



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

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

MATTER OF P-E-S- LLC

DATE: DEC. 14, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an Oklahoma limited liability company engaged in private limousine and coach services, seeks to extend the Beneficiary's classification as an L-1A nonimmigrant intracompany transferee. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Petitioner is an affiliate of [REDACTED] located in [REDACTED], Venezuela. The Beneficiary was previously granted a total of three years in L-1A classification. The Petitioner seeks to extend the employment of the Beneficiary as its President for an additional period of two years.

The Director denied the petition concluding that the Petitioner did not establish that the Beneficiary will be employed in a qualifying managerial capacity in the United States.

On appeal, the Petitioner asserts that the Beneficiary will be employed in a qualifying managerial and executive capacity in the United States. The Petitioner submits a brief and additional evidence in support of the appeal.

I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying 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. 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.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, 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.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

Finally, 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. Section 101(a)(44)(C) of the Act.

II. THE ISSUE ON APPEAL

The sole issue addressed by the Director is whether the Petitioner established that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition.

A. Facts

The Petitioner filed the Form I-129 on May 30, 2014. On the Form I-129, where asked to describe the Beneficiary's proposed duties in the United States, the Petitioner stated that the Beneficiary will "[c]ontinue to establish, set-up and manage operations in the United States," and referred the Director to its business plan.

In support of the petition, the Petitioner submitted its business plan explaining that it operates a "private-hire-vehicle business engaged in transporting passengers within the state of Oklahoma." The business plan went on to describe the U.S. company's management and staffing as follows:

[W]hile primarily engaged in business operations, he has also been engaged with customers directly in order to evaluate their needs and verify operational protocols. He has managed every aspect of this type of business including: accounts receivable, accounts payable, pricing, staffing, customer service, statistical assessments of sales reports, and marketing. He plans to hire external professionals to assist him with specific tasks.

.....

Our business relies heavily on the skill and judgment of our drivers. Our drivers will have proper licenses, insurance and any other necessary documentation.

(b)(6)

Matter of P-E-S- LLC

They must know and comply with all traffic guidelines and will be trained on proper professional decorum.

....

We will start to operate with a minimum of two or three units, but we may hire people to perform services with their own vehicles if their vehicle passes an inspection that ensures that company standards are upheld.

The Petitioner did not submit any additional information pertaining to the Beneficiary's position or job duties, the positions or job duties of his subordinates, if any, or the organizational structure of its U.S. company.

The Director issued a request for evidence (RFE) on July 28, 2014 advising the Petitioner that it did not submit any evidence as to whether the Beneficiary will be primarily performing managerial or executive duties at its U.S. company. The Director instructed the Petitioner to submit evidence to satisfy this requirement.

In response to the RFE, the Petitioner submitted a letter, dated October 21, 2014, stating the following about the Beneficiary's position at its U.S. company:

Initially, it is necessary to point out that the beneficiary is attempting to establish the operation so that when he and his family eventually immigrate to the country in several years through a family based petition, the company will be operational. . . . [W]hile visiting his father in Oklahoma several years ago [the Beneficiary] saw the opportunity for a similar organization in the [redacted] area. With the immediate petition for extension a business plan was provided that detailed the products and services to be offered and the qualifications of the beneficiary so some of the answers to our questions are included in that business plan.

The Petitioner submitted a second letter, also dated October 21, 2014, describing its operations and the Beneficiary's position as follows:

[The Petitioner] is a private car service located in [redacted] Oklahoma that serves the greater [redacted] Metropolitan area. Although the company only has one employee, we do need him to hire, fire and supervise contract workers that will drive for it who require supervision and coordination. [The Beneficiary's] job is to run the organization. As such he oversee its day to day operations, maintains the accounting and tax records, negotiates contracts, promotes the services being offered, coordinates drivers, reviews insurance policies and keeps track of the car maintenance.

The Petitioner submitted an undated document from the Vice President in Charge of the foreign entity, titled "Duties and Responsibilities of the Company Director." The document breaks up the Beneficiary's duties into five categories: general duties (without title), "build the market," "maintain the service," "client care," and "fleet maintenance." The duties listed for the Beneficiary's position are as follows:

Managing the administration of the company[.]

Operating the multi-faceted tasks for the company[.]

Ensure that the routine requirements of the company are adequately fulfilled and on time. Provide and describe the scope of service to appropriate authorities and comply with consumer rights and requirements.

