



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

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

MATTER OF M-NY INC.

DATE: SEPT. 30, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an importer and seller of food products, seeks to temporarily employ the Beneficiary as the chief executive officer (CEO) of its new office under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in an executive or managerial capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity within one year of approval of the petition.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that it will open a second location shortly and that it has hired additional staff. The Petitioner contends that the Beneficiary will oversee subordinate managers and primarily perform executive level duties.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the Beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. In addition, the Beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity. *Id.*

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

II. UNITED STATES EMPLOYMENT IN A 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.

Further, “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.” *Id.*

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

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

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

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A. Evidence of Record

The Petitioner filed the Form I-129 on March 24, 2015. In the Form I-129, the Petitioner indicated that it has four current employees in the United States and a projected gross annual income of \$350,000.

In the Form I-129, the Petitioner stated that as CEO, the Beneficiary would be responsible for “supervision of all aspects of company’s activities, negotiation of contracts with prospective distributors, stipulation of same, [and] supervision of staff at locations for direct sales.”

The Petitioner submitted a business plan stating that it intends to do business as [REDACTED] selling precooked, frozen pasta imported from Italy. The Petitioner stated that it would “initially focus on residents of [REDACTED] both through in-store sales and super markets promotion.” In a section titled “personnel plan,” the Petitioner stated that it had two employees, [REDACTED] acting as president, and the Beneficiary as “Operations Director.” Further, it explained that the company employed a “No 3 Sales person,” and it projected that it would be “hiring 4 more employees before the end of 2015 at the time of the opening of the second store and 8/10 more in 2016.”

In addition, the business plan stated that the Petitioner had opened its first store in the [REDACTED] in [REDACTED] on November 14, 2014. Beyond the sale of precooked frozen pasta at the market, the Petitioner indicated that it would focus on catering, selling to local markets and retailers, and opening nine other stores in various other major metropolitan areas in the United States. The Petitioner submitted a financial projection for the business estimating that it would earn \$452,000 in revenue and pay \$95,040 in salaries during the first year of operation and that it would earn \$858,000 and pay \$195,680 in salaries during its second year.

The Petitioner provided a “License Agreement” it executed with [REDACTED] in August 2014 indicating that it had leased space at the [REDACTED] through August 2016. The Petitioner submitted bank statements, vendor invoices, and other transactional documents suggesting that it was operating a retail business specializing in pasta sales.

The Petitioner submitted documentation reflecting nine separate wire transfers from the Beneficiary’s foreign employer, its parent company, totaling \$44,454. In addition, the Petitioner provided documentation indicating that the foreign entity also wired \$10,040 to the Petitioner’s attorney, \$4460 to [REDACTED] and \$5840 to an [REDACTED]

The Director later issued a request for evidence (RFE) instructing the Petitioner to submit additional evidence to demonstrate that the Beneficiary would be employed in a managerial or executive capacity in the United States within one year. Specifically, the Petitioner requested that the Petitioner submit evidence to establish the size of the foreign entity’s investment in the Petitioner and its ability to pay the Beneficiary’s salary. The Director further asked the Petitioner to provide information on the proposed number of employees it would hire during the first year, including an

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organizational chart listing all its proposed positions, the duties of these positions, and their expected education levels. In addition, the Director requested that the Petitioner explain how its proposed business venture would support the Beneficiary in a managerial or executive capacity within one year.

In response, the foreign entity's president, [REDACTED] submitted a letter stating that his company "has sales in Italy of approximately 2.000.000 euros [...] and has now decided to bring to the United States its new product, named [REDACTED] indicated that the foreign entity "has invested more than \$160.000 in the project and has the financial ability to support the foreseen expansion of the project." He explained that he "foresees the opening of up to 100 sales points all over the United States of America within 5/6 years." He stated that "each store will be only 400/500 sq/ft and the reduced dimensions will assure low lease costs and could be managed by only three people."

[REDACTED] further stated that the Petitioner already had plans to open five additional stores before December 2015 and provided a list of five proposed [REDACTED] locations. He indicated that "each store will be staffed with one manager and two workers" and that "one executive will also be hired in order to help [the Beneficiary] in the general management of the business." [REDACTED] explained that the Petitioner planned to establish its own pasta production capabilities by the end of 2015 instead of relying on imports from Italy. He stated that after the fifth store is open, the Petitioner will hire "several other manager[s]/employees" to focus on supermarket distribution, opening pasta bars in hotels, catering, events, schools and colleges, sporting events, and franchising.

The Petitioner provided its organizational chart reflecting that it employed the Beneficiary as "president/CEO," a local manager and two "workers" subordinate to the Beneficiary, and "some part-time workers." The chart did not include [REDACTED] the individual identified in the Petitioner's business plan as the company president.

