U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Y-&P-, INC.

DATE: APR. 9, 2019

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a convenience store, seeks to temporarily employ the Beneficiary as the general manager of its new office[1] under the L-1A nonimmigrant classification for intracompany transferees. Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the Vermont Service Center denied the petition, concluding that the record did not establish, as required, that: (1) sufficient premises for the U.S. entity's new office have been secured; (2) the new office will support a managerial or executive position within one year after the approval of the petition; and (3) the Beneficiary has been employed abroad in a managerial or executive capacity.

The matter is now before us on appeal. On appeal, the Petitioner asserts that: (1) the Director did not review the lease provided for its premises; (2) its foreign entity has the capacity to support the new office; and (3) the Beneficiary serves abroad as a function manager.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving a new office, a qualifying organization must have employed the beneficiary in a managerial or executive capacity for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). 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.*

A petitioner must submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner

[1] The term "new office" refers to an organization which has been doing business in the United States for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation no more than one year within the date of approval of the petition to support an executive or managerial position.

secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

II. DEFINITIONS

"Managerial capacity" means an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization; 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; has authority over personnel actions or functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

Based on the statutory definition of managerial capacity, the Petitioner must first 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 duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

III. SUFFICIENT PHYSICAL PREMISES

The Director determined that the Petitioner has not established that sufficient premises for the U.S. entity's new office have been secured. When a petition indicates that a beneficiary is coming to the United States to open a "new office," the petitioner must show that it is ready to commence doing business immediately upon approval. At the time of filing the petition to open a "new office," a petitioner must demonstrate that it has acquired sufficient physical premises to commence business. *See* 8 C.F.R. § 214.2(l)(3)(v).

On the petition, the Petitioner described itself as a convenience store. The Petitioner's business plan submitted with the petition states that it will "become a newly established convenience store and gas station;" that it will offer "gas, organic produce, and a deli;" and that the business plan will serve as "a guide for this renovation of this business." It states that [redacted] one of the Petitioner's shareholders, "will purchase the equipment or fixtures, or properties for this new location." It further states that the Petitioner will sell "gasoline and diesel fuel; oil, de-icer, car accessories, etc.; deli items; drinks; bakery goods; organic produce." With the petition, the Petitioner also submitted a Commercial Lease Agreement dated October 1, 2017, between the lessor, the Beneficiary, and the Petitioner for a 3,000 square foot building in [redacted] Texas. The lease carries a three-year term, with an additional optional three-year renewal term, at a rate of $31,800 per year for the first three years, and $35,000 per year for any renewal term.[2] The lease is missing Exhibit A, which details the "initial rules for the

[2] The business plan contains a pro forma profit and loss statement that lists the rent expense as $13,000 per year for the first three years. The Petitioner must resolve this discrepancy with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

building." The lease does not include a floor plan or a description of the activities to be conducted by the Petitioner on the premises, and it does not provide for the lease or operation of gas pumps.

In a letter of support dated October 2, 2017, submitted with the petition, the human resources manager for [redacted] in India stated that the company planned to set up a "U.S. branch" to establish a "wholesale distribution center where we can export our line of watches into the U.S. market."[3] The letter states that the Beneficiary has been offered the position of general manager to develop "relationships with large wholesalers and retail businesses in the U.S. to book large orders."

Thus, the documents submitted with the petition presented conflicting descriptions of the Petitioner's business – it is described as a convenience store, a convenience store/gas station, and a wholesale watch distribution center. The Petitioner must resolve this discrepancy with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 582. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* In a request for evidence (RFE), the Director stated the lease does not provide sufficient detail of the breakdown of the square footage, including all office, production, manufacturing, and warehouse spaces, and requested the Petitioner to provide additional evidence relating to its premises.

In response to the RFE, the Petitioner submitted another copy of the lease without Exhibit A. It stated that the lease was for a retail convenience store and gas station, and it submitted pictures of [redacted] whose sign indicates that it sells ice, beer, cigarettes, sodas and chips, groceries, cell phone cards and accessories, phone cards, money orders, money transfers, bill payments, and lottery tickets. The pictures also show the inside of a convenience store, with prepackaged food items; cold drinks; freezers; t-shirts and hats; lottery machines; and cigarettes. The pictures do not show a deli, organic produce, or gas pumps. They also do not show a wholesale distribution center for watches imported from India. The RFE response included an assumed name certificate showing that the Petitioner is authorized to conduct business in Texas under the assumed name [redacted] The Petitioner also stated in its RFE response that the "foreign entity has established low contracted rates from their vendors, and shipments can be directed to the U.S. location which will help the store maintain a large inventory with far less cost overhead."

