U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 08229621

DATE: OCT. 19, 2020

Appeal of California Service Center Decision

Form I-129, Nonimmigrant Petition for an Intracompany Transferee

The Petitioner, a promotional product sales business, seeks to temporarily employ the Beneficiary as a chief of marketing and sales 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 California Service Center denied the petition on the grounds that the Petitioner did not establish that the Beneficiary had been employed abroad in a managerial or executive capacity and would be employed in a managerial or executive capacity in the United States within one year of the petition's approval to meet the requirements for a new office petition.

The matter is now before us on appeal. The Petitioner asserts that the evidence of record establishes that the Beneficiary has been employed abroad in an executive capacity and will be employed in the United States in a managerial or executive capacity within one year of the petition's approval.

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. Upon *de novo* review, we will dismiss the appeal because the Petitioner has not established that the Beneficiary will be employed in the United States in a managerial or executive capacity within one year of the petition's approval. As this is a fundamental element of eligibility and the Petitioner has not satisfied this element, we will reserve the remaining issue relating to the Beneficiary's employment abroad.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized knowledge" 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 petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

As defined in section 101(a)(44)(A) of the Act, the term "managerial capacity" means 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.

As defined in section 101(a)(44)(B) of the Act, the term "executive capacity" means 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.

Section 101(a)(44)(C) of the Act further provides that:

> 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] shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

To be eligible for L-1A nonimmigrant visa classification as a manager or an executive, a petitioner must show that the beneficiary will perform the high-level responsibilities set forth in the statutory definitions at sections 101(a)(44)(A)(i)-(iv) and 101(a)(44)(B)(i)-(iv) of the Act, each of which has four parts. If the record does not establish that the offered position meets all four elements of the pertinent statutory definition, we cannot conclude that it is a qualifying managerial or executive position. If a petitioner establishes that the offered position meets all four elements of the applicable statutory definition, it 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). In determining whether a beneficiary's duties will be primarily managerial or executive, we consider the petitioner's description of the job duties, the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the beneficiary's actual duties and role in the business.

II. ANALYSIS

The Petitioner, established in [redacted] 2019, is an affiliate of [redacted] based in [redacted] China. The Petitioner is a supplier of promotional products featuring custom imprinted dog leashes, collars, and lanyards, but also including writing instruments, tech items, magnets, key tags, and drinkware, which are sourced from its Chinese affiliate and its own manufacturing facility in [redacted] California, and sold to distributors in the United States for sale to end users. [redacted] has employed the Beneficiary as its director of marketing and sales in China since April 2015, and now wishes to reassign him to its U.S. affiliate to serve as chief of marketing and sales.

A. Employment in the United States

The Director determined that the record did not establish that the new U.S. office would support a primarily managerial or executive position within one year of the petition's approval. On appeal the Petitioner asserts that the Director's analysis was faulty, submits some additional documentation, and claims that the Beneficiary will be employed in either a managerial or an executive capacity by the U.S. entity within one year of the petition's approval. The Petitioner does not clarify whether the Beneficiary will be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. The Petitioner must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are either in an executive or managerial capacity. The Petitioner must demonstrate that the Beneficiary's responsibilities will meet the requirements of one or the other capacity.

1. New Office Requirements

As previously indicated, a petitioner seeking to employ a beneficiary as manager or executive of a new office must establish that the new office will support such a position within one year of the approval of the petition. When a new business is 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 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 order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require a petitioner to disclose the proposed nature of the business and the size of the U.S. investment, and establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves

away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

2. Petitioner's Organizational Structure

An organizational chart submitted with the petition identified ten positions in the new U.S. office, including a president, a COO, three departmental heads (of marketing and sales, finance, and production and shipping), and five subordinate positions in the departments of marketing and sales (three) and of production and shipping (two). Three of the ten positions (the President, COO, and head of the finance department) were filled at the time the petition was filed in May 2019. The other seven positions were projected to be filled by February 2020. They included the Beneficiary's proposed position as chief of marketing and sales and three subordinate positions in the department – including two directly subordinate positions of marketing executive and programmer/web designer and a third position – graphic artist – subordinate to the programmer/web designer.

