



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

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

MATTER OF B-A-USA, INC.

DATE: AUG. 11, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an exercise and fitness studio, seeks to extend the Beneficiary's temporary employment as its chief executive officer (CEO) under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director, California Service Center, denied the petition. The Director concluded that the evidence of record did not establish that the Beneficiary will be employed in a managerial or executive capacity under the extended petition.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in determining that the Beneficiary does not qualify for the requested extension of status.

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

#### I. LEGAL FRAMEWORK

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

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

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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

## II. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. 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.

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

*Matter of B-A-USA, Inc.*

A. Evidence of Record

The Petitioner filed the Form I-129 on July 6, 2015. On the Form I-129, the Petitioner indicated that it has three current employees in the United States. The record shows that the Beneficiary was previously granted one year in L-1A classification to open the Petitioner's new office as its CEO.

The Petitioner submitted a letter from its foreign parent company which explained that the Petitioner was established to operate a chain of workout studios and to promote, license and manage its branded studios and franchises throughout California. The parent company's letter explained that the Petitioner did not open its first Pilates studio until April 2015 because the Beneficiary realized upon his arrival to the United States that the initial leased premises was unsuitable and that it would be necessary to locate, lease and remodel a new location. The foreign company's representative stated that the Petitioner had hired three employees, enrolled 40 clients, was offering 100 classes per week, and had "hired attorneys to set up the franchise offering documents." She further explained that "if economic conditions are favorable, two more . . . studios will open in the [REDACTED] area before the end of 2018."

The Petitioner described the Beneficiary's duties as CEO as follows:

Planning:

- Create operations plans and budgets to successfully operate existing studios
- Develop promotion and financial plans to market studios and franchises
- Collaborate with board of directors to define company expansion in USA
- Continue to develop adaptive strategies for long-term viability of the company

Executive

- To contract for and bind [the Petitioner] with respect to any matters or tasks needed to continue operating [the company]
- After approval of the Board of Directors, to incur debt needed to continue operating [the Petitioner]
- Continue work with attorneys to create franchise contracts and materials
- Promote company to potential franchisees
- Create promotional materials for franchise
- Negotiate and execute franchise agreements on behalf of company

Management:

- Create management systems to assure smooth running of studios
- Oversee [the Petitioner's] studios in the [REDACTED] area
- Establish paradigm and operations systems for franchises
- Oversee compliance by franchisees with organization requirements

Financial Management:

- Develop and submit budgets and targets for board approval

(b)(6)

*Matter of B-A-USA, Inc.*

- Manage company resources to stay within budget
- Establish bookkeeping framework
- Oversee compliance by franchisees with bookkeeping requirements

Personnel and Human Resources

- Create personnel policies
- Hire, manage, terminate human resources of the [Petitioner]-operated studios, in accordance with personnel policy and local regulatory requirements

The Petitioner submitted a copy of its payroll for the period June 2, 2015, through June 16, 2015, which indicated three employees. According to a document titled “Staff Projections 2015 -2018,” the positions held by the three employees were instructor [REDACTED] receptionist – morning shift [REDACTED] and receptionist – evening shift ([REDACTED]). The staff list also included the Beneficiary as “Manager (CEO).” According to the staff projections, the Petitioner intends to operate its current and any future studios with a minimum of four employees, including two instructors and two receptionists. The Petitioner projected that by 2017, it would operate three of its own studios and would add staff to oversee franchises, including a studio manager, franchise manager, marketing manager, and two assistants. The Petitioner provided a letter dated June 4, 2015, from the attorney it had retained to assist with the preparation of franchise offering documents.

The Petitioner submitted a copy of its class schedule showing that it offers 10 classes Monday through Friday and five classes on Saturdays. The Petitioner also submitted reviews of its studio from [REDACTED] which include comments such as “the [Beneficiary] is a great instructor.” The Beneficiary’s resume, biography, and training certificates show that he holds many certifications in Pilates instruction, is an experienced fitness instructor, and was the creator of the Petitioner’s [REDACTED] and [REDACTED] workouts.