In her decision, the Director noted that the Petitioner did not provide any evidence of the renovations mentioned in its business plan, and that it did not provide sufficient detail of the breakdown of the square footage. She also noted that the retail store [redacted] does not include the Petitioner's "name, logo, signage, address, or any indication of where these photographs were taken."

On appeal, the Petitioner asserts that the Director did not review the lease provided for its premises. It states that the lease shows that the premises is 3,000 square feet; that it operates a convenience store; that there is no production, manufacturing, or warehouse space needed; and that there is a 600 square foot stockroom for dry goods and surplus inventory. The Petitioner further asserts that it purchased the [redacted] location and renovated the store; that it assumed the name [redacted] and that it uses the acronym [redacted] as an abbreviation to identify the business. The Petitioner references four new exhibits

[3] The record shows that [redacted] and the Petitioner are each owned in the same percentages by the same two individuals.

that were purportedly included on appeal, including a copy of the floor plan for the premises; an affidavit; and copy of a webpage listing. However, none of these exhibits were submitted on appeal. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

The Petitioner has not established with relevant, probative, and credible evidence that it has secured sufficient premises for its new office. While the Petitioner has established that it has leased 3,000 square feet of space in Texas, it has not established what type of business will be conducted there. The Petitioner asserts that it purchased and assumed its name, but the record does not contain a purchase agreement; a bill of sale; an inventory list; an assumed name certificate permitting the Petitioner to operate as ' evidence of payment of the purchase price for the business; business license; or any other evidence supporting the Petitioner's claim. Further, the record contains no evidence to support the Petitioner's claim that there is a 600 square foot stockroom for dry goods and surplus inventory. Additionally, the record contains no evidence supporting the Petitioner's claims that it renovated the premises or that it operates gas pumps at its location. There is also no evidence showing that the Petitioner operates a deli or sells organic produce at the leased location. Without a clear idea of what the Petitioner is doing on a daily basis, we cannot determine whether it has secured sufficient premises for its new office.

The Petitioner has not established that sufficient premises for the U.S. entity's new office have been secured.

IV. THE PETITIONER'S ABILITY TO SUPPORT A MANAGERIAL POSITION

The Director found that the new office will not support a managerial or executive position within one year after the approval of the petition. The Petitioner seeks to employ the Beneficiary as a general manager in the United States, asserting that this qualifies as a position of managerial capacity. Thus, we will restrict our analysis to whether the Beneficiary would be employed in a managerial position within one year of approval. A petitioner seeking to employ a beneficiary as a manager of a new office must establish that the new office will support a managerial position within one year of approval of the petition. The Petitioner must establish the proposed nature of the office, describing its scope, organizational structure, and financial goals; the size of the United States investment and the foreign entity's financial ability to remunerate the beneficiary and to commence doing business in the United States; and the foreign entity's organizational structure. 8 C.F.R. § 214.2(l)(3)(v)(C).

When a new business is first established and commences operations, the regulations recognize that a designated manager responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the 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 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. *See* 8 C.F.R. § 214.2(l)(3)(ii).

A. Duties

With the petition, the Petitioner listed the duties of general manager as follows:

100% of time is spent:

- Maintains adherence to and establishes operational procedures and oversee the functioning of all areas including: incoming and outgoing shipments, damages and returns, merchandise processing, inventory control, and quality control and assurance.

10% of time is spent:

- Reviews assistant manager's weekly productivity reports and discusses productivity concerns. Ensures that procedures meet productivity standards and are in compliance with company policies and procedures.
- Reviews scheduling and assists in determination of temporary staffing needs based on review of inbound merchandise volume, daily workload, priorities and available staff.

10% of time is spent:

- Oversees the resolution of problems that occur within the store i.e. flow, space capacity issues, systems problems, etc. Manages the inspection, maintenance, and repair of store equipment. Approves work orders for repairs and requisitions for replacement of equipment.

20% of time is spent:

- Trains assistant managers to maintain accuracy goals, productivity, safety and budget requirements. Ensures compliance of all safety standards, policies and procedures.