Prepare or hire consultant(s) as needed for the tax and the business related matters of the company such as the annual account report[.]

Set and meet different targets which are highly necessary for the success of the company, such as researching the market, building the market, maintaining the service, caring for the client, maintaining the service, caring for the client, maintaining the fleet, and caring for the employee(s)[.]

Build the Market:

Assess the transportation landscape . . . become aware of frequently traveled destinations in ways that mass transit cannot accommodate, or a taxi company does not perform.

Manage the advertising opportunities and costs. . . .

Maintain the Service:

Monitor the quality throughout the road network to ensure that our rider's experience is as positive as possible. –Monitor and maintain a schedule strategically designed to meet fluctuating demands. –Match and coordinate each trip to the most appropriate provider and distribute trip assignments across multiple drivers to maintain competitive rates for our clients. . . . –Manage multiple calls and problems at the same time and organize and prioritize the order of calls. –Verify phone, fax, and modem capabilities for administrative support. Develop a website and Facebook presence and keep it updated.

Client Care:

Accommodate each passenger's individual needs. –Handle any request and complaint made by the customers[.] –Practice tact and diplomacy and discretion regarding the origination and destination of the client trips. –Drive with care to provide a comfortable experience for the passenger.

Employee care: Our philosophy and management style for all personnel is based on the belief that the retention of quality providers is critical to our long-term success.

Deal with the drivers on a daily basis. –Look after the health, and safety of the drivers working with me, ensuring the drivers meet health and safety standards for vehicle maintenance and operation, although they are privately contracted. –Assess driver qualifications and training; and the delivery of courteous, safe, and timely transportation services. –Verify initial and periodic driver background checks. –Verify proof of insurance in compliance with local and state requirements. –Verify appropriate driver training, licenses and compliance with local and state requirements. –Verify appropriate safety procedures. –Reward drivers with holiday . . . and birthday gifts and a company outing for the family every fall.

Fleet Maintenance:

Perform ad-hoc vehicle inspections to ensure vehicles used for transport are properly licensed, clean, safe, and well-maintained.

Request and record and document maintenance records and trip logs.

Keep backup lists of contact information of other drivers in case of mechanical breakdown during a trip.

The Petitioner did not submit any additional information pertaining to the Beneficiary's subordinates' positions or job duties, or the organizational structure of its U.S. company. Although the Petitioner referenced contracted drivers, it did not provide any evidence of contracts or agreements with hired drivers or other staff.

The Director denied the petition on December 12, 2014, concluding that the Petitioner did not establish that the Beneficiary will be employed in a managerial capacity under the extended petition. In denying the petition, the Director found that the Petitioner provided minimal information regarding the nature of the Beneficiary's U.S. position and did not establish that the U.S. position satisfies all four parts of the definition of managerial capacity. The Director noted that, although requested, the Petitioner declined to submit a detailed statement of the Beneficiary's proposed U.S. duties that included the amount or percentage of time the Beneficiary spends on each duty. The Director found that all of the duties ascribed to the Beneficiary are typically considered to be non-qualifying, junior-level operational and administrative functions, rather than managerial duties.

The Director further noted that, although requested, the Petitioner did not provide any evidence to demonstrate that the Beneficiary will supervise and control the work of other supervisory, professional, or managerial employees who will relieve him from performing the listed non-qualifying, non-managerial activities. As such, the Director found that it appears that the Beneficiary, despite his senior title, would merely be a first-line supervisor.

On appeal, the Petitioner submits a brief, dated January 13, 2015, contending that the Director did not elaborate on why the Beneficiary could not be considered an executive of the organization. The Petitioner states that its intent in its response to the RFE was to demonstrate that the Beneficiary could meet the definition of either manager or executive and that the reference to the Beneficiary "directing the management of the organization" was made in reference to the executive nature of his

Matter of P-E-S- LLC

position, which meets the definition of executive under the Act and the regulations. The Petitioner further states:

As previously stated in the response letter from the company's secretary, that although the company only had one employee, it was in need of the beneficiary to direct all phases of the management of the organization. The beneficiary hires, fires and supervises the contract workers that drive for the organization. His job is simply to run the organization. He oversees the day to day operations, maintains the accounting and tax records, negotiates contracts, promotes the services being offered, coordinates drivers, reviews insurance policies and keeps track of the car maintenance. The Director's assertion that this job description is vague and provides minimal information can hardly be substantiated by reason; although admittedly it did not break down in percentages the amount of time spent in each area. . . . The beneficiary was, at the time, the sole employee of the company, and as such performed all tasks related to the management of the organization, but for some of the driving of clients, which was performed by contract labor. The employer has since hired someone to help with some of the company's bookkeeping needs. . . .