The Director issued a request for evidence (RFE) on August 15, 2015, instructing the Petitioner to submit further evidence that the Beneficiary will be employed in a managerial or executive capacity under the extended petition.

In response to the RFE, the Petitioner explained that the Beneficiary’s duties until the summer of 2015 were focused on establishing its initial studio, and stated that since the summer of 2015, he has concentrated on creating new company-owned studios as well as creating the framework for future franchised studios. The Petitioner stated that the Beneficiary has performed the following duties since June 30, 2015, with the goal of opening two or three additional studios and possibly having one franchise sold by 2018:

PLANNING: 40%

- Determine all the steps to follow to open [the Petitioner’s] Company-owned Studio #2. These duties include: research and evaluate possible cities for new locations, sign lease new location, purchasing equipment and accessories,

overseeing buildout of new space, create new advertising materials and placements, and hiring and training additional staff.

- Create timetable for the opening of the Company-owned Studio #2 and #3.
- Create timetable for offering the franchises, including setting up appearances at small-business and entrepreneurial “fairs.”
- Create annual operating plans that support sales and merchandizing strategies for [the Petitioner’s] Company-owned studios as well as franchises.
- Create and rectify each Company-owned [the Petitioner’s] studio’s monthly and annual operating budgets.
- Examine and (if needed) adjust [the Petitioner’s] Franchisees’ monthly and annual operating budgets.
- Develop strategies for ensuring the long-term financial viability of [the Petitioner].
- Contact organizers or franchise fairs. Attend, or train staffers to attend, Franchise fairs to sell [the Petitioner’s] franchises.

FINANCIAL OVERSIGHT: 25%

- Developing monthly and annual budgets that support [the Petitioner’s] and Franchise operating plans.
- Ensure that accountant practices appropriate accounting procedures in compliance with Generally Accepted Accounting Principles.
- Manage [the Petitioner] and Franchise headquarters resources within budget guidelines according to current laws and regulations.
- Keep the Guatemala Board of Directors appropriately informed of [the Petitioner’s] and Franchise headquarters’ financial position.

MANAGEMENT: 20%

- Oversee the operations of Company-owned [the Petitioner’s] studios and manage its compliance with legal and regulatory requirements.
- Hire, manage and fire the human resources of [the Petitioner] according to personnel policies, best-practices, and procedures that conform to current laws and regulations.
- Oversee creation of Franchise-related policy and procedure manual, in accordance with personnel policies, best-practices, and procedures that conform to current laws and regulations.
- Create and maintain procedures for implementing plans approved by the board of directors.
- Evaluate [the Petitioner’s] staff performance on a regular basis.
- Promote customer’s service culture and family atmosphere.
- With studio managers, continue recruitment and contracting of [the Petitioner’s] staff.
- Oversee [the Petitioner’s] Company-owned studios’ employee relations, development and training.

(b)(6)

*Matter of B-A-USA, Inc.*

MARKETING AND COMMUNITY OUTREACH: 10%

- Manage [the Petitioner's] advertising, including promotion of Franchise sales.
- Oversee content, production, and distribution of all marketing and publicity materials (posters, program, flyers, mail outs, brochures, etc.).
- Organize the availability of [the Petitioner's] members for media and community events (neighborhood fairs, school fairs, church fairs, etc.) as necessary.
- Co-ordinate the invitation of potential future promoters and supporters of [the Petitioner].
- Serve as the primary spokesperson and legal representative for [the Petitioner] Company-owned studios and franchises.

PROGRAMMATIC EFFECTIVENESS: 5%

- Oversee design, delivery and quality of programs and services.
- Stay abreast of current trends related to [the Petitioner's] USA fitness services, anticipates future trends likely to have impact on [the Petitioner's] work, maintain contact with Pilates and other similar fitness programs, to keep [the Petitioner] programs up to date.
- Collect and analyze evaluation information that measures the success of [the Petitioner's] USA program efforts; refines or changes programs in response to that information.
- Keep the Guatemala Board of Directors appropriately informed of [the Petitioner] and franchise progress, fulfillment of corporate goals, and report on fitness trends in USA that may also benefit [the Petitioner's] Guatemala studios.

