



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

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

MATTER OF U-E-, LLC

DATE: JAN. 27, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a company engaged in travel services, management consulting, and import and export activities, seeks to extend the Beneficiary's temporary employment as its managing member under the L-1A nonimmigrant intracompany transferee classification. *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 and upheld his denial in response to the Petitioner's combined motion to reopen and reconsider. We dismissed the Petitioner's subsequent appeal. The matter is now before us again on a combined motion to reopen and reconsider.

The Director concluded that the Petitioner did not establish that the Beneficiary will be employed in the United States in a qualifying managerial or executive capacity. We dismissed the Petitioner's appeal in a decision dated June 23, 2015 after determining that the record of proceedings did not establish that the Beneficiary would be employed in a qualifying managerial or executive capacity.

On motion, the Petitioner submits a brief contesting the specific findings made in our appellate decision, and provides additional evidence, including an expert opinion letter, copies of two non-precedent decisions issued by this office, and other documentation to support its claim that the Beneficiary will be employed in a managerial capacity.

After reviewing the Petitioner's evidence and arguments submitted on motion, we find that it has not met its burden to establish that the previous decisions of the Director and this office were incorrect at the time of their issuance or that the petition warrants approval. Accordingly, while we will address the Petitioner's evidence and arguments below, we will not disturb our prior decision, and the combined motion will be denied.

I. MOTION REQUIREMENTS

A. Overarching Requirement for Motions by a Petitioner

The provision at 8 C.F.R. § 103.5(a)(1)(i) includes the following statement limiting a U.S. Citizenship and Immigration Services (USCIS) officer's authority to reopen the proceeding or reconsider the decision to instances where "proper cause" has been shown for such action:

[T]he official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision.

Thus, to merit reopening or reconsideration, the submission must not only meet the formal requirements for filing (such as, for instance, submission of a Form I-290B that is properly completed and signed, and accompanied by the correct fee), but the petitioner must also show proper cause for granting the motion. As stated in the provision at 8 C.F.R. § 103.5(a)(4), “*Processing motions in proceedings before the Service*,” “[a] motion that does not meet applicable requirements shall be dismissed.”

B. Requirements for Motions to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2), “*Requirements for motion to reopen*,” states: “A motion to reopen must [(1)] state the new facts to be provided in the reopened proceeding and [(2)] be supported by affidavits or other documentary evidence”

This provision is supplemented by the related instruction at Part 3 of the Form I-290B, which states: “**Motion to Reopen:** The motion must state new facts and must be supported by affidavits and/or documentary evidence.”¹

Further, the new facts must possess such significance that, “if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case.” *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); *see also Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

C. Requirements for Motions to Reconsider

The regulation at 8 C.F.R. § 103.5(a)(3), “*Requirements for motion to reconsider*,” states:

A motion to reconsider must [(1)] state the reasons for reconsideration and [(2)] be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must [(3)], [(a)] when filed, also [(b)] establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

¹ The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, such instructions are incorporated into the regulations requiring its submission.

These provisions are augmented by the related instruction at Part 3 of the Form I-290B, which states: “**Motion to Reconsider:** The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.”

A motion to reconsider contests the correctness of the prior decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new facts. *Compare* 8 C.F.R. § 103.5(a)(3) and 8 C.F.R. § 103.5(a)(2).

A motion to reconsider should not be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991) (“Arguments for consideration on appeal should all be submitted at one time, rather than in piecemeal fashion.”). Rather, any “arguments” that are raised in a motion to reconsider should flow from new law or a *de novo* legal determination that could not have been addressed by the affected party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) (examining motions to reconsider under a similar scheme provided at 8 C.F.R. § 1003.2(b)); *see also Martinez-Lopez v. Holder*, 704 F.3d 169, 171-72 (1st Cir. 2013). Further, the reiteration of previous arguments or general allegations of error in the prior decision will not suffice. Instead, the affected party must state the specific factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision. *See Matter of O-S-G-*, 24 I&N Dec. at 60.

