



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

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

MATTER OF A-T-T-R-M-, INC.

DATE: OCT. 30, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a restaurant business, seeks to temporarily extend the Beneficiary's employment as its general manager under the L-1A nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Director, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director determined that the Petitioner did not establish that the Beneficiary would be employed in either a managerial or executive capacity for the U.S. entity. On appeal, the Petitioner asserts that the Director's basis for denial of the petition was erroneous and contends that it has satisfied all evidentiary requirements.

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 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

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

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

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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

In a letter appended to the petition, the Petitioner stated that the Beneficiary would "continue working as a multinational executive" and "manage and direct the development of the petitioning corporation." The Petitioner noted that the Beneficiary is "authorized to use a total of two million dollars investing [*sic*] by the Chinese Parent Corp. to set up [REDACTED] food restaurants" and that the Beneficiary's "responsibilities and duties are the same as stated in the initial application package." The initial evidence in this matter included the qualifying foreign entity's translated work plan for 2015, dated August 30, 2014. The 2015 work plan indicated that the [REDACTED] restaurant had performed well and that by 2015, the foreign entity planned to open "another big restaurant either in [REDACTED] or in [REDACTED] and that its "total investment will increase to two million."

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In response to the Director's request for evidence (RFE), the Petitioner submitted the same translated 2015 work plan but changed the date of the plan to November 19, 2014. The Petitioner also provided the following description for the Beneficiary's duties in the United States:

1. ADMINISTRATIVE DUTIES: Responsible for overseeing the management of human resources (including payroll), financial and taxation documentation, and all record management. This includes establishing job descriptions for each position, directing the recruitment of workers and making final decisions regarding hiring, training, and termination of employee services. He will oversee all employee relations and ensure that all laws, rules and regulations are followed. He will establish effective advertising and promotion programs, make decisions regarding items to be included on the menu, establish operating hours and make other operational decisions.
2. FRONT-OF-THE-HOUSE DINING SERVICES[:] Makes sure that the front-of-the-house manager for each restaurant properly handles all front-of-the-house operations including managing the employees who provide services to customers and who open and close the restaurant. He also ensures that the staff follows the company's service standards and health and safety regulations. He instructs and advises the restaurant managers so they can make sure the workforce is strong and the restaurant is profitable.
3. BACK-OF-THE-HOUSE SERVICES: He ensures that the senior manager in each restaurant closely supervises the back-of-the-house operations and kitchen staff in their food preparation and deliveries, in ordering and caring for food supplies and other inventory, and complying with health and safety rules.
4. MANAGEMENT OF THE PARENT COMPANY'S INVESTMENT: He is responsible for carrying out the company's plan to open many more restaurants in the United States including locating suitable locations and negotiating the terms and conditions for acquiring sites, arranging for the renovation and remodeling of existing structures or, if appropriate, for the design and construction of new buildings. He will manage all of the efforts that must be made to open these new ventures including all of the legal, financial[,], architectural, accounting aspects. He will report directly to the President, [... ,] of the company. The company expects him to remain in the United States for 5-6 years and then return to China to continue his work with the company.

The Petitioner also included an organizational chart, copies of its employer's quarterly wage reports for the last three quarters of 2014, payroll records, and a copy of the lease for its [REDACTED] California restaurant. The record also included a translated newspaper advertisement for prospective restaurant employees dated October 2013, bank statements with copies of cancelled checks from

November 2013 to August 2014, and photographs of a restaurant. According to the submitted menu, the Petitioner's restaurant is open for lunch and dinner daily from 11:00 a.m. until 2:00 a.m.

The organizational chart depicts the Beneficiary as General Manager overseeing the "HR Department," the "Development Department," a kitchen manager, and a front-office manager. The chart also includes a storekeeper who reports to the kitchen manager and a "financial department" and "cashier" working under the front office manager. The chart did not identify any employees by name or include positions such as cooks, dishwashers, hosts, or servers.