In response to the RFE, the Petitioner submitted a list of employees which included the Beneficiary as CEO; [REDACTED] as studio manager and instructor; [REDACTED] as receptionist/front desk; and [REDACTED] as receptionist/front desk. The Petitioner also stated that it had hired [REDACTED] as an instructor, but that he was still in training at the time it responded to the RFE. The Petitioner provided brief position descriptions for each role. The Petitioner stated that the studio manager evaluates employees and applicants, supervises the studio's day-to-day operation, monitors income, runs payroll, handles complaints, and reports to the Beneficiary.

The Petitioner provided a year-to-date payroll summary prepared on October 2, 2015. This document showed the following employee data:

Name	Hire Date	Termination Date	Employee Type	Year-to-Date Pay
[REDACTED]	5/27/2015	09/01/2015	Part-time	\$3336.24
[REDACTED]	5/5/2015		Part-time	\$5470.90
[REDACTED]	9/8/2015		Part-time	\$1069.95
[REDACTED]	5/19/2015		Full-time	\$3850.00

*Matter of B-A-USA, Inc.*

The Petitioner also submitted a financial statement for the year ending on September 30, 2015. The financial statement lists \$10,798.00 in wage and benefit expenses, which did not match the information provided in the payroll summary.

The Director denied the petition on January 20, 2016, concluding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity under the extended petition. In denying the petition, the Director found that based on the organizational structure of the Petitioner, it appears that the Beneficiary would be primarily assisting with the day-to-day non-supervisory functions of the business. The Director also concluded that the evidence of record did not show that the Beneficiary would be supervising professional employees or managing an essential function.

On appeal, the Petitioner states that it employs a professional with a bachelor's degree, [REDACTED] who was hired as a manager "to assist with expansion." The Petitioner explains that [REDACTED] will "assist with management and execution of expansion by seeking out future locations for franchises, managing the portfolios of property leases, assisting with budgeting, assisting with marketing, and designing the layout of all franchises."

The Petitioner submits an organizational chart dated March 1, 2016, which shows the Beneficiary as CEO, [REDACTED] as manager, [REDACTED] as studio #1 supervisor, [REDACTED] as an instructor, and [REDACTED] as administrative support/instructor. The Petitioner submits additional evidence on appeal, including: a Department of Labor O\*Net OnLine summary report for the position of chief executive; a copy of its 2014 IRS Form 1120, U.S. Corporation Income Tax Return; recent bank statements; copies of [REDACTED] university diploma, resume and evidence of payments made to him beginning in March 2016; evidence of advertising through [REDACTED] and social media; and [REDACTED] reviews mentioning the Petitioner's instructors by name as "[the Beneficiary's first name], [REDACTED] and [REDACTED]"

Finally, the brief submitted on appeal includes a revised breakdown of the Beneficiary's duties stating that he allocates 30% of his time to executive planning, 25% of his time to financial oversight, 25% of his time to management and supervision, and 20% of his time to operations and marketing.

## B. Analysis

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

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

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

Here, the Petitioner has submitted lengthy descriptions of the Beneficiary's duties that do not sufficiently articulate the Beneficiary's day-to-day tasks as of the date the petition was filed. Rather, a significant portion of the Beneficiary's stated duties appear to be speculative and based on the company's planned expansion to operate multiple Pilates studios and to oversee franchised studios. For example, the Petitioner stated that the Beneficiary would create franchise contracts, create promotional materials for franchises, promote the company to potential franchisees, negotiate and execute franchise agreements, establish operations systems for franchises, and oversee compliance by franchisees. While the Petitioner provided evidence that it had retained an attorney to assist with franchise offering documents just a few weeks prior to filing the petition, the Petitioner's business plan indicates that it did not plan to promote the availability of franchised studios until February 2017, concurrent with the opening of its third company-owned studio. The position description submitted in response to the RFE similarly included many references to the Beneficiary's management, promotion and oversight of franchises, while stating the possibility that one franchise may be sold by 2018. A visa petition may not be approved based on speculation of future eligibility. See, e.g., *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978).