In denying the petition, the Director concluded that the evidence did not establish that the proposed new office would support the Beneficiary in a managerial or executive capacity within one year of approval. The Director found that it appeared from the evidence that the Beneficiary would not act as more than a first line supervisor and that the company would not employ sufficient employees within one year to relieve the Beneficiary from performing non-qualifying operational duties.

In its appeal, the Petitioner asserts that the Beneficiary will be responsible for hiring managers to act as first line supervisors overseeing its proposed retail locations. The Petitioner states that there is "no doubt" that the Beneficiary duties will be primarily executive in nature, asserting that she would have wide latitude on the choice of new stores, negotiations, and the selection of subordinate managers. The Petitioner disputes the Director's conclusion that the Beneficiary will act primarily as a first line supervisor stating that "her duties include surveying the market, selecting the first and subsequent locations, retaining an architect to design and furnish the stores, choosing a shipping company and a customs broker to ship the product from Italy to the United States and hiring managers to supervise the [current] store and the future locations." Further, the Petitioner states that

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“it is foreseeable that when the number of stores will reach a level to require the hiring of a sales manager.”

The Petitioner further contends that the Beneficiary’s role “should be considered within the whole organization,” asserting that she will continue to supervise professional subordinates working for the foreign entity, which it claims is also engaged in “the production, marketing and distribution of pasta and bottled sauce.”

Lastly, the Petitioner asserts that “pending the approval of the petition,” it has reached an agreement for the opening of its second location in [REDACTED] New York. The Petitioner noted that it is a larger location and that it has hired two new managers to supervise five additional workers. The Petitioner states that, with the opening of this location on March 1, 2016, the Beneficiary would manage an organization with three managers, eight employees, and a sales volume of over one million dollars.

B. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States within one year an approval of the new office petition.

When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. The “new office” regulations allow a newly established petitioner one year to develop to a point that it can support the employment of a beneficiary in a primarily managerial or executive position.

The evidence submitted in support of the new office petition should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally* 8 C.F.R. § 214.2(l)(3)(v). The petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

When examining the managerial or executive capacity of the Beneficiary, we will look first to the Petitioner’s description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The Petitioner’s description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial or executive capacity. *Id.*

Here, the Petitioner consistently claims that the Beneficiary’s duties would be primarily executive within one year. The statutory definition of the term “executive capacity” focuses on a person’s

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

The definitions of managerial and executive capacity each have two parts. First, the Petitioner must show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

In the current matter, the Petitioner has not submitted a detailed and comprehensive explanation of the Beneficiary's duties after the company's initial year as a new office. Further, the Petitioner has not provided a consistent position title for the Beneficiary, referring to her as the operations director, general manager, CEO and "president/CEO," while also claiming to employ another individual as its president. For this reason, it is difficult to determine whether the Beneficiary would be the senior employee in the U.S. company or whether she would report to the individual identified as the president.

In the petition, the Petitioner generally stated that the Beneficiary would be responsible for "supervision of all aspects of the company's activities, negotiation of contracts with prospective distributors, stipulation of same, [and] supervision of staff at locations for direct sales." However, this description could apply to any manager or executive acting in any retail business. The Petitioner has provided few specifics to support a conclusion that the Beneficiary would primarily devote her time to qualifying managerial or executive tasks within one year.

In its appeal, the Petitioner provides some additional detail, indicating that the Beneficiary will survey new locations for stores, select locations, retain architects to design and furnish the stores, hire managers, and choose shipping companies and a customs broker to ship its product from Italy. However, the Petitioner has not articulated specific plans to hire any other managers or employees during the first year to perform the operational aspects inherent in these duties, beyond managers and employees set to operate its proposed retail locations. As such, the Beneficiary's duties submitted on appeal suggest that she will be significantly engaged in non-qualifying operational aspects of the proposed business, such as coordinating construction of new locations, administering payroll, paying expenses, managing shipments from Italy, amongst other inherent operational duties of the business.

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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 their 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).

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

The Petitioner has provided inconsistent statements and insufficient documentation regarding its initial staffing level and its proposed business and hiring plans for its initial year of operations and beyond. The Petitioner stated in the Form I-129 that it had four employees as of the date of the petition. However, the business plan provided in support of the petition indicated that it employed only the Beneficiary, a president [REDACTED] and a "No 3 Sales person." The Petitioner did not identify or name a fourth employee. In response to the RFE, the Petitioner removed [REDACTED] from its organizational chart, named a "local manager" and two "workers," and stated that it employs part-time workers, but again, did not provide job descriptions, salaries, or other information for these claimed employees or evidence of wages paid to them.