40% of time is spent:

- Oversees assistant managers carry out supervisory responsibilities including training, planning, assigning, directing work, performance appraisals, rewarding, disciplining, addressing complaints and resolving issues.
- Observes current processes and obtains information from employees in order to evaluate business requirements. Provides recommendations, obtains approval, and implements changes based on this evaluation.
- Maintains adherence to operational procedures for activities such as verification of incoming and outgoing shipments, processing merchandise, inventory control, quality control and quality assurance.[4]

20% of time is spent:

- Purchases all store supplies, works with suppliers to insure best possible pricing, schedules inbound supply trailer flow for to [sic] optimize space without interrupting processing.
- Projects fiscal expenses and prepares annual budget and submits to President for approval. Manages expenses based on approved budget.

[4] We note that this appears nearly the same as the first entry describing how the Beneficiary spends 100% of her time.

In response to the RFE, the Petitioner materially changed the duties of the Beneficiary, as follows: 50% of her time is spent being responsible for sales and marketing, branding, and establishing budgets;[5] 10% of her time is spent attending trade shows, meeting with vendors, buyers and establishing new markets to develop and grow the business;[6] 20% of her time is spent handling human resources and training functions; and 20% of her time is spent being responsible for inventory control and loss prevention, establishing incentive rewards for employees, and training store managers. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, a petitioner cannot offer a new position to a beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. A petitioner must establish that the position offered to a beneficiary, when the petition was filed, merits classification as a managerial or executive position. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). If significant changes are made to the initial request for approval, a petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the Petitioner in its response to the Director's RFE added new generic duties to the job description.

In the denial notice, the Director concluded that the Beneficiary's duties will primarily consist of the day-to-day marketing and sales operations of the new office. On appeal, the Petitioner does not address the deficiencies in the Beneficiary's duties.

We find that the Petitioner provided deficient job descriptions that are so general that they could describe virtually any general manager position with any company. They provide only vague information that focus on the Beneficiary's oversight of the business, but say little about the actual tasks she would perform during the various stages of the company's development and make no distinction between tasks that the Beneficiary would need to perform during the Petitioner's rudimentary phase and those she intends to perform once the company is no longer in the "new office" stage of development. 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). Although it is reasonable to conclude that the Beneficiary's duties would change to correspond with the Petitioner's operational development and changing needs, the Petitioner did not provide a job description that reflects this likely progression. Without a detailed iteration of the Beneficiary's job duties during the Petitioner's first year of operation, it is unclear how the Petitioner would progress beyond the "new office" phase. Further, the conflicting descriptions of the Petitioner's business described above (i.e., a convenience store, a convenience store/gas station, and a wholesale watch distribution center), together with the general nature of the duties, create confusion as to how the Beneficiary will actually spend her time.

Further, the Beneficiary does not appear to be the Petitioner's senior employee because its organizational chart lists the President at the top. Without details regarding the President's duties, it

[5] The original description did not include any marketing or branding duties, and the business plan indicates that the Petitioner does not plan to spend any funds on marketing expenses in its first three years of operation.
[6] The original description did not mention attendance at trade shows.

is not clear that the Beneficiary would have authority to establish plans, policies, and objectives for the company and make major decisions regarding its finances and overall direction.[7] By statute, eligibility for this classification requires that the duties of a position be "primarily" executive or managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. Therefore, a broad overview of her responsibilities is insufficient to establish that her actual duties during the Petitioner's first year of operation would lead to primarily managerial or executive duties within one year of this petition's approval.

B. Projected Staffing and Business Plan

When examining the managerial capacity of a given beneficiary, we will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). However, the position description alone is insufficient to establish that a beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as a petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the proposed position. If staffing levels are used as a factor in determining whether an individual will be acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) takes 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.

The Petitioner's organizational chart shows that the President will supervise the Beneficiary; that the Beneficiary will supervise "Assistant Mgr(s), Day & Night, New Hires," who in turn will supervise "Retail Cashiers (4) New Hires." The business plan indicates that the Petitioner will have a "staff of six," including the Beneficiary as general manager; one assistant manager; and four sales clerks. It did not mention the President or an additional assistant manager. The Petitioner provided job descriptions for the general manager, assistant manager(s), and retail staff, but did not provide a job description for the President.