The Petitioner stated on the Form I-129 that it had "7 - 9" current employees at the time of filing. The most recent California employer's quarterly wage report provided, for the third quarter of 2014, showed that the Petitioner employed seven employees throughout that quarter. The most recent payroll records provided, for the pay period ended on October 7, 2014, included only the Beneficiary and four other employees.

The Director denied the petition on February 6, 2015, determining that the record was insufficient to establish that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition. The Director emphasized that the Petitioner did not provide the detailed organizational chart requested in the RFE, and thus had not established that the Beneficiary's subordinates relieve him from performing duties associated with the day-to-day operations of the Petitioner's restaurant.

On appeal, the Petitioner asserts that the Beneficiary spends more than half of his time working as the general manager of the petitioning company and that these duties do not involve the day-to-day operations of the restaurant. Rather, the Petitioner contends that the Beneficiary is the individual who: decides where the restaurant should be built and negotiates the deal to acquire the site; hires and oversees the personnel who design and construct the restaurant; hires the lawyers, accountants, and advertising agencies to promote the restaurant; deals with city officials to obtain permits; decides on the menus, uniforms, and how the restaurant is decorated; decides on the staffing, the security, and supplies; deals with health inspections; and reports to the parent company. The Petitioner claims that it continues to expand and that as other projects are started, the Beneficiary will assemble an office staff to handle the details of each of these operational areas on a daily basis and he will continue to provide guidance and direction to each new restaurant. The record also includes a copy of the Petitioner's employee handbook and training manual, which the Petitioner indicates the Beneficiary put together with the help and advice of a restaurant management consultant.

The record on appeal also includes a document titled Staffing and Organizational Chart. In this document, under the Beneficiary's position title, the Petitioner lists two commercial development agents, a legal firm, and an accounting firm and also lists the responsibilities of "[a]dvertising, employee recruitment, compliance with Building, Health, OSHA, and Fire regulations" and "[l]ocating and contracting with business providing food supplies, restaurant supplies, security services, cleaning, pest control, repair and maintenance services." The Petitioner also notes under

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the Beneficiary's position that it is in negotiations for an [REDACTED] restaurant project, has identified restaurant sites in [REDACTED] and [REDACTED] and is gathering information regarding projects in [REDACTED]

This document also lists the personnel employed at the Petitioner's [REDACTED] restaurant. Specifically, it identifies a dining room/front-of-the-house manager, two waiters, a bus person/cashier, a kitchen/back-of-the-house manager, three cooks, and a kitchen assistant. The Petitioner included brief job descriptions for these positions. The Petitioner also provides a three-page job description for the general manager position listing duties that pertain to managing a restaurant. Specifically, it states that the general manager performs administrative responsibilities such as processing payroll, maintaining personnel files, analyzing and signing invoices, monitoring inventory, completing a daily "Comp and Void Report," money handling, staff scheduling, reviewing marketing plans, and conducting weekly meetings. The job description also describes the general manager's accountabilities and performance metrics for the dining room and kitchen areas. This job description does not include any references to the general manager's duties relating to the development of additional restaurants.

Nevertheless, in the brief submitted on appeal, the Petitioner states that the Beneficiary spends no more than 10 to 12 hours at the restaurant each week and further describes his duties as follows:

In addition to doing all of his work for the existing restaurant, [the Beneficiary] spends many hours each week doing the work that needs to be done to get more restaurants open. He meets with real estate agents who specialize in identifying the best locations for restaurants (the most important aspect of starting a new restaurant). He meets with construction coordinators, architects, building engineers, and contractors (building, electrical, plumbing, air conditioning), equipment and fixture suppliers, food, supplies and sundry goods suppliers, advertising and promotions companies, legal and financial/accounting offices.