In addition to the office worker the petitioner has hired two additional employees . . . prior to the issuance of the immediate decision.

In support of the appeal, the Petitioner submits a letter from its Secretary, dated January 12, 2015, describing the Beneficiary's duties in the United States as follows:

[The Beneficiary] performs all the duties of running the company as well as some of the driving of customers. His primary duties, at least 50% of the time, are in the direct management of the company; i.e. hires, fires, trains, supervises and coordinates drivers and maintains work and service schedules for the customers. He analyzes and organizes office operations and procedures. He prepares the organizational budget and financial reports based on the monthly financial records. He is responsible for analyzing and organizing the office operations and procedures, such as bookkeeping, maintaining tax records, payroll, flow of correspondence, filing, requisition of supplies and all other clerical services. He is responsible for promotion of the services to potential customers and negotiating various agreements about the services. Because he is the only statutory employee of the company he does perform non-management of executive duties, such as clerical work and some driving of clients but those are less than 50% of the time. Now with [REDACTED] performing some of the clerical duties of the company he will be supervising her work. . . .

In addition to his management duties he is responsible for establishing the goals and policies of the company. As the only statutory employee he has full authority to make all decisions about the running of the business and the

Matter of P-E-S- LLC

commitments and obligations as well. As a part-owner of the business I of course give my input and suggestions but he is the primary director of all activities.

The Petitioner's letter further stated that [REDACTED] "will help maintain the financial records of the company and will work in the office and is also an outside promotion agent responsible for attracting various customers." The Petitioner further stated that the other two individuals will be drivers for the company.

The Petitioner also submits a Memo, dated January 9, 2015, in reference to the "Duties and Activities for a typical day with list of weekly and monthly duties." The Memo describes the Beneficiary's daily activities as follows:

An Average day for the beneficiary consists of one to two client transports that last a total of 2 to 3 hours. Review, Coordinate & Post Drivers Schedules for 1 hour. Contact potential customers through phone or personal contact and negotiate contracts with those clients, 1 to 2 hours. Review and respond to correspondence, reconcile receipts, make and post client invoices for 1 to 2 hours. Prepare and reconcile bookkeeping records, and prepare related budgets, financial reports and federal and local returns/reports as needed. 1 to 2 hours. (At least 50% of the above time is therefore spent in carrying out managerial or executive duties.)

Additional Weekly Schedule breakdown:

- 1) Mondays and Thursdays: Bank reconciliations, deposits[.]
- 2) Wednesday: visit Co-owner to review activities for week.
- 3) Tuesdays and Thursdays: Driver interviews, orientation and training as well as car inspection[.]
- 4) Friday: Meet with co-owner and assistant for development. Coordinate special trips, Coordinate drivers for week-end services[.]

Monthly Tasks:

1. Meet with [REDACTED] business advisor
2. Arrange special tours based on festivals or local activities through contact with city/community organizations
3. Review and evaluate advertising

The Petitioner further submits three Forms W-9, Request for Taxpayer Identification Number and Certification for the following individuals: [REDACTED] dated December 1, 2014; [REDACTED] dated December 1, 2014; and [REDACTED] dated December 1, 2014.

B. Analysis

Upon review, and for the reasons stated herein, the Petitioner has not established that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition.

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

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

In the instant matter, the Petitioner first characterized the Beneficiary's role as President and briefly described his duties in the following very broad terms: continue to establish, set-up, and manage operations; evaluate customer needs; verify operational protocols; accounts receivable; accounts payable; pricing; staffing; customer service; assessment of sales reports; and marketing. The Petitioner did not include any additional details or specific tasks related to each duty, nor did the Petitioner indicate how such duties qualify as managerial or executive in nature. 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).