With respect to future hiring plans, the Petitioner's initial business plan indicated that the company anticipated hiring four additional employees by the end of 2015, and eight to ten additional staff in 2016, but it did not provide a more detailed timeline for hiring, a proposed organizational chart, or information regarding the job titles, duties, or salaries of the anticipated employees. Moreover, the financial projections in the business plan indicated that the company would pay \$95,040 in salaries during the first year (2015) and \$195,580 in the second year, while the Beneficiary's offered salary is \$100,000. Based on these projections, the financial figures do not support the Petitioner's claim that it intends to employ as many as 8 employees in 2015 and 16 employees in 2016.

In the RFE, the Director requested that the Petitioner submit a proposed organizational chart listing all current and proposed employees and their titles, including their duties and current or expected education levels. In response, the Petitioner submitted the names of three subordinates and vague titles such as "local manager" and "workers" and "some other part-time workers." However, the Petitioner did not provide job duties for the claimed employees or evidence of wages paid to them. Further, the chart did not include the Petitioner's president [REDACTED] who is elsewhere documented

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as performing many duties related to the start-up of the company. In addition, and most importantly for a new office, the organizational chart did not reflect the company's proposed expansion during the first year, its proposed positions, when these employees are projected to be hired, and what their expected education levels will be. 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).

In response to the RFE, the foreign entity stated the Petitioner would imminently open five other retail locations throughout [REDACTED] by December 2015, and provided addresses for these coming locations. As noted, the concurrently submitted organizational chart did not include these locations or their proposed employees. The Petitioner did not submit a revised business plan showing its projected staffing and financial projections for this imminent expansion, and, as noted above, the initial business plan clearly did not account for the opening of six or more stores in 2015. The Petitioner provided no timetable for the opening of these stores, the date these additional employees will likely be employed, or any supporting evidence that these coming locations exist.

On appeal, the Petitioner has not mentioned these five New York locations. Instead, the Petitioner states that it has secured a second retail location that would open March 1, 2016, and that it has hired two additional managers and five employees. Again, the Petitioner provides no supporting evidence to corroborate the existence of this location and these newly-hired employees. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (quoting *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The Petitioner asserts that it will also hire "several other" managers and employees to expand into supermarkets, hotels, catering and other industries, further referring to a "sales executive network" and a "sales manager," but it does not clearly articulate its business or hiring plans related to this proposed expansion during the first year. In fact, as noted, the Petitioner financial projections with respect to salary do not appear to account for this level of expansion. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.* The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The Petitioner also states on appeal that the Beneficiary's supervision of subordinates abroad should be taken into account in determining whether she would be employed in a managerial or executive capacity. The Petitioner did not previously mention the foreign employees when describing the Beneficiary's proposed role in the United States. While the record contains an foreign organizational chart showing that the Beneficiary currently supervises office and administrative staff in Italy, the Petitioner did not submit job descriptions for these employees or supporting evidence to substantiate their employment, and has not explained how this staff would contribute to the day-to-day operations of the U.S. company. For these reasons, the record does not support the Petitioner's new claim that the Beneficiary's responsibilities will include oversight of foreign staff.

Therefore, although the Petitioner is afforded the opportunity to expand during the first year, the consistency and credibility of its statements, and any supporting evidence to substantiate its statements are crucial to assessing whether it is likely to meet its expectations during the first year. Here, the Petitioner has provided inconsistent statements and insufficient documentation to corroborate its proposed staffing and expansion plans for the first year of operations, making it difficult to determine the company's anticipated scope and structure at the end of the first year of operations and whether the company will likely grow to the point where it will support the Beneficiary in a qualifying managerial or executive position.

Furthermore, the Petitioner has not established the size of the investment made by its foreign parent company as required by a new office in 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The Petitioner submitted evidence of various wire transfers from the foreign entity to the Petitioner, the Petitioner's attorney, and certain other parties, including the Petitioner's lessor and a consulting company, which amounted to \$64,995. However, in a support letter in response to the RFE, the president of the foreign entity indicated that it had invested "more than \$160,000" in the U.S. company. Not only is this amount inconsistent with the submitted wire transfers, the latter amount has not been substantiated with supporting evidence. In addition, the Petitioner has not identified its anticipated start up and operating costs for the first year which makes it difficult to determine whether either of these amounts would be sufficient to carry out the company's business plan.