The Petitioner contends that the Beneficiary manages an essential function of the company and states that the "primary function of the subsidiary company [the Petitioner] is to learn how to create and operate a chain of successful restaurant[s] and that [is] the reason [the Beneficiary] was transferred to the United States." The Petitioner adds that the Beneficiary's "function is to establish and manage the operations of a subsidiary company that is engaged in the construction and opening of new restaurants that prepare and sell entrees and items that are prepared using unique recipes and methods used only [by] the original [...] Restaurant in [REDACTED]. The Petitioner submits a copy of a purchase agreement, dated April 1, 2015, and a subsequent buyer counter offer, dated April 7, 2015, for a restaurant business located in [REDACTED] California.

The Petitioner references two non-precedent decisions issued by this office in support of the assertion that the Director did not properly consider that the Petitioner employs companies to perform many of the services for its restaurants. The Petitioner also asserts that it employs two managers subordinate to the Beneficiary to perform the duties of the existing restaurant, thereby

relieving the Beneficiary from performing the day-to-day operational duties of the existing restaurant.

B. Analysis

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

Preliminarily, we observe that this petition requests the extension of a petition that involved a new office. However, there is no provision in USCIS regulations that allows a business, that is not a new office as set out in 8 C.F.R. § 214.2(l)(3)(v), additional time to establish that it can employ a beneficiary in a predominantly managerial or executive position. If the business is not sufficiently staffed and operational after one year to employ a beneficiary in a qualifying managerial or executive position, the petitioner is ineligible by regulation for an extension. Additionally, 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'l Comm'r 1978). The petition here was filed December 2, 2014, and requested the Beneficiary's employment period be extended from December 3, 2014 to December 2, 2017.

When examining the executive or managerial capacity of the Beneficiary, we look first to the Petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The Petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In this matter, the Petitioner does not specifically state whether the Beneficiary's duties fall within the parameters of executive capacity or managerial capacity. The Petitioner must demonstrate that the Beneficiary's responsibilities will meet the requirements of one or the other capacity. In this matter, the record does not provide probative consistent evidence demonstrating that the Beneficiary's proposed duties satisfy either the executive or manager definition.

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). Here, while the evidence shows that the Beneficiary has the appropriate level of authority as the senior ranking employee in the company, the Petitioner has not established that the Beneficiary primarily performs qualifying duties.

Upon review of the Petitioner's description of the Beneficiary's proposed duties, the Petitioner initially stated that the Beneficiary would continue performing the same duties as set out in the initial new office petition. First, we note that each nonimmigrant petition filing is a separate proceeding

with a separate record and a separate burden of proof. In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Accordingly, the Petitioner must submit sufficient evidence to establish eligibility with each filing. Second, the Petitioner's first petition was a "new office" petition for which 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. As pointed out above, this petition is not a new office petition and thus the Petitioner must establish that when this petition was filed, the Beneficiary's proposed duties encompassed duties in a primarily managerial or executive capacity. The regulation at 8 C.F.R. § 214.2(l)(14)(i)(D) requires the Petitioner to submit specific supporting evidence in support of the extension of a petition involving a new office.

In response to the Director's RFE, the Petitioner stated that the Beneficiary would perform administrative duties. When describing the administrative duties, the Petitioner stated that the Beneficiary would oversee the management of human resources, financial and taxation documentation and all record management. However, the record does not include evidence that the Petitioner employs individuals in the human resources or record management departments who manage these administrative tasks. Although the Petitioner identifies individuals who work in the Petitioner's restaurant, the duties of these individuals do not include human resource (payroll) or record management functions. The Petitioner states on appeal that it employs other companies to perform accounting functions, but the record includes only two checks paid to an accountant. There is not information in the record that the Petitioner employs other individuals or companies to perform the duties necessary to gather and record financial data for taxation or other financial purposes.

Similarly, it appears from the description of administrative duties provided that the Beneficiary is the individual performing the tasks related to advertising and promotion of the restaurants and performing the operational tasks of menu planning and establishing hours and other routine and necessary duties to keep the restaurant open.¹ For example, the lengthy description for the general manager position provided on appeal indicates that the Beneficiary's "administrative" duties include processing payroll, maintaining personnel files, analyzing and signing invoices, monitoring inventory, completing a daily "Comp and Void Report," money handling, and staff scheduling. The Petitioner does not allocate the amount of time the Beneficiary will spend performing these non-qualifying administrative and operational tasks.