The Petitioner's business plan indicates that the Petitioner will offer gas, organic produce, and a deli to commuters in the [redacted] and [redacted] areas of [redacted] Texas. It states that [redacted] has invested $50,000 in the purchase of the business, plus the inventory (wholesale-cost) under purchase contract." It states that he will purchase equipment, fixtures or properties for the location. It further states that [redacted] has invested $40,000 to finance the remainder of the renovation costs. It states that "eighty percent of I-69 commuters fits the demographic profile of customers of upscale organic/natural food stores" including that they are 25-45 years of age; 60% percent are women; their average income is $40,000+; they are college graduates; and they are professionals in business and education.[8]

[7] The Petitioner initially provided a Partnership Agreement dated October 1, 2017. It states that the Petitioner is a partnership under the Partnership Act of Ontario, Canada. In response to the RFE, however, it submitted Bylaws indicating that it is a corporation. The Bylaws do not provide for a President. Instead, under the heading of "Chairman," they state that the Directors shall have "supervision of the affairs of the corporation." The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 582.

[8] The record contains no support for these assertions. If USCIS finds reason to believe that an assertion stated in the petition is not true, USCIS may reject that assertion. *See, e.g.*, Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988);

It projects the following sales[9] in the first three years of operation:

	Year 1	Year 2	Year 3
Gasoline	$623,000	$660,000	$700,000
Food, Drinks, produce	$185,000	$198,000	$210,000
Total Sales	$808,000	$858,000	$910,000

The Director stated in the RFE that the Petitioner's description of its business and its projections were overly broad and lacked sufficient detail to determine how it will support a managerial or executive position within one year. The Director also noted that the record lacked evidence of the initial investments in the new office.

In response to the RFE, the Petitioner provided general a definition of industry analysis, together with two online articles related to retail marketing strategy and emerging trends in the convenience store industry. It also stated that "the foreign entity's earnings are more than sufficient enough to support the U.S. entity in the first year of business."

In the denial notice, the Director concluded that the record contains no evidence of the foreign entity's investment in the Petitioner, or of the individual shareholders' investment in the Petitioner.[10] She stated that the online articles provided by the Petitioner in response to the RFE provide no information as to the size and scope of the new office. She indicated that the business plan is vague and lacks sufficient detail to determine the size and scope of the new office. Further, she noted that the income and other projections in the business plan do not provide sufficient detail as to how they were calculated. She stated that the organizational chart for the Petitioner shows that the Beneficiary has two direct subordinates, but does not describe the nature of the positions and how they will support the Beneficiary's role as manager of the new office within one year.

On appeal, the Petitioner asserts that [redacted] has "the financial ability to invest and support the [Petitioner]." The Petitioner provides no additional support for that claim. The Petitioner's unsupported statements are insufficient to carry its burden of proof. The Petitioner has not supported its assertions on appeal with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner does not address the other deficiencies noted by the Director. Further, the Petitioner asserts that it has provided audited financial statements on appeal; however, audited financial statements were not included with the appeal.

We agree with the Director that the Petitioner's business plan, including its description of its mission and its "keys for success," is vague and lacks sufficient detail to determine the size and scope of the new office. The Petitioner's conflicting descriptions of the nature of its business in the record

---

Systronics Corp. v. INS, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

[9] The business plan indicates that the Petitioner expects to receive all of these funds in cash, and there are no provisions in its projections for the collection or payment of sales tax, VAT, or any other taxes. We note that Texas has a sales tax, and there are excise taxes on fuel, tobacco, and alcohol. *See id.*

[10] 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).

exacerbates the difficulty of determining the size and scope of its new office. We also agree with the Director that the income and other projections in the business plan do not provide sufficient detail as to how they were calculated. The Petitioner's sales projections are not credible, given that the majority of sales revenue is attributed to gas sales and the record contains no evidence showing that it operates gas pumps at its location. Additionally, some of the sales revenue is attributed to produce sales, and there is no evidence showing that the Petitioner sells produce at the leased location. Further, we agree that the organizational chart for the Petitioner does not describe the nature of the positions of the Beneficiary's direct subordinates and how they will support the Beneficiary's role as manager of the new office within one year. Further, the chart and the business plan give conflicting descriptions of the Petitioner's staffing which have not been resolved with independent, objective evidence. *Matter of Ho*, 19 I&N Dec. at 582.

A petitioner has the burden to establish that it would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the evidence must be considered in analyzing whether the proposed duties are plausible considering a petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). Here, the Beneficiary's job duty breakdown does not provide a meaningful understanding of how the Beneficiary will spend his time, and as such, we cannot find that he would primarily engage in qualifying managerial duties within one year of approval. Furthermore, the Petitioner's staffing and organizational structure is not sufficient to support a finding that the Beneficiary will be relieved from having to allocate his time primarily to performing non-managerial job duties beyond the first year of operation. Thus, the Petitioner has not established that the new office will support a managerial position within one year after approval of the petition.