Overall, the record does not include a clear description of the Beneficiary's proposed duties, or consistent statements and supporting documentation regarding the Petitioner's anticipated growth, structure, or staffing levels during the initial year of operations. As such, the Petitioner has not demonstrated that the Beneficiary, as a personnel manager, would be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel within one year, or that she would be managing an essential function of the organization. *See* section 101(a)(44)(A)(ii) of the Act. Furthermore, the Petitioner has not established that it would employ sufficient staff to relieve the Beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial or executive duties. Finally, regardless of the Beneficiary's position title, the record is not persuasive that the Beneficiary will function at a senior level within an organizational hierarchy or focus primarily on the goals and policies of the organization within one year. *See generally* section 101(a)(44)(B) of the Act.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States within one year of approval of the new office petition.

III. FOREIGN EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

Beyond the decision of the Director, the Petitioner has not established that the Beneficiary acted in a managerial or executive capacity abroad.

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A. Evidence of Record

On the Form I-129, the Petitioner identified the Beneficiary's foreign employer as [REDACTED]. On the L Classification Supplement to Form I-129, the Petitioner described the Beneficiary's duties abroad as follows:

General Manager. Negotiation of contracts with clients and supervision of implementation of the same.

Further, in the same section of the Form I-129, the Petitioner stated that the Beneficiary had "seven years['] experience at [the foreign employer], of which 4 as general manager, in charge of all aspects of company's activity as promoter of food products in supermarkets."

The Petitioner provided a marketing document stating that it "specializes in the rental of equipment (tanks, banquets, slicers, scales) as well as in setting up stands and fairs." In its business plan, the Petitioner stated that the foreign entity "is a company leader in managing in-store promotions in the Italian supermarket business, field marketing, merchandising activities and post-selling reports." The Petitioner explained that its "core business is to train and teach new promoters and to use them to present and offer fresh food product in the supermarkets with more and more professionalism." The Petitioner stated that the foreign entity has "more than 500 hostesses and promoters, models and stewards work[ing] daily to support [the foreign entity's] customers in promotional campaigns and in store activities."

In the RFE, the Director indicated that the Petitioner needed to submit additional evidence to establish that the Beneficiary acted in a managerial or executive capacity abroad. The Director requested that the Petitioner submit copies of the Beneficiary's payroll or other personnel records to confirm her managerial or executive employment. The Director asked the Petitioner to provide a foreign entity organizational chart reflecting all its employees, their names, positions, duties, education levels and salaries, along with the Beneficiary's place therein. Further, the Director requested that the Petitioner submit a letter from the foreign entity detailing the Beneficiary's typical managerial or executive duties and decisions.

In response, the foreign entity submitted a letter from its president stating that the Beneficiary "supervises all [foreign entity] accounts and sales" and that she oversees "the work of the office staff and takes part in meetings with managers, sales managers and owners of Italian and foreign companies, and directly takes care of any contracts made." The president of the foreign entity indicated that the Beneficiary "began in 1995 as sales operator and today occupies a managerial/executive position."

The Petitioner submitted a foreign entity organizational chart indicating that the Beneficiary acted as executive director earning €160,000 annually and reporting to the "non-executive director." The chart further reflected that the Beneficiary oversaw the following subordinates earning the listed annual salaries: a finance and administration employee (€24,000), a support administration employee

(€24,000), a response front office employee (€17,700), and two support front office employees (€12,000). The chart appeared to indicate that the finance and administration employee held accounting degrees, that the support administration and response front office employees hold “business administrator degree[s],” and that the support front office employees respectively have a “human resources” degree and a “social pedagogical diploma.” In addition, the chart reflected that the foreign entity had seventeen other full-time employees and approximately 90 other “occasional workers.”

The Petitioner also submitted the foreign entity’s balance sheet for 2014 indicating that the company earned €1,351,667 in revenue and paid €72,993 in salaries and wages during 2014 and that it earned €563,717 in revenue and paid €164,341 in salaries in wages during 2013.

B. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that the Beneficiary was employed in a managerial or executive capacity abroad.

When examining the managerial or executive capacity of the Beneficiary, we look first to the Petitioner’s description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The Petitioner’s description of the job duties must clearly describe the duties performed by the Beneficiary and indicate whether such duties are in either a managerial or executive capacity. *Id.*

The definitions of managerial and executive capacity each have two parts. First, the Petitioner must show that the Beneficiary performed certain high-level responsibilities. *Champion World*, 940 F.2d at 1533 (9th Cir. 1991). Second, the Petitioner must prove that the Beneficiary has been *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the foreign entity’s other employees. *See Family Inc.*, 469 F.3d at 1313, 1316; *Champion World*, 940 F.2d at 1533.