Here, the Petitioner has not submitted any facts that could be considered “new” in support of its motion to reopen, but it has stated specific reasons for reconsideration and cited to regulations and case law in support of its assertion that the petition was denied and the appeal was dismissed in error. While we will address the Petitioner’s evidence and arguments below, the Petitioner has not established that our previous decision was incorrect based on the evidence of record at the time of the initial decision and has not demonstrated that the petition warrant approval. Accordingly, the combined motion will be denied.

II. 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.

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

III. THE ISSUE

The sole issue before us is whether the evidence of record establishes that the Beneficiary will be employed in a qualifying managerial or executive capacity.

As noted in our previous decision, 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 definitions of executive and managerial capacity 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 prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In dismissing the Petitioner's appeal, we concluded that the Beneficiary's duties reflected that he was more likely than not allocating a significant portion of his time to operational duties related to “routine

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sales and marketing activities” and providing the Petitioner’s travel agent services. Further, we found that while the Petitioner’s description of the Beneficiary’s duties indicated that he would also perform qualifying managerial or executive duties, such duties were described in vague terms and did not identify the specific managerial or executive tasks he performs or the amount of time he spends performing qualifying duties. We found that the Petitioner did not distinguish between the Beneficiary’s qualifying and non-qualifying tasks as necessary to establish that he would primarily perform managerial or executive duties.

On motion, the Petitioner reiterates the position descriptions for the Beneficiary that were previously submitted for the record. The Petitioner states that we acted in error by concluding that these duties were overly vague. Further, the Petitioner acknowledges that the Beneficiary performs some operational tasks, but notes that it must only demonstrate that the Beneficiary spends a majority of his time on qualifying managerial tasks.

The submitted position description for the Beneficiary, approximately five pages in length, indicates that he performs some qualifying tasks and has the required level of authority within the company. These tasks include establishing and implementing “corporate policies,” “actively engaging in new business development opportunities,” closing “corporate contracts,” assigning projects, “setting corporate goals,” “financial planning,” establishing “marketing schemes,” leading “business development efforts,” “set goals and objectives for team members,” amongst other similar qualifying tasks. More specifically, the Petitioner indicated that the Beneficiary was responsible for “actively pursuing” and establishing four U.S. distributorships for the sale of its Indian food product lines, leading frequent meetings in New Jersey and New York with sales directors of these distributors to increase sales, and negotiating contracts “with all USA major hotel chains.”² In addition, as acknowledged by the Petitioner, the Beneficiary’s duties include various tasks related to the direct provision of goods and services such as negotiating travel for five hundred school students from India to [REDACTED] and New York, booking a cruise line order worth \$150,000, and direct involvement in exporting cheese and almonds to India.

The Petitioner contends on motion that it is clear that the Beneficiary’s duties mainly consist of higher level qualifying tasks. We do not dispute that on its face the lengthy list of duties provided includes duties that appear to be managerial or executive in nature. However, as we found in our previous decision, the Petitioner did not provide sufficient detail regarding the Beneficiary’s claimed qualifying tasks. For instance, the Petitioner has provided few specific examples and no supporting documentation relevant to corporate policies the Beneficiary has implemented or will implement, new business opportunities he has developed for the business, specific corporate or distribution contracts he has negotiated and established, corporate goals he has set or met, marketing schemes he has implemented, goals and objectives he has set for team members, or projects he has assigned to his subordinates. The Petitioner states that the Beneficiary has negotiated contracts with four major distributors in the United States and closed contracts with “all USA major hotel chains.” However, the Petitioner provides no

² As discussed in our previous decision, the Petitioner states that it is involved in travel agency services, professional management consulting services, and importing and exporting of Indian goods.