V. EMPLOYMENT ABROAD IN A MANAGERIAL CAPACITY

The Director further found that the Petitioner did not establish that the Beneficiary has been employed abroad in a managerial or executive capacity. The Petitioner claims that the Beneficiary has served as a corporate accountant for [redacted] in India since 2013 and asserts that this position was a managerial position. As such, we will restrict our analysis to whether the position abroad was in a qualifying managerial capacity. The Petitioner listed the duties of the position as follows:

- 40% of time is spent: Analyzing Accounting records
- 25% of time is spent: Computing Taxes
- 10% of time is spent: Developing Budgets
- 25% of time is spent: Meeting with the Director of Finance and Administration

The Petitioner stated that the Beneficiary generates accounts receivable and accounts payable reports; prepares income statements and balance sheets; computes taxes; determines what expenses need to be cut; prepares budget reports; and assists in presenting the financial position of the company.

The organizational chart for [redacted] shows that the foreign entity has 12 employees. The director of finance and administration oversees the Beneficiary and the human resources director. Neither the Beneficiary nor the human resources director has any subordinates. The sales director

manages a retail manager; a wholesale manager; and an internet salesperson. The retail sales manager oversees two retail salespeople, one of which oversees three cashiers.

In the RFE, the Director stated that the job description details the day-to-day work of a bookkeeping/ accounting nature and that the duties are not supported by sufficient corroborating evidence. In its RFE response, the Petitioner stated that the Beneficiary's duties abroad were managerial because she primarily managed a function. The Director denied the petition, concluding that the description of the Beneficiary's duties are broad and lack sufficient detail necessary to determine if the Beneficiary's duties were executive or managerial in nature. Further, the Director noted that the descriptions are not supported with sufficient corroborating evidence of the Beneficiary performing duties in an executive or managerial capacity. The Director also stated that the job description details the day-to-day work of an accounting nature and does not establish that the duties were executive or managerial duties.

On appeal, the Petitioner does not rebut the Director's finding by presenting additional details about the Beneficiary's duties. Instead, the Petitioner again asserts that the Beneficiary serves abroad as a function manager. 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. The term "function manager" applies generally when a beneficiary is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that:

> (1) the function is a clearly defined activity; (2) the function is "essential," i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations.

Matter of G- Inc., Adopted Decision 2017-05 (AAO Nov. 8, 2017).

The list of job duties is deficient for three reasons. First, although the accounting function may be deemed essential to the organization, the record shows that the Beneficiary primarily performs rather than manages the accounting duties of the organization. The Beneficiary reports to the director of finance and administration, who appears to manage the accounting function. The Beneficiary performs general accounting duties such as generating accounts receivable and payable reports; preparing income statements and balance sheets; computing taxes; and preparing budget reports. Second, the Beneficiary oversees no employees and does not act at a senior level within the organizational hierarchy or with respect to the accounting function. Third, the Beneficiary does not exercise discretion over the day-to-day accounting operations, as her financial and budget reports must be reviewed and approved by the director of finance and administration.

On appeal, the Petitioner cites several non-precedent AAO decisions in support of its claim that the Beneficiary serves as a function manager. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on USCIS, non-precedent decisions are not similarly binding. For the reasons set forth above, the Petitioner has not established that the Beneficiary serves as a function manager.

Furthermore, we note that the record contains wage reports for [redacted] representing details of salaries, wages, and tips paid in 2013-2014 and 2014-2015. The reports list one accountant employed by the company, [redacted] and shows that he was appointed as accountant on May 2, 2003. The Beneficiary's name is not listed on either of the wage reports. Therefore, it does not appear that the Beneficiary was employed as a corporate accountant by [redacted] starting in 2013 as claimed by the Petitioner. The Beneficiary's name is listed on [redacted] 's monthly wage reports for 2017, where it appears the Petitioner simply removed [redacted] name and replaced it with the Beneficiary's name. The date of her appointment as accountant is the same as the date previously listed for [redacted] – May 2, 2003. As such, the record does not demonstrate that the Beneficiary was actually employed abroad during the claimed time period or that she was employed in the position described. The Petitioner must resolve this discrepancy with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 582.

For the foregoing reasons, the Petitioner has not established that the Beneficiary has been employed abroad in a managerial or executive capacity.

VI. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of* Y-&P-, Inc., ID# 2461277 (AAO Apr. 9, 2019)