3. Job Duties of the Proposed Position

In examining whether the Beneficiary's employment in the United States will be in a managerial or executive capacity, we will first examine the Petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). In the petition the Beneficiary's proposed duties as chief of marketing and sales in the United States were described as follows:

> Manage marketing and advertising campaigns;
> Set up plan of implementation for marketing and sales;
> Direct the hiring and training of marketing staff;
> Set up software design and implementation;
> Design web products;
> Advise on pricing strategies;
> Establish distribution networks;
> Negotiate contracts and pricing agreements with marketing platforms.

A more detailed description of the Beneficiary's proposed duties was provided in letters from the Chinese affiliate's chief executive officer submitted with the petition and by the Petitioner's chief operating officer (COO) submitted in response to the Director's request for evidence (RFE). The duties were arranged in three broad categories and associated sub-categories, with percentages of time allocated to the respective duties. So presented, the Beneficiary's proposed duties read as follows:

Directing the Operations of the Marketing and Sales Department – 40%

- Develop weekly, bi-weekly, monthly quarterly, half-yearly and yearly reports to distribute to Chief Financial Officer, Chief Operations Officer, President, and Chief Production Officer. This job duty consists of the following sub-duties: 10%
    - Compile sales report from subordinates' daily check-ins with information about incoming orders, pricing, new clients, and product inventory.

- Compile business reports after careful analysis of current trends in the industry, client reviews, incoming sales, and production distribution. Include business theories to continue improving company performance and increase efficiency.

- Coordinate or participate in promotional activities or trade shows, working with developers, advertisers, or production managers, to market products or services. This job duty consists of the following sub-duties: 10%
  - Ensure that raw promotional materials are ready for use in any promotional event or trade show by coordinating requirements with graphic department; inventory stock; instructing future subordinates to place orders (custom, specialty or otherwise); and verifying receipt of materials.
  - Plan meetings and trade shows by guiding and overseeing the identification, assembly and coordination of requirements; develop schedules and assignments accordingly; establish contacts; and coordinate mailing lists and email campaigns.
  - Keep up to date on industry changes and trends by participating in educational opportunities; reading trade publications; and attending online SAGE seminars to be able to run market and sales department according to updates in the industry.
  - Plan and organize promotional presentations with subordinates and oversee development of sample promotional products and advertising materials.

- Work with developers, advertisers, or production managers to market products or services. This job duty consists of the following sub-duties: 5%
  - Assemble and analyze sales forecasts from subordinates to provide guidelines on implementing marketing and advertising campaigns accordingly.
  - Prepare market and advertising strategies based on product demand, market trends, seasonality, events, and holidays to keep company competitive.
  - Direct and oversee subordinates work with developers in implementing and updating web and mobile application-based systems compatible with both iOS and android technologies.

- Consult with buying personnel to gain advice regarding the types of products or services which are expected to be in demand. This job duty consists of the following sub-duties: 5%
  - Have subordinates research competitive products, and identify and evaluate product characteristics, market share, pricing, and competitive advertising tactics such as price comparison, better quality materials, etc.
  - Maintain research databases for future use.
  - Lead and engage in brainstorm sessions with market and sales subordinates to determine how best to market and develop new products based on research results and suggestions from buying personnel.

- Consult with Operations Manager to discuss production capacity at a given time in order to ensure that the sales correspond. This job duty consists of the following sub-duties: 5%
    - Have subordinates track product line sales and costs by analyzing and entering sales, expenses, and new business data including cheaper product costs from other suppliers while maintaining quality control for new inventory.
    - Review departmental marketing reports from staff.
    - Collect, analyze, and summarize sales data from marketing staff to ensure no errors have been made with regard to orders or quotation requests.
    - Meet and discuss reports with operations manager to provide guidelines on what future production capacity should look like.

- Identify and develop new markets for the company. This job duty consists of the following sub-duties: 5%.
    - Have future marketing executive produce viability report on opening new locations and/or expanding existing business to include new products or services.
    - Monitor budgets by comparing and analyzing actual results with plans and forecasts.