In response to the RFE, the Petitioner submitted a similarly vague list of duties for the Beneficiary's position, noting that he will hire, fire, and supervise contract drivers; maintain accounting and tax records; negotiate contracts; promote services offered; coordinate drivers; manage the administration of the company; manage advertising opportunities and costs; monitor and maintain a schedule; match and coordinate each trip to the most appropriate provider and distribute trip assignments across multiple drivers to maintain competitive rates for clients; manage multiple calls and problems at the same time; verify phone, fax, and modem capabilities for administrative support; develop and maintain a website and Facebook presence; accommodate each passenger's individual needs; handle any request and complaint made by customers; drive with care to provide a comfortable experience for the passenger; ensure the drivers meet health and safety standards for vehicle maintenance and operation; assess driver qualifications and training; verify initial and periodic driver background checks; verify proof of insurance; verify appropriate driver training, licenses, and compliance with local and state requirements; verify appropriate safety procedures; perform ad-hoc vehicle inspections; and request, record, and document maintenance records and trip logs.

Here, the Petitioner has not provided sufficient information detailing the Beneficiary's duties at the U.S. company to demonstrate that these duties will qualify him as a manager or executive. The Petitioner also did not indicate how much time the Beneficiary will devote to each duty. Based on the current record, we are unable to determine whether the few claimed managerial duties would constitute the majority of the Beneficiary's duties. The Petitioner's description of the Beneficiary's job duties does not establish what proportion of the Beneficiary's duties will be managerial in nature, and what proportion will be non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). These general statements do not offer any clarification as to the Beneficiary's actual proposed duties in the United States, and fall considerably short of demonstrating that the Beneficiary will primarily manage the organization and supervise and control the work of other supervisory, professional, or managerial employees. 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 not provided any detail or explanation of the Beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

On appeal, the Petitioner contends that the Beneficiary will be employed in both a managerial and executive capacity, but the Director did not consider whether the Beneficiary's position is also executive. The Petitioner asserts that the Beneficiary will perform all duties associated with running the organization. The Petitioner submits a letter further describing the Beneficiary's position in the United States in equally broad terms and states that he will devote at least 50% of his time to the direct management of the company, performing duties such as: hiring, firing, supervising, and coordinating drivers; maintaining work and service schedules for customers; preparing the organizational budget and financial reports; and analyzing and organizing office operations and procedures, such as bookkeeping, maintaining tax records, payroll, correspondence, filing, requisitions of supplies, and all other clerical services. The Petitioner also states that, as the only statutory employee of the company, the Beneficiary will devote less than 50% of his time to non-management duties, such as clerical work and some driving of clients. The Petitioner further contends that the Beneficiary will establish the goals and policies of the company and, as the only statutory employee, will have the full authority to make all decisions about running the business, its commitments, and obligations. In support of these contentions, the Petitioner submits another document attempting to detail the Beneficiary's duties on an average day; however, the document shows that the Beneficiary devotes at least six hours a day and at most 10 hours a day to menial tasks, such as transporting clients; reviewing, coordinating, and posting driver schedules; contacting potential customers and negotiating contracts; reviewing and responding to correspondence, reconciling receipts, making and posting client invoices; and preparing and reconciling bookkeeping records, preparing budgets, and financial reports. While some tasks, such as negotiating contracts and preparing budgets could be considered managerial or executive in nature, the Petitioner has not submitted sufficient information pertaining to those specific tasks to establish the level at which the Beneficiary performs them.

Here, the Petitioner briefly listed some of the Beneficiary's vague duties and allocated the number of hours he devotes to them on an average day. The Petitioner also made a blanket assertion that the Beneficiary devotes at least 50% of his time to running the business, but failed to quantify the time the Beneficiary would spend on each task. This lack of documentation is important because the Beneficiary's proposed daily tasks, as noted above, do not fall directly under traditional managerial or executive duties as defined in the statute. In fact, the majority of the listed duties, as indicated above, are directly associated with performing a service of the business. For this reason, the Petitioner has not established that the Beneficiary would primarily perform duties in either a managerial or executive capacity. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Further, on the Form I-129, and again in response to the RFE, the Petitioner indicates that the Beneficiary is establishing and setting up its operations in the United States. However, the Petitioner has had three years to establish its operations in the United States as the Beneficiary was initially granted one year of L-1A classification to open a new office and a subsequent extension of two years to continue operations. Despite the Petitioner's current business status, it may not be granted a second "new office" L-1A visa approval. The nonimmigrant intracompany transferee visa is not an entrepreneurial visa classification allowing a beneficiary a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business. The regulations allow for a one-year period for the U.S. entity to commence doing business and develop to the point that it will support the beneficiary in a qualifying managerial or executive position. By allowing multiple petitions under a more lenient standard, USCIS would allow foreign entities to create under-funded, under-staffed, or even inactive companies in the United States, with the expectation that they could receive multiple extensions of their L-1 status without primarily engaging in managerial or executive duties. The only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii).