Setting aside the Beneficiary's proposed franchise-related duties, the remainder of the job description indicates that the Beneficiary will exercise the appropriate level of discretionary decision-making authority over the Petitioner's operations, but will perform both qualifying and non-qualifying duties. For example, the Petitioner states that the Beneficiary is responsible for planning the opening of additional company-owned studios and setting policies and operating guidelines for the current and all future studios, but also states that he is personally responsible for researching possible cities for new locations, purchasing equipment, creating advertising materials, attending industry fairs, overseeing creation and distribution of marketing materials, staying abreast of fitness trends, managing financial resources, and collecting and analyzing company performance information. The Petitioner does not provide evidence of other employees working for the Petitioner at the time of filing, including two receptionists and one instructor, who would assist the Beneficiary with these research, purchasing, marketing, financial, or administrative tasks.

The fact that the Beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act. While the Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-

*Matter of B-A-USA, Inc.*

making, the position description alone is insufficient to establish that his actual duties, as of the date of filing, would be primarily managerial or executive in nature.

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

At the time of filing, the Petitioner employed two part-time receptionists and one full-time instructor. The Petitioner's own staff projections indicate that its studios require a minimum of four employees – two instructors and two receptionists – in order to operate. While the Petitioner insists that the Beneficiary would not be involved in providing its services to clients, it submitted reviews from [REDACTED] which named him as a regular Pilates instructor in its existing studio. Further, it did not explain how the single instructor employed at the time of filing would be able to teach 55 to 100 Pilates classes per week, which is what the Petitioner has claimed to offer. In response to the RFE, the Petitioner claimed to employ a part-time studio manager/instructor (previously identified as a receptionist/front desk employee), one instructor and only one part-time receptionist, but still had not reached what the Petitioner claims is its minimum staffing level. Therefore, the job descriptions provided for the Beneficiary are incomplete and the record supports a conclusion that some unidentified portion of the Beneficiary's time as of the date of filing would actually be allocated to teaching Pilates classes, a responsibility that is neither managerial nor executive in nature.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See sections 101(a)(44)(A)(i) and (ii) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. The statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional."<sup>1</sup> Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(4). If a petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act; 8 C.F.R. §§ 214.2(l)(1)(ii)(B)(2)-(3).

---

<sup>1</sup> To determine whether the Beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Cf. 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

(b)(6)

*Matter of B-A-USA, Inc.*

As noted, at the time of filing, the Petitioner claimed to employ two receptionists and one instructor. The Petitioner neither claimed nor provided evidence that any of these employees were managers, supervisors, or professionals. In response to the RFE, the Petitioner claimed that one of its receptionists was serving as “studio manager,” and, on appeal, the Petitioner states that it hired a professional, [REDACTED] who will assist with franchise operations. However, our analysis is limited to a review of the employees supervised by the Beneficiary when the petition was filed. At the time of filing, the Petitioner did not employ a subordinate supervisor or professional. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg’l Comm’r 1978). While the Beneficiary holds the authority to hire and fire staff, the Petitioner has not established that, when the petition was filed, the Beneficiary would be supervising a subordinate staff of supervisory, managerial or professional personnel. Therefore, the Petitioner has not supported its claim that the Beneficiary qualifies as a personnel manager.

