the Beneficiary's subordinate employees. While the Petitioner claims that degrees for the beneficiary's subordinate employees were not provided because the documents could not be obtained before the deadline of the NOIR, the documents have not been provided on appeal. The Petitioner cannot meet its burden of proof simply by claiming a fact to be true, without supporting documentary evidence. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)); see also *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner must support its assertions with relevant, probative, and credible evidence. See *Matter of Chawathe*, 25 I&N Dec. at 376.

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.

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: (1) whether (a) the Petitioner has demonstrated that it has been doing business for the year prior to filing the extension and whether (b) the United States entity continues to do business as required; (2) whether the Petitioner (a) has a qualifying relationship with a foreign entity and (b) continues to conduct business abroad; and (3) the Beneficiary’s qualifying managerial or executive employment with the foreign entity.

A. Doing Business in the United States

At the time of filing a petition to open a “new office,” a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval of the petition. *See generally* 8 C.F.R. § 214.2(l)(3)(v). If approved, the beneficiary is granted a one-year period of stay to open the “new office.” 8 C.F.R. § 214.2(l)(7)(i)(A)(3). At the end of the one-year period, when the petitioner seeks

(b)(6)

Matter of H-USA LLC

an extension of the “new office” petition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business “for the previous year” through the regular, systematic, and continuous provision of goods and/or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining the term “doing business”). The mere presence of an agent or office of the qualifying organization will not suffice. *Id.* Therefore, 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.

The record supports a finding that the Petitioner has not sustained operations for the required one year prior to filing the new office extension petition on December 26, 2009. The Petitioner claims that it did not commence business operations until approximately June of 2009, six months prior to the filing date of the petition. The Petitioner states in its brief on appeal that it launched in the “latter part of 2009” as well as stating that it began operations in “June of 2009.”

The evidence of record shows no business activity earlier than May of 2009: the earliest documentation of business by the Petitioning entity is a purchase order from May 20, 2009.⁸ Additionally, the Petitioner did not appear to have any employees on staff earlier than the third quarter of 2009. The Petitioner submitted quarterly payroll reports for the last two quarters of 2009, and stated in response to the NOIR that it did not have any employees for the first two quarters of 2009. We note that the Petitioner submitted tax returns and consolidated financial statements showing income for 2010, but the statements do not show what month the entity began sales. The Petitioner’s IRS Form 1120, U.S. Corporate Income Tax Return, for 2008 shows \$0 in total income. Again, at the time the petitioner seeks an extension of the new office petition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. We recognize the Petitioner’s assertions that it had problems obtaining the required day-care permits and consequently switched business models. There is no provision in the regulations, however, allowing for the extension of this one-year period. If the business has not been sufficiently operational for the previous year, the petitioner is ineligible for an extension by regulation. In the instant matter, the petitioner has provided evidence of a mere six months of operations, falling short of the one year requirement.

Furthermore, 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, as that term is defined in the regulations, since June of 2009 and continues to do so to date. The minimal documentation of the Petitioner’s business operations raises the issue of whether the Petitioner is a qualifying organization engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States.” 8 C.F.R. § 214.2(l)(1)(ii)(G)(2).

⁸ We note that the petitioner submitted invoices dating back to February 16, 2010 to the Petitioner’s D/B/A, [REDACTED] for the purchase of equipment, but the documentation does not support a finding that the Petitioner was engaged in the sale of goods or the provision of services at that time. Similarly, the Petitioner has submitted freight receipts of goods shipped to the foreign employer, but has not submitted any evidence to show that the U.S. Petitioner was involved in the purchase or sale of goods to the foreign employer.

Matter of H-USA LLC

As stated above, the first issue is that the Petitioner has not provided a consistent and credible description of their 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 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 concerns 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 (a) the Petitioner has been doing business for the year prior to filing the extension; and (b) it is currently doing business as required. For these reasons, even if the Petitioner were to overcome the deficiencies in the record with regard to the Beneficiary's managerial or executive position, we

Matter of H-USA LLC

would need to remand the case to the Vermont Service Center to address these deficiencies in the record.

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 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.

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 2008.⁹ Of the three contracts to be completed after 2008, two contracts are solely for work to be performed by another entity, [REDACTED]. The

⁹ 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.

Matter of H-USA LLC

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.”

The Petitioner also submitted a partial translation of a document purporting to form [REDACTED] as a joint venture between the Beneficiary, in his capacity as 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]

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.

(b)(6)

Matter of H-USA LLC

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 or invoices 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 Beneficiary, representing [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 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).¹⁰ Without a full

¹⁰ 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*

Matter of H-USA LLC

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 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 either of 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.

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 his position as the foreign entity’s president and director. The duties provided merely paraphrased the applicable statute and regulations including duties such as: “conducting the management and overseeing the progress of the company”; managing the “operations of the business”; supervising personnel as well as “all policies and procedures of the business.” Conclusory assertions regarding the Beneficiary’s employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Furthermore, the Petitioner has not provided any of the Beneficiary’s

Hughes, 18 I&N Dec. at 294; *see also Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970).

(b)(6)

Matter of H-USA LLC

subordinates' position description or educational requirements to show that the Beneficiary supervised and controlled the work of other supervisory, professional, or managerial employees.

We also note that the Petitioner has not submitted evidence to establish that the Beneficiary 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. See 8 C.F.R. § 214.2(l)(3)(iii). On the Form I-129, the Petitioner claims that the Beneficiary was employed with the foreign entity, [REDACTED] from 1997 to "Present" without any interruptions. The Petitioner stated that as evidence of the Beneficiary's employment, it provided payroll documents with certified translations. The payroll documents submitted covered the period from May 3, 2009 to September 30, 2009. According to the Form I-129, however, the Beneficiary first entered the United States on February 15, 2009. The Petitioner also submitted the foreign entity's payroll documents covering the period from June of 2007 until the Beneficiary's entry to the United States, but the Beneficiary is not listed as an employee during this period.¹¹

Due to the vague position description provided for the Beneficiary's employment abroad, lack of evidence regarding subordinate employees, and contradictory payroll documents, 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# 16066 (AAO Sept. 26, 2016)

¹¹ The Petitioner also submitted a document from an accountant claiming to review the Beneficiary's income from the period of February 26, 2007 to February 26, 2008. The accountant, however, stated only that the documents have been "revised" and that "all is in accordance to the documents provided to me" and does not make any statements regarding his employment with the foreign entity.