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supporting documentation to substantiate his performance of these qualifying tasks. 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. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. The actual duties themselves will reveal the true nature of the employment. *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 contrast, the Petitioner provided several types of supporting documentation reflecting the Beneficiary's performance of non-qualifying operational tasks. For instance, the Petitioner submits invoices listing the Beneficiary as the representative booking travel for customers, including one as recent as July 2014. Further, several invoices and shipping documents related to the Petitioner's import and export business include the Beneficiary's email and contact information, suggesting that he was directly involved in performing non-managerial tasks associated with this line of business. The Petitioner submitted a letter dated April 2013 from [REDACTED] stating that the Beneficiary had been appointed as its "authorized representative" for "business development activity." The letter further stated that the travel company wished to appoint the Beneficiary to "generate travel business." The Petitioner provided a spreadsheet reflecting more than thirty travel bookings completed in April and May 2014, all with the Beneficiary's name listed, near and after the date of the expiration of the new office petition. Furthermore, the Petitioner submitted a letter from [REDACTED] dated May 20, 2014, stating that it had appointed the Beneficiary as its authorized representative. The letter went on to state that "since his appointment, [the Beneficiary] has shown an impressive record of booking upscale luxury travels for our Indian marketplace." In sum, this evidence supports a conclusion that the Beneficiary is acting as a travel agent booking trips for customers.

Although we agree with the Petitioner that performing these tasks during the first year as a "new office" should not disqualify the Beneficiary, we would expect to see evidence that such tasks were only tangential to his position by the end of the first year of operations and evidence that he has other staff to which he can delegate such tasks, along with evidence that he is actually performing the stated qualifying 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* 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

To illustrate, despite asserting that the Beneficiary has since delegated all operational tasks to subordinates, the Petitioner has not provided supporting evidence reflecting the performance of these non-qualifying tasks by someone other than the Beneficiary. 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)). Because the stated job duties were vague and not supported by sufficient evidence, the Petitioner's assertion on motion that the

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Beneficiary's job description was sufficiently detailed to establish that he performs primarily managerial or executive duties is not persuasive.

As noted by the Petitioner on motion, beyond the required description of the job duties, United States Citizenship and Immigration Services (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 the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

In our previous decision, we concluded that the Petitioner had not demonstrated that it had sufficient staffing at the time of the petition to relieve the Beneficiary from performing non-qualifying duties associated with operating the company's import-export, travel services and management consulting business. The staffing levels tended to support a finding that the Beneficiary's performance of non-qualifying duties, which, as noted above were documented on the record, required a significant amount of his time and prevented a finding that he would primarily perform managerial or executive duties.

We also noted that the Petitioner had made significant changes to its organizational structure in response to the Director's RFE in an apparent attempt to establish that the Beneficiary is qualified for the benefit sought. On motion, the Petitioner asserts that the changes to its organizational chart did not reflect changes made for the sake of attempting to establish eligibility, but rather genuine modifications made to the organization, mainly due to the underperformance of some of its employees. Further, the Petitioner notes that we should not have based our determination on whether the company was sufficiently staffed as of March 2014 when the petition was filed. The Petitioner emphasizes that the Beneficiary's one-year new office petition was valid until May 9, 2014, and therefore, we should have considered evidence of the Petitioner's staffing levels as of that date. The Petitioner states that by May 2014, it employed sufficient subordinates to qualify the Beneficiary as a personnel manager.

In support of the petition, filed on March 27, 2014, the Petitioner stated that it had two employees working subordinate to the Beneficiary – a Management Accountant, [REDACTED] and a Senior Travel Agent, [REDACTED]. The petition indicated that the Beneficiary employed three employees and its IRS Form 941 Employer's Quarterly Federal Tax Return from the first quarter of 2014 indicated that it had two employees.