In the current matter, the Petitioner has not submitted a sufficiently detailed duty description for the Beneficiary’s position abroad necessary to demonstrate that she primarily devoted her time to qualifying managerial or executive tasks. For instance, in support of the petition, the Petitioner vaguely stated that the Beneficiary was responsible for “negotiation of contracts with clients and supervision of implementation of the same” and that she was “in charge of all aspects of company’s activity as promoter of food products in supermarkets.” These duties provide little insight into the Beneficiary’s actual day-to-day tasks abroad, as such, the Director requested a more detailed statement of the Beneficiary’s duties, including examples of her typical managerial or executive duties and decisions.

The Petitioner’s response reflected little additional information on the Beneficiary’s daily tasks abroad, again vaguely stating that the Beneficiary supervised “all [foreign employer] accounts and sales,” that she oversaw “the work of the office staff and takes part in meetings with managers, sales

managers and owners of Italian and foreign companies,” and that she “directly takes care of any contracts made.” The Beneficiary’s stated duties abroad could apply to any manager or executive working in any company or industry. The Petitioner has not specifically articulated or documented client contracts the Beneficiary negotiated and implemented, food products she promoted or supermarkets she worked with, accounts she managed, or managers, sales managers, or owners of other companies she met with. Reciting a beneficiary’s vague job responsibilities or broadly cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary’s daily job duties. Conclusory assertions regarding a beneficiary’s employment capacity are not sufficient. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros.*, 724 F. Supp. at 1108, *aff’d*, 905 F.2d 41.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company’s organizational structure, the duties of a beneficiary’s subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary’s actual duties and role in a business.

The Petitioner has submitted little supporting documentation to corroborate that the Beneficiary was employed in a managerial or executive capacity abroad. The Director requested that the Petitioner submit pay or personnel records from the foreign entity to confirm her employment, but the Petitioner did not provide this documentation. Likewise, the Director requested that the Petitioner provide duty descriptions for the members of the foreign entity’s organizational chart, particularly the Beneficiary’s claimed subordinates, to substantiate her asserted role. However, the Petitioner did not submit this evidence. 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. at 165 (quoting *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

In addition, to the extent the Petitioner did provide evidence related to the Beneficiary’s asserted foreign employment it includes various discrepancies which leave question as to whether the Beneficiary was acting in a managerial or executive capacity. For example, the foreign entity organizational chart indicates that the Beneficiary earned €160,000 and that her subordinates earned a combined €65,700. However, submitted foreign entity financial statements indicate that the company paid much less than this in overall salary during 2013 and 2014, or €72,993 and €164,341 during each respective year, not even taking into account the salaries of the numerous other employees listed in the foreign entity organizational chart.

Further, the Petitioner provided inconsistent information regarding the Beneficiary’s actual position abroad, stating that her title was both general manager and executive director. In addition, the organizational chart appears to reflect that the Beneficiary oversees various administrative functions related to finance, administration and front office activities, while her duty descriptions suggest that she acted in more of a sales and marketing capacity, overseeing client accounts, meeting with clients,

and overseeing sales managers. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 92.

On appeal the Petitioner appears to indicate that the Beneficiary acted as a personnel manager abroad through her supervision of professional subordinates. The statutory definition of “managerial capacity” allows for both “personnel managers” and “function managers.” See sections 101(a)(44)(A)(i) and (ii) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. The statute plainly states that a “first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor’s supervisory duties unless the employees supervised are professional.” Section 101(a)(44)(A) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(4). If a petitioner claims that a beneficiary directly supervises other employees, the subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act; 8 C.F.R. §§ 214.2(l)(1)(ii)(B)(2)-(3).

To determine whether the Beneficiary manages professional 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.”

Here, the Petitioner has not established that the Beneficiary acted as a personnel manager abroad. First, it is noteworthy that the foreign organizational chart does not indicate that the Beneficiary’s subordinates supervise other employees, as such she cannot qualify as a personnel manager in this respect. Therefore, the question is whether the Petitioner has demonstrated that the Beneficiary primarily supervised professional subordinates abroad. We find that the Petitioner has not met this burden. As previously mentioned, the Petitioner has not submitted duty descriptions for any of the Beneficiary’s subordinates in order to assess whether they perform professional level duties. The Petitioner only vaguely indicates that these subordinates have baccalaureate level degrees in areas such as accounting, business administration, and human resources. However, it provided no supporting documentation to demonstrate that the Beneficiary’s subordinates hold these degrees or that the knowledge acquired from these degrees is required for the performance of their duties. As such, the Petitioner has not established that the Beneficiary acted as a personnel manager in her capacity abroad. Again, 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. at 165 (quoting *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary was employed in a managerial or executive capacity abroad.

IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of M-NY Inc.*, ID# 12139 (AAO Sept. 30, 2016)