Implementation and Future Plan of Expansion – 35%

- Identify, develop, and evaluate the most suitable marketing strategy based on market characteristics, objectives set by [the CEO of the Chinese affiliate] and cost and markup factors. This job duty consists of the following sub-duties: 15%
    - Work with marketing executive and web designer on determining current market characteristics and adjust existing strategies accordingly to best serve the company's goals to acquire regular monthly orders, national business relations, and improving inter-company policies.
    - Have marketing executive prepare cost and mark-up factors report based on cost analysis and target pricing for competitiveness.

- Recommend organizational processes and policy changes at staff meetings. This job duty consists of the following sub-duties: 5%
    - Create organizational process based on efficiency, digitizing certain aspects of the company, and providing insight on policy changes that will improve customer relations and product development.
    - Based on department's market research, suggest updates to existing order management system to make it easier for clients to track orders.

- Respond to queries by Managing Members and Superiors regarding the performance in sales and relaying whether his set plan for future targets can be met in the time set. This job duty consists of the following sub-duties. 5%
    - Provide subordinates with instructions to meet managing members' target plans for product distribution.

- Create timeline for subordinates to follow for when each step should be completed, from incoming order to shipping to end user.
- Oversee and manage step-by-step plans to reach targets and review final products to determine whether target has been reached.

- Analyze operations to evaluate the performance of the company and its sales to determine areas to maximize returns and increase productivity of the sales and marketing team. This job duty consists of the following sub-duties: 5%
  - Review sales data, market trends, forecasts, account analyses, and new product information, and set guidelines for department based on findings.
  - Monitor budgets to ensure cost analyses are in line with target plans and future forecasts for the company.
  - Have marketing executive and web designer draw up reports on department performance indicating problem areas and production issues to be able to adjust plans for the department accordingly.

- Participate in key decisions as a member of the Senior Management team. This job duty consists of the following sub-duties: 5%
  - Provide information on competition in the industry and assist in setting strategies to remain a viable, yet competitive, company by reviewing profit margins, competitive pricing, and department's efficiency.
  - Set guidelines for pricing management and percentage of optimum pricing to determine company growth and expansion paths.
  - Provide direction to other senior managers on how to maintain and increase sale productivity.

Pricing and Contract Negotiation – 25%

- Negotiate and approve contracts with vendors or distributors to manage product distribution channels, establishing distribution networks or developing distribution strategies. This job duty consists of the following sub-duties: 15%
  - Negotiate contracts with distributors to use products in marketing or promotional campaigns at trade shows or expos.
  - Finalize and approve vendor and distributor products.
  - Manage distribution channels for manufactured products to ensure transition from production to end user.
  - Oversee management of established distribution networks to ensure receipt of inventory and delivery of product to end user.
  - Guide marketing executive on tracking product through distribution channel and network to ensure it is delivered timely to end user.

- Ensure that all pro forma invoices are issued and that the team is replying to all queries by customers. This job duty consists of the following sub-duties: 5%
  - Final approval of all pro forma invoices confirming that the details on the proposed invoice match the purchase order.

- Provide department with guidelines on how to respond to customer queries.
- Oversee responses to custom quotation inquiries and provide specific guidelines for how to do custom quotations. Approve final quotation before it is sent to clients.

- Determine price and monetary policies for products. This job duty consists of the following sub-duties: 5%
  - Research on competition prices for similar products, factory pricing of raw materials, and shipping costs to determine best product pricing.
  - Ensure final pricing and company monetary policies keep the company competitive and viable.

4. Job Duties of Subordinate Positions

As previously discussed, the Petitioner's organizational chart identified two positions in the marketing and sales department directly subordinate the Beneficiary's position – including a marketing executive and a programmer/web designer – as well as a third position – graphic artist – subordinate to the programmer/web designer. The letter from the Petitioner's COO submitted in response to the RFE listed the job duties of all three positions, and the percentage of time allocated to each duty, as follows:

Marketing Executive:

- Develop sales and performance reports to submit to [the Beneficiary] for review to ensure department is meeting all target orders each month: 20%
- Conduct in depth research on markets in different geographical areas nationwide regarding competitive pricing, different advertising methods used by similar companies, and market trends to assist [the Beneficiary] in developing the most suitable marketing strategy for company products: 20%
- Implement [the Beneficiary]'s marketing and sales strategies within the department and report to him directly should any obstacles or delays be encountered for final instruction on how to correct said errors: 10%
- Write up daily order reports to keep track of all orders coming in, increases in order size, varying types of orders (custom or standard), and types of clients requesting orders and submit them to [the Beneficiary] for review: 10%
- Review operational records and reports to project sales and determine profitability, then report final findings to [the Beneficiary]: 5%
- Develop all pro forma invoices before final approval from [the Beneficiary]: 10%
- Prepare report detailing department progress, contracts and new sales of products or services to submit to [the Beneficiary] along with a report detailing possible reasons for increase or decrease of sales in any given time period: 10%
- Assist [the Beneficiary] with coordinating promotional activities with clients: 5%
- Manage department responses to customer inquiries per [the Beneficiary]'s instructions, particularly for custom quotations, and track orders through distribution channels and networks to ensure timely delivery to clients: 10%

Programmer/Web Designer:

- Design, build and maintain company websites based on instruction from [the Beneficiary] regarding audience the company wants to target and products that should be highlighted on the website: 20%
- Review Graphic Artist's conceptual designs for company website and provide them to [the Beneficiary] for final review and approval to ensure designs are satisfactory: 15%
- Confer with [the Beneficiary] to prioritize needs for programming and website design, resolve any conflicts that arise regarding web design and website maintenance, and choose best solutions if obstacles are encountered: 10%
- Design and implement website security measures: 5%
- Identify and maintain links from other websites such as Chinese affiliate's for maximum efficiency. Link other website to company website as instructed to do so by [the Beneficiary]: 5%
- Develop web site design with assistance from Graphic Artist and ensure that design is in line with current advertising strategies based on seasonality, special events, holidays, etc. that the company is targeting: 10%
- Ensure that website design follows key components of a well-designed site including friendly user experience, search engine optimized, and conversion optimization: 10%
- Provide [the Beneficiary] with final design proofs for final approval: 10%
- Ensure that content on company website is up to date and properly maintained consistently: 10%
- Manage consistent revision of website to ensure that clients are seeing the most recent promotions, product designs, and advertising: 5%

Graphic Artist:

- Conduct market research on what graphic designs have been used by competing companies, current trends in virtual design adaptation of products for website and email advertising, and draft report for [the Beneficiary] to prepare guidelines on best direction to take for product designs: 25%
- Gather information and guidelines from [the Beneficiary] to begin planning conceptual designs for new and existing products to include in all aspects of email and website advertising: 10%
- Illustrate concepts by designing rough layout of art and copy regarding arrangement size, type size and style, and other related aesthetic concepts: 25%
- Obtain initial approval of concept designs from Programmer/Web Designer by submitting rough layout for approval: 10%
- Prepare final layout of concept design with any changes noted by Programmer/Web Designer: 15%
- Assist Programmer/Web Designer with overall website design for promotional events, holidays, seasonality, that the company is focusing on: 15%

5. Director's Decision

In his decision the Director determined that the Beneficiary's two direct subordinates would primarily be performing routine day-to-day functions of the new office, not managerial duties, and that the Beneficiary would be personally overseeing the work of his three subordinate employees rather than directing the management of the Petitioner's marketing and sales department. As such the Beneficiary's position as chief of marketing and sales would not meet all of the definitional elements of "executive capacity" at section 101(a)(44)(B) of the Act. The Director also determined that the Beneficiary'sA proposed position did not meet all of the definitional elements of "managerial capacity" at section 101(a)(44)(A) of the Act. None of the job descriptions for the three subordinate positions in the marketing and sales department indicated that any of the three positions required a specific baccalaureate degree, as required to be considered professional positions. Therefore, the Beneficiary would not be supervising and controlling the work of other supervisory, professional, or managerial employees, and would at most be a first-line supervisor of employees performing daily operational tasks of the business. The Director concluded that the record did not establish how the Beneficiary would be relieved from performing primarily day-to-day operational tasks for the new office, with its prospective staff of 10 employees, or how the new office would be able to support an executive or managerial position within one year of the petition's approval.