In response to the RFE, on appeal and now on again on motion, the Petitioner contends that it recruited "additional professionals" later in 2014. The Petitioner claimed an entirely different organizational structure and staff only two months later when it responded to the Director's RFE in May 2014. The new organizational chart reflected that the Beneficiary would oversee an Office Manager, who would supervise four employees, including a Director of Travels, Management Accountant, and two Sales and Marketing Managers for the Mid-Atlantic and Northeast regions. The

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aforementioned Ms. [REDACTED] and Ms. [REDACTED] were shown as no longer employed by the company as of April 30, 2014. The chart showed that the Director of Travels has worked remotely from India since December 2013.

This new chart was accompanied by evidence that the Petitioner paid two workers, the individuals identified as office manager and one of the sales and marketing managers, during the two-week pay period that ended on May 15, 2014. The sales and marketing manager for the Mid-Atlantic region was paid for 43 hours of work and the office manager was paid for 66 hours of work. The Petitioner provided evidence that the Director of Travels, was employed by the foreign entity as “Director of Travels and Promotions” as of May 2014. The Petitioner also provided a copy of a check dated May 5, 2014 issued to the accountant with the memo “Payroll for April 2014,” but this individual did not appear on the company’s payroll journal in April 2014.

The Petitioner asserts that the Director of Travels is responsible for booking all travel for the company’s customers thereby relieving the Beneficiary of these duties, and that he is being compensated by the Petitioner’s affiliate in India. The Petitioner claims that it hired its office manager and two sales and marketing managers on April 1, April 21, and May 5, 2014, respectively, and that these employees handle the operational duties related to the import and export business line. The Petitioner also asserts that the management consulting branch of its business is still prospective. However, the Petitioner has provided little evidence to support its assertion that it completely replaced its staff in the time between the filing of the petition and its response to the Director’s RFE. The Petitioner has provided no supporting documentation reflecting the recruitment and hiring of these employees, their performance of duties for the company, or tax documentation confirming their employment. As noted previously, despite asserting that the Petitioner has employed twelve different employees during the first year, the Petitioner has not submitted any documentation reflecting their performance of duties; rather, the submitted documentation indicates that the Beneficiary has been the employee responsible for booking travel and making shipping arrangements. The Petitioner states that the director of travels handles all travel booking remotely, but again provides no evidence to support this assertion. Furthermore, the Petitioner provided insufficient evidence to support its claim that it employed the management accountant or the marketing and sales manager for the Northeast region at the time of filing.

The only documentation the Petitioner has provided to support the employment of the entirely new organizational structure are internally generated payroll documents reflecting salaries paid during late May and early June to the office manager and one sales and marketing manager. The Petitioner has not provided any additional evidence on motion, such as copies of its state and federal quarterly tax filings and IRS Form W-2s or 1099 for 2014. Once 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm’r 1972)). Based on these deficiencies, the Petitioner has not established who was actually working for the company as of May 9, 2014 when the new office petition expired. At most, it appears that the Petitioner was paying the office manager and a part-time sales and marketing manager.

The Petitioner emphasizes that, pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. 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).³ 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.

Here, the Petitioner has provided little evidence to support its assertion that it hired a manager and four subordinate professionals in less than two months between the filing of the petition and the Petitioner’s response to the Director’s RFE. Although the Petitioner states that by May 2014, it employed sufficient subordinates to qualify the Beneficiary as a personnel manager, the Petitioner has not provided sufficient evidence to corroborate its claimed staffing levels.

Further, even if the Petitioner did submit evidence to corroborate the staffing structure depicted in its May 2014 organizational chart, the chart shows that the Petitioner, which claims to operate primarily as a travel services business, had no U.S.-based employees working in its travel department at the end of the first year of operations. The Petitioner states that the other claimed employees were assigned to import and export operations. In addition, although the Petitioner claims that it has not yet started its consulting services line of business, it reported income from consulting services in 2013 and 2014 and provided copies of invoices issued for consulting services dated in early 2014. The Petitioner has not claimed that any of the subordinates are performing these services and it is unclear who, other than the Beneficiary, was available to do so when the petition was filed. Overall, the record did not establish that the Petitioner had sufficient subordinate staff to relieve the Beneficiary from spending a significant amount of time performing non-managerial duties related to at the Petitioner’s three separate revenue-generating lines of business.