The Petitioner has not established, in the alternative, that the Beneficiary will be 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. The term “essential function” is not defined by statute or regulation. If a Petitioner claims that a Beneficiary will manage an essential function, a Petitioner must clearly describe 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 a Beneficiary’s daily duties dedicated to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, a Petitioner’s description of a Beneficiary’s daily duties must demonstrate that the Beneficiary will manage the function rather than perform the duties related to the function. The Petitioner has not claimed or provided evidence that the Beneficiary will primarily manage an essential function of the business as of the date of filing. As noted above, the Petitioner’s description of the Beneficiary’s duties, considered along with the totality of the evidence in the record, does not establish that he will be relieved from performing non-qualifying duties of running a fitness studio, such as instructing clients and handling administrative, budgeting, marketing, and sales functions associated with its day-to-day operations.

The statutory definition of the term “executive capacity” focuses on a person’s elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to “direct the management” and “establish the goals and policies” of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a Beneficiary to direct and a Beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they “direct” the enterprise

as an owner or sole managerial employee. A Beneficiary must also exercise “wide latitude in discretionary decision making” and receive only “general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.” *Id.*

On appeal, the Petitioner submits a Department of Labor (DOL) O\*Net OnLine summary report for the position of chief executive and asserts that the Beneficiary would perform duties similar to those outlined in the DOL’s generalized summary for this position.

Upon review, the Petitioner has not established that the Beneficiary will be employed in an executive capacity under the extended petition. While the record shows that the Beneficiary would perform some qualifying duties similar to the generic duties outlined in the DOL summary, the evidence of record does not support a finding that the Beneficiary would primarily focus on the goals and policies of the organization rather than being involved in its day-to-day operations of the Petitioner’s existing fitness studio as of the date of filing. As noted, the Petitioner did not provide supporting documentation to substantiate its employment of sufficient subordinates to provide the instructional services of the company, or subordinates who would handle the studio’s marketing, sales, budgeting, bookkeeping, and administrative tasks. While an executive is not required to supervise subordinate professionals, the Petitioner must still establish that someone other than the Beneficiary is available to provide the goods or services offered by the company and perform other non-qualifying duties associated with its day-to-day operations. The Petitioner in this matter has not done so and the evidence of record is insufficient to establish that the Beneficiary will perform primarily executive duties.

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 petition for classification as a multinational manager or executive. See section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In the present matter, however, the regulations require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D).<sup>2</sup> The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the “new office” operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the Petitioner is ineligible by regulation for an extension. In the instant matter, the Petitioner has not reached the point that it can employ the Beneficiary in a managerial or executive position.

---

<sup>2</sup> Following the enactment of section 101(a)(44)(C) of the Act in 1990, the former Immigration and Naturalization Service (INS) recognized that that managerial capacity could not be determined based on staffing size alone and deleted reference to “size and staffing levels” at 8 C.F.R. § 214.2(l)(3)(v)(C)(3) (1990), setting out the evidentiary requirements for initial new office petitions. See 56 Fed. Reg. 61111, 61114 (Dec. 2, 1991). However, the INS chose to maintain the review of the new office’s staffing, among other criteria, at the time that the new office seeks an extension of the visa petition. See 8 C.F.R. § 214.2(l)(14)(ii)(D).

As noted, the Petitioner operates a fitness studio open six days a week and claims to offer between 55 and 100 classes per week. At the time of filing, the Petitioner stated that it employed one instructor earning less than full-time wages, and indicated that its studios require at least two instructors. The Petitioner also submitted supporting evidence indicating that the Beneficiary was acting as an instructor when the petition was filed and that he is well-qualified to do so. While we do not doubt that the Beneficiary has the authority to make decisions regarding the Petitioning business and would oversee its planned expansion activities, we must evaluate the Petitioner's eligibility at the time of filing. At the time of filing, the Petitioner had one studio that had not yet been fully staffed and did not have a reasonable need for the Beneficiary to primarily perform managerial or executive duties. 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 also*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

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

### III. CONCLUSION

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

**ORDER:** The appeal is dismissed.

Cite as *Matter of B-A-USA, Inc.*, ID# 17877 (AAO Aug. 11, 2016)