¹ The Petitioner confirms on appeal that the Beneficiary's responsibilities continue to include "[a]dvertising, employee recruitment, compliance with Building, Health, OSHA, and Fire regulations" and "[l]ocating and contracting with business providing food supplies, restaurant supplies, security services, cleaning, pest control, repair and maintenance services." These duties appear to be non-qualifying administrative and operational tasks. The brief statements regarding these duties do not provide sufficient insight into the actual work the Beneficiary is expected to perform. The Petitioner has not adequately described the specific duties of the proffered position such that we may conclude that these are primarily managerial or executive duties as defined in the statute and regulation.

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The remaining portion of the Petitioner's description of the Beneficiary's duties, in response to the Director's RFE, relates to the Beneficiary's tasks of finding suitable locations for additional restaurants, negotiating to acquire the sites and building out potential restaurants. On appeal, the Petitioner presents inconsistent information regarding the Beneficiary's proposed duties as it relates to this duty. As noted, the petitioner has submitted a document that provides a job description for its general manager that lists only duties that pertain to operating a restaurant and does not include duties regarding opening new restaurants. However, in its brief on appeal, the Petitioner emphasizes that the Beneficiary is primarily engaged in the process of finding locations for and opening new restaurants and spends less than half of his time on the operation of the existing restaurant. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Here, although the Petitioner does not reference the Beneficiary's duties regarding opening new restaurants in the separate position description for its general manager, we recognize that the Petitioner identifies its primary function as "to learn how to create and operate a chain of successful restaurant[s]" and that the Beneficiary's function in this process is "to establish and manage the operations of a subsidiary company that is engaged in the construction and opening of new restaurants that prepare and sell entrees and items that are prepared using unique recipes and methods used only [by] the original [...] Restaurant in [REDACTED]". The Petitioner also submits a copy of a purchase agreement, dated April 1, 2015, and a subsequent buyer counter offer, dated April 7, 2015, for a restaurant business located in [REDACTED] California, as evidence that this is the Petitioner's business. While we do not doubt that the Beneficiary has the authority to make decisions on new restaurant investments, the record as a whole does not support a conclusion that this is his primary responsibility or that his involvement in the day-to-day operation of the Petitioner's current restaurant is very limited, as the Petitioner suggests on appeal.

The Petitioner asserts that the Beneficiary is the individual who ensures that the restaurant's front-of-the-house manager and back-of-the-house managers handle the operations of the restaurant. In the Petitioner's brief descriptions of the duties of the two individuals it identifies as the restaurant managers, the Petitioner states that the primary restaurant manager (the front-of-the-house manager) acts as host and serves as a waiter when needed. It is not possible to ascertain from this brief description and the number of hours this individual works whether his actual duties are managerial or supervisory. Similarly, the Petitioner states that the back-of-the-house manager performs the tasks of ordering supplies and foodstuffs and is the lead chef. These duties are not managerial or supervisory and without additional information, the description of duties is insufficient to identify this employee as a supervisor or manager.

Further, given the information in the record regarding the Petitioner's operating hours and staffing levels, it is likely that the full-time employees designated as "managers" may need to perform the duties of host, server and cook on a regular basis. The Petitioner submitted a menu indicating that its

restaurant is open daily from 11:00 until 2:00 a.m., or 105 hours per week. Although the Petitioner indicates that each manager works 48 hours per week, it is unclear who is managing the restaurant's dining room and kitchen for the balance of time when the managers are not working. Further it is unclear that the Petitioner has subordinate sufficient kitchen and dining room staff to fully cover its operating hours. The Petitioner stated on the Form I-129 that it has "7 to 9" employees, but the most recent payroll records submitted showed only five employees, including the Beneficiary, the front-of-house manager, two cooks, and one other part-time employee. Even with nine employees as reflected in the most recent organizational chart, it is unclear how this staff can cover two shifts per day, seven days per week.