6. Petitioner's Appeal

On appeal the Petitioner claims that the Beneficiary's employment in the United States will meet the definitional requirements of both managerial and executive capacity within one year of the petition's approval through his oversight of the U.S. business's "essential function" of marketing and sales. Specifically, the Petitioner asserts that the Beneficiary will manage this essential function within the meaning of section 101(a)(44)(A)(ii) of the Act, and that he will direct the management of the function within the meaning of section 101(a)(44)(B)(i) of the Act.[1] Thus, the Petitioner has shifted its characterization of the Beneficiary's employment in a managerial or executive capacity from the management or executive oversight of subordinate employees to the management or executive oversight of a specific and essential function of the business.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. 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

[1] A petitioner claiming that a beneficiary will perform as a "hybrid" manager/executive will not meet its burden of proof unless it has demonstrated that the beneficiary will primarily engage in either managerial or executive capacity duties. *See* section 101(a)(44)(A)-(B) of the Act. While in some instances there may be duties that could qualify as both managerial and executive in nature, it is the petitioner's burden to establish that the beneficiary's duties meet each element set forth in the statutory definition for either managerial or executive capacity. A petition may not be approved if the evidence of record does not establish that the beneficiary will be primarily employed in either a managerial or executive capacity.

beneficiary will exercise discretion over the function's day-to-day operations." *Matter of G-*, Inc., Adopted Decision 2017-05 (AAO Nov. 8, 2017).

In claiming that the Beneficiary will be employed in a managerial capacity, the Petitioner asserts that the Beneficiary will manage the essential function of marketing and sales through his supervision and management of tasks performed by his subordinate departmental employees and his consultation with the chief of the production and shipping department. Because the Beneficiary will allegedly manage an essential function, the Petitioner asserts that it does not need to show that the Beneficiary will supervise and control the work of other supervisory, professional, or managerial personnel (under section 101(a)(44)(A)(ii) of the Act). Nevertheless, the Petitioner contends that all three subordinate positions in the marketing and sales department are occupations that typically require a bachelor's degree and should therefore be considered professional positions. Contrary to the Director's determination, therefore, the Petitioner asserts that the Beneficiary will supervise and control professional employees, as well as an essential function of the organization, and will also have the authority to hire and fire subordinate employees and exercise discretion over the day-to-day operations of the marketing and sales function, thus meeting all of the definitional requirements of "managerial capacity" employment.

In claiming that the Beneficiary will be employed in an executive capacity, the Petitioner asserts that the Beneficiary will direct the management of the marketing and sales function of the U.S. business through his direct and indirect subordinates – the marketing executive, the programmer/web designer, and the graphic artist. Contrary to the Director's determination, the Petitioner asserts that the marketing executive and the programmer/web designer will not primarily be performing daily operational tasks necessary to produce a product or provide services, but instead will primarily be managing the marketing and sales as well as the programming and website design functions of one of the Petitioner's major components – its marketing and sales department. According to the Petitioner, therefore, the Beneficiary will be directing the management of a major component and function of the U.S. company, and will also meet the other definitional requirements of "executive capacity" employment because he will establish the goals and policies of the marketing and sales function to be implemented by his subordinate employees, exercise wide latitude in discretionary decision-making with full authority to hire and fire subordinate employees, and receive only general supervision from the COO.

The Petitioner asserts that since the Director took its staffing level into consideration by indicating that the prospective 10-person office could not support an executive or managerial position within a year, the Director should have also considered the reasonable needs of the organization, component, or function in light of the organization's overall purpose and stage of development, as required in section 101(a)(44)(C) of the Act. The Petitioner points to its business plan, an updated version of which is submitted on appeal, as addressing the reasonable needs of the new U.S. company and establishing the need for an employee performing primarily executive or managerial duties within one year of the petition's approval. The updated business plan confirms that the Petitioner's product line will feature an inventory of dog leashes, dog collars, and lanyards with associated clips and clasps, that these products will be sourced from its Chinese affiliate and a U.S. manufacturing facility in [redacted] California, and that the products will be sold to distributors in the United States, primarily in midwestern and western states. Startup costs for the U.S. business are not projected to be high since

much of the office equipment and imprinting machinery had been provided by one of the Petitioner's co-owners. The business plan projects sales of around $500,000 in the first year, $700,000 in the second year, and $900,000 in the third year. In accordance with the Petitioner's organizational chart, the business plan also confirms the prospective hiring of seven employees by February 2020 to supplement the three already in place. As stated by the Petitioner, the business plan highlights the following key steps for the U.S. business over the next year of operation:

1. We intend to focus on Midwest and West Coast distributors . . . [and] focus on the quality and durability of our imprinting process, guaranteeing their quality so that distributors can ensure their clients that their message will be around for a while.
2. All advertising will be disseminated through Advertising Specialist Institute publications.
3. Because many specialty advertising distributors are wary of doing business with suppliers whom they believe to be "dealing direct," all direct inquiries will be directed to a distributor with whom we already have a business relationship.
4. Our main marketing program will revolve around the placement of our full line, full color catalog and price list . . . we will introduce [new] products to the advertising specialty industry through postcards featuring the product on one side and our mailing address on the other . . . [The Petitioner] will also hire industry experienced sales reps of the highest caliber . . . They will not be expected to close sales, but will be expected to represent our products in a competitive atmosphere.
5. Our pricing strategy is to be competitive within the various product categories, but not to rely on the selling price to overshadow the other advantages of doing business with the company.
6. . . . Our in-house sales department will be calling on some of the larger West Coast distributors. We have hired a consultant who has had ongoing business relationships with many of these distributors over the last 24 years and we are counting on him to help us meet our sales objectives right from the start.

The information in the updated business plan does not appreciably add to our knowledge about the Petitioner's fledgling business operation and its staffing needs during the first year. Earlier in these proceedings the Petitioner submitted evidence that the U.S. business was at least operational, including its commercial lease agreement,[2] the first month's rental payment, photos of the premises, projected startup costs over the first year, a $50,000 capital contribution from one of the co-owners, bank account statements, and some purchase orders during the first several months of operation. This documentation provides little basis, however, to draw any conclusion about the future prospects of the U.S. business. The evidence of record is insufficient to demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, and that it will have an actual need for an executive or a manager who will primarily perform qualifying duties by the end of the one-year period. *See generally* 8 C.F.R. § 214.2(l)(3)(v).

[2] The lease agreement describes the leased premises as: "Approx. 500-800 square feet of storage space located on 2nd floor of warehouse, Office facilities as required, Printing and shipping area as required."

Even if we agree with the Petitioner that marketing and sales is a clearly defined activity and a core function of the U.S. business, which would meet the first two elements of "essential function" in *Matter of G-*, the evidence of record does not indicate that the Beneficiary will primarily manage rather than perform this function, as required in the third element of "essential function." *Matter of G.* The job duties of the Beneficiary and his two direct subordinates, as described in these proceedings, indicate that the marketing executive and the programmer/web designer will provide assistance to the chief of marketing and sales in the forms of market research, operational support, record-keeping, and information technology services, and that the chief of marketing and sales will exercise some managerial tasks vis-à-vis these two employees. This assistance, however, will not relieve the chief of marketing and sales from performing many day-to-day operational tasks of the business, as indicated in the job duties described by the Chinese affiliate's CEO and the Petitioner's COO. Thus, the record does not show that the Beneficiary will primarily "manage" the marketing and sales function, as required to meet the definitional requirement of managerial capacity employment at section 101(a)(44)(A)(ii) of the Act.