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 petitioner'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 petitioner's business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

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, 8 U.S.C. §§ 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary

Matter of P-E-S- LLC

must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Here, the submitted evidence does not establish that the Beneficiary supervised any subordinate staff at the time of filing. The Petitioner has made broad assertions about having contracted drivers for the business, but it has not provided any evidence of said contracts or agreements with private or self-employed drivers. In fact, the Petitioner has only provided evidence that the Beneficiary owns at least two vehicles in order to perform the services of the business. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

On appeal, the Petitioner states that it has hired [REDACTED] to perform clerical duties, maintain financial records, and attract clients, as well as two contracted drivers, but again, does not provide any evidence of said employees. Although the Petitioner submits copies of IRS Forms W-9 for these individuals, these forms merely demonstrate the Petitioner's efforts to obtain their taxpayer identification numbers and are insufficient to establish that the Petitioner employs them as claimed on appeal. Regardless, even if the Petitioner did establish that it hired staff to carry out the non-qualifying duties being performed by the Beneficiary, it was after the filing of the petition and, according to the Petitioner, immediately prior to the Director's decision. As such, the three employees were not available to relieve the Beneficiary from performing non-qualifying duties at the time of the petition's filing. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Therefore, although the Petitioner has consistently stated that the Beneficiary has the authority to hire, fire, train, supervise, and coordinate employees, it has not established that he was eligible for the benefit sought as a personnel manager as of the date of filing.

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

Here, the Petitioner did not indicate that the Beneficiary is a function manager. The Petitioner did not describe an essential function to be managed by the Beneficiary or provide a breakdown of the Beneficiary's job duties to support such a claim.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and 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 the beneficiary to direct and the 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. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization.

The Petitioner asserts on appeal that the Beneficiary will also be an executive; however, the Beneficiary's position has not been shown to be primarily executive in nature, and the Petitioner has not demonstrated that the Beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. As noted above, the Petitioner did not submit a detailed description of the Beneficiary's position sufficient to establish that the Beneficiary's daily routine will consist of primarily executive duties, rather than on providing the services of the organization as its sole employee. The Petitioner has not submitted evidence that it has staff that will relieve him from performing non-qualifying operational and administrative duties at the U.S. company. Although the Petitioner may not be required to demonstrate that the Beneficiary has subordinate employees who will assist him, it is necessary to demonstrate that someone other than the Beneficiary will carry out the day-to-day routine duties required to continue operations. At this time, the Petitioner has not shown that there have been any employees to carry out such duties as of the date of filing the instant petition.

We note that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. at 178; *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v.*

INS, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

As discussed, the Petitioner states that it operates a private for-hire passenger transportation business, but does not provide any evidence of drivers, dispatchers, or other employees who would provide the services of the company or assist the Beneficiary with administrative and other routine matters. As such, the record reflects that, to the extent that the Petitioner has commenced business operations, the Beneficiary, as the sole employee at the time of filing the instant petition, is providing these services on behalf of the Petitioner. Whether the Beneficiary is an employee in a qualifying managerial or executive capacity turns in part on whether the Petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. Here, the Petitioner has not met that burden.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

III. PRIOR APPROVALS

The Petitioner noted that USCIS approved two other petitions that had been previously filed on behalf of the Beneficiary. The Director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions; however, in her decision, the Director clearly articulated the objective statutory and regulatory requirements and applied them to the case at hand. If the previous nonimmigrant petitions were approved based on the same minimal evidence of the Petitioner's eligibility, the approvals would constitute material and gross error on the part of the Director. Our office is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Eng'g. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Moreover, the prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ.-Corpus Christi v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center Director had approved the nonimmigrant petitions on behalf of the Beneficiary, we would not be bound to follow the contradictory decision of

Matter of P-E-S- LLC

a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

IV. CONCLUSION

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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of P-E-S- LLC*, ID# 13648 (AAO Dec. 14, 2015)