Accordingly, when reviewing the description of the Beneficiary's duties as those duties relate to the Petitioner's only operational restaurant, the record does not include sufficient descriptive information to conclude that the Beneficiary in this matter is primarily a personnel manager. 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 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 Petitioner has not established that the Beneficiary will supervise and control other supervisory, professional, or managerial employees. The Beneficiary's supervision of the restaurant employees are at most the duties of a first-line supervisor over non-supervisory, non-professional, and non-managerial employees.² Moreover, the record does not include probative evidence demonstrating that the Petitioner employs sufficient staff to relieve the Beneficiary from performing the non-qualifying administrative and operational tasks it described as part of the Beneficiary's routine duties. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees

² When evaluating whether the beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Here, the record does not establish that the positions subordinate to the Beneficiary require a baccalaureate degree as a minimum for entering into the positions.

supervised are professional. Section 101(a)(44)(A)(iv) of the Act. In the present matter, the totality of the record does not support a conclusion that the Beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the Beneficiary and his subordinates perform the actual day-to-day tasks of operating the restaurant.

On appeal the Petitioner suggest that the Beneficiary is a function manager based on his responsibility for the company's expansion activities. 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. However, if a petitioner claims that a beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish 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, the 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. Again, an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

However, even when examining the Beneficiary's duties that relate to the function of expanding the Petitioner's restaurant business, the record does not include probative evidence that the Beneficiary will be performing managerial tasks rather than the necessary research, contract negotiations, and work with financial institutions and government entities to locate and begin the process of the Petitioner's expansion. That is, when reviewing the totality of the record, when the petition was filed, the Petitioner had opened one restaurant. There is no evidence in the record that when the petition was filed, the Beneficiary had worked with other companies or individuals to perform the research to find and acquire potential restaurant sites, or that the Petitioner's expansion had begun. The record does not include documentary evidence that the Petitioner employed or had contracted with real estate agents, or had begun negotiations on any prospective locations when the petition was filed. 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'l Comm'r 1972)). Again, 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'l Comm'r 1978).³

³ The record on appeal includes a purchase agreement and buyer's counter offer dated April 1, 2015 and April 7, 2015 respectively. It is not clear that the Petitioner has closed on this prospective purchase. Moreover, the contract for this additional location was entered into four months subsequent to the date the petition was filed.

We have reviewed the copies of the Petitioner's cancelled checks and cannot ascertain that any of the checks were written for anything other than the operation of the Petitioner's one restaurant and the supplies, staffing, and operation of that restaurant. Other than the Petitioner's description of a portion of the Beneficiary's duties relating to the function of managing the Petitioner's expansion and the assertion on appeal, that the Beneficiary spends at least 51 percent of his time on this function, the record does not include probative evidence regarding the Beneficiary's duties relating to this function. Additionally, the record does not include evidence in sufficient detail demonstrating that the Beneficiary would be relieved from performing the daily operational and administrative tasks of researching, negotiating, and acquiring permits, and performing the myriad number of non-qualifying tasks necessary to acquire and open prospective restaurants.⁴ Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Upon review of the totality of the record, the Petitioner has not established that the Beneficiary is primarily a function manager.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for 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. A review of the totality of the record reveals that the Beneficiary in this matter does not have a subordinate level of managerial employees to direct. Rather, the Petitioner currently employs several individuals who perform the routine tasks associated with operating one restaurant. As set out above, the record does not establish that any of these individuals perform primarily managerial functions. We acknowledge the Petitioner's assertion that it has employed contractors and other companies to perform some of the duties to acquire, refurbish, and establish the restaurant; however, the record does not include probative documentary evidence demonstrating when these companies or individuals were hired, the number of hours they worked, the duration of their work, or the specific nature of their work. Thus it is not possible to analyze how the Beneficiary was relieved from performing specific non-qualifying duties.