Nor do the prospective job duties of the subordinate employees in the marketing and sales department indicate that the Beneficiary, as head of the department, will meet all the definitional requirements of employment in an executive capacity. Despite the Petitioner's claim that the marketing executive and the programmer/web designer are managerial positions, and that the Beneficiary as chief of marketing and sales will therefore "direct the management" of the marketing and sales function, the job duties of the marketing executive and programmer/web designer clearly indicate that neither position is primarily managerial in nature. The marketing executive has no subordinate(s) and the job duties of the position, as detailed in the COO's letter, are devoid of managerial tasks. The programmer/web designer does have one subordinate – the graphic designer – but only two of the programmer/web designer's duties totaling 25% of his time (as detailed in the COO's letter) involve management duties vis-à-vis the graphic designer.[3] Thus, the programmer/web designer's duties are not primarily managerial. Both the marketing executive and the programmer/web designer, therefore, will mainly perform daily operational tasks of the business, not managerial tasks. Since neither of the positions directly subordinate to the chief of marketing and sales is a managerial position, the Beneficiary will not "direct the management" of the Petitioner's marketing and sales function, as required to meet the definitional requirement of executive capacity employment at section 101(a)(44)(B)(i) of the Act.

The Petitioner's claim that the Beneficiary will be employed in a managerial or executive capacity in the United States is further undermined by some documentation submitted in support of the appeal. The Petitioner submits excerpts from the website of the Occupational Outlook Handbook (OOH), U.S. Bureau of Labor Statistics, providing information about the occupations of marketing managers and computer programmers. This documentation was submitted as evidence that these two occupations typically require a bachelor's degree, the educational threshold of a "professional" as defined in the regulation at 8 C.F.R. § 204.5(l)(2), and to demonstrate that the Petitioner's analogous positions of marketing executive and programmer/web designer will therefore be professional positions. The OOH

[3] The two managerial duties are (1) reviewing the Graphic Artist's conceptual designs for company website and providing them to the Beneficiary for final review and approval to ensure the designs are satisfactory (15%), and (2) developing the web site design with assistance from the Graphic Artist and ensuring that design is in line with current advertising strategies based on seasonality, special events, holidays, etc. that the company is targeting (10%).

information also indicates that in 2018 the median pay for marketing managers was $132,620 per year and for computer programmers was $84,280 per year. These figures are considerably higher than the the salary the Petitioner intends to pay its chief of marketing and sales. The Form I-129 petition indicates that the chief of marketing and sales will be paid $5,000 per month, which works out to $60,000 per year. The letter from the Petitioner's COO submitted in response to the RFE indicates that the Beneficiary's U.S. salary would be even lower – $24,000 per year. Thus, the Petitioner has provided two widely divergent figures for the Beneficiary's salary, both of which are far below the median salaries for two occupational positions subordinate to the Beneficiary on the Petitioner's organizational chart.

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See id.*

The Petitioner has not resolved the inconsistencies discussed above. It has not explained the two different salaries it provided for the chief of marketing and sales position and why the figures are so far apart. Nor has it explained why the chief of marketing and sales position, which is superior to the marketing executive and programmer/web designer positions on the organizational chart, would be paid at a level vastly below the median salaries of those subordinate occupational categories.[4] Moreover, the comparatively low salary figures proposed for the chief of marketing and sales position raise crucial questions as to whether the job duties have been inflated and whether the Beneficiary will actually exercise high-level managerial or executive functions, or act at a senior level within the organization, as asserted by the Petitioner. The low and discrepant salary figures cast further doubt on the Petitioner's claim that the Beneficiary will actually be employed in a managerial or executive capacity.

Finally, the Petitioner has not specified in this proceeding whether it is claiming managerial or executive capacity for the Beneficiary's prospective employment in the United States. It is the Petitioner's burden to establish that the Beneficiary will be employed in either a managerial capacity or in an executive capacity, and to specify which one. As previously stated, the Petitioner bears the burden of proof in visa petition proceedings to establish eligibility for the immigration benefit it seeks. Section 291 of the Act. 8 U.S.C. § 1361. The Petitioner has not met its burden in this case.

B. Employment Abroad

As previously indicated, because the Petitioner has failed to establish that the Beneficiary will be employed in a managerial or executive capacity in the United States, which is a fundamental element of eligibility for the immigration benefit sought in this proceeding, we reserve the issue of the Beneficiary's employment abroad in a managerial or executive capacity.

[4] The Petitioner does not indicate the salaries of its own marketing executive and programmer/web designer.

III. CONCLUSION

In accord with the foregoing analysis, 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 of the petition's approval. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.