The current adjudication requires a review of the totality of the record when examining the claimed managerial or executive capacity of the Beneficiary, including the Beneficiary's job description, the company's organizational structure, the duties of the Beneficiary's subordinate employees, the presence of other employees or contractors to relieve the Beneficiary from performing operational duties, the nature of the business, as well as any other factors that will contribute to understanding

⁴ For example, on appeal the Petitioner asserts that many of the administrative and clerical duties are outsourced and that it will establish an office to perform these duties at a later time. However, the record does not include documentary evidence that the Petitioner has entered into contracts with or made payments to companies or individuals who could perform these duties.

the Beneficiary's actual duties and role in the business. However, when reviewing the totality of the record, the Petitioner's assertions alone are insufficient to establish eligibility.

To elaborate, the burden of proof is on the Petitioner in the current matter. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). In addition to *Matter of Soffici*, cited above, we note that this precedent decision cites another precedent case supporting a conclusion that a petitioner must submit sufficient supporting evidence to corroborate its assertions on the record, namely *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972). In this widely cited case, the Board of Immigration Appeals (BIA) noted that the burden of proof to establish eligibility for benefits sought rests with the petitioner. Further, in that matter, the petitioner sought to accord beneficiaries classification as trainees under section 101(a)(15)(H)(iii) of the Immigration and Nationality Act and the petitioner contended that it need only go on record stating that training is not available outside the United States. However, the BIA rejected this contention that USCIS must rely solely upon a petitioner's statements. As such, we do not find the Petitioner's assertions without supporting evidence persuasive.

Upon review of the totality of the record, including the Petitioner's descriptions of the Beneficiary's duties, its organizational chart, the copies of its employer's wage reports, its bank statements and cancelled checks and its lease agreement and prospective purchase of a second property, we do not find that the Petitioner has established that it is more likely than not the Beneficiary will perform duties in primarily a managerial or executive capacity. The record includes sufficient evidence to establish that the Petitioner had opened one restaurant when this petition was filed; however, the record does not include sufficient probative evidence demonstrating that the employees in the restaurant relieved the Beneficiary from performing non-qualifying duties. Likewise, the record does not contain sufficient probative evidence of any subordinate companies or individuals who relieved him from performing the non-qualifying duties of locating and acquiring additional properties.

We recognize that several of the overbroad duties described by the Petitioner may fall generally under the definitions of managerial or executive capacity; however, the lack of consistency and specificity in the description of the Beneficiary's duties, the lack of evidence regarding contractors, as well as the brief descriptions of the duties of the Beneficiary's subordinate employees raises questions as to the Beneficiary's actual primary responsibilities.

We acknowledge 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 section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Here, it is not the Petitioner's size that raises questions regarding its eligibility; rather it is the lack of

substantive evidence regarding the Beneficiary's actual proposed duties and the lack of probative evidence regarding who will perform the operational and administrative tasks of the organization.

We have reviewed the non-precedent decisions submitted on appeal in support of the Petitioner's assertions. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, the Petitioner does not articulate how the proffered position in this matter is analogous to the positions in the decided cases, other than in the most general terms. The Petitioner does not elaborate on specific facts or its claims to demonstrate that this petition and the underlying facts are similar to those in the non-published decisions. Neither does the record include sufficient probative documentary evidence in support of its claims and assertions so that we may compare and analyze this petition to the unpublished decisions. As such, we cannot find that this case is analogous to the unpublished decisions. Accordingly, the Petitioner's reliance on these decisions is misplaced.

In this matter, the Petitioner did not provide sufficient probative and descriptive evidence regarding the Beneficiary's and his subordinate's duties. Accordingly, we will uphold the Director's determination that the Petitioner did not establish that the Beneficiary will be employed in a qualifying managerial or executive capacity in the United States.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reason. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the Petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of A-T-T-R-M-, Inc.*, ID# 13543 (AAO Oct. 30, 2015)