The Petitioner’s primary claim on motion is that the evidence of record establishes that the Beneficiary qualifies for an extension of his L-1A status as 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

³ 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).

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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).

The Petitioner provides evidence on motion meant to demonstrate that the Beneficiary's subordinates are professionals, including a screenshot from the U.S. Department of Labor's “O*Net” website relevant to sales managers and job postings for various travel directors with different companies. In 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.”

First, as noted above, the Petitioner has provided no evidence beyond its own statements that it employed any subordinates other than the office manager and a sales and marketing manager as of May 2014. Although the Petitioner submitted evidence reflecting that the director of travel is employed by the foreign employer, it has not provided supporting documentation to substantiate that this employee is significantly engaged by the Petitioner to relieve the Beneficiary from his non-qualifying duties related to provision of travel services, which are documented in the record. The record contains insufficient evidence regarding the duties the office manager and sales and marketing manager perform to establish that they hold professional positions. Further, as noted, the Petitioner has not provided any additional evidence to corroborate their employment, such as state and federal tax filings or IRS Form W-2s. The preponderance of the evidence does not establish that the Beneficiary is employed as a personnel manager as the record does not establish that he is primarily overseeing and controlling professional, supervisory or managerial subordinates.

On motion, the Petitioner offers an expert opinion from [REDACTED] Ph.D. of [REDACTED], who states he is a professor of Computer Science at [REDACTED]. Mr. [REDACTED] states that he was asked to provide an “expert opinion and position evaluation in the capacity of a consultant” and that his expertise is “in distinguishing the levels of degree and coursework knowledge required to perform Computer Information Systems-related tasks” and “advanced technical and business knowledge of the Information Technology industry.” He opines that the Beneficiary primarily supervises and controls the work of other supervisory, professional or managerial employees, and appears to base his opinion on a description of the Beneficiary's duties and the Petitioner's organizational chart. Mr. [REDACTED] also cites to job descriptions for the positions of “director,” CEO and “HR/Personnel director” from various Internet sources, but not to the statutory definitions of managerial or executive capacity set forth at section 101(a)(44) of the Act. He recites various job duties attributed to the Beneficiary in the record and states they are “diverse and complex” and, due to their complexity, are “of managerial type.”

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USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron Int'l.*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding a beneficiary's eligibility for the benefit sought. Where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron Int'l.*, 19 I&N Dec. 791 (Comm'r 1988). In this case, the expert is a computer science professor and he merely reiterates the assertions of the Petitioner in his opinion. While we have considered the provided expert opinion, we find that it has limited probative value. Mr. [REDACTED] does not reference the applicable statutory definitions of managerial or executive capacity and does not claim to have any expertise in the Petitioner's industry. Mr. [REDACTED] appears to have accepted the Petitioner's organizational chart as evidence of the Petitioner's management structure; however, as discussed, the Petitioner has not corroborated the staffing levels or structure illustrated in its chart. Moreover, the record contains evidence of the Beneficiary's performance of non-qualifying duties, such as booking travel and arranging shipments, which are not included in his job description and such evidence was likely not made available to Mr. [REDACTED].

Furthermore, the Petitioner cites a number of cases on motion as persuasive authority to grant this motion and overturn our previous decision in this matter. Counsel cites *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988) and states that the size of its business is not a relevant factor in determining the Beneficiary's eligibility. First, we note that the Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, we are not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

We do not find the Petitioner's citation to *Mars Jewelers, Inc* to be persuasive. The Petitioner indicates that this decision establishes that we are not permitted to take into account the size of the Petitioner's business when determining a Beneficiary's eligibility for L-1A classification. However, the Petitioner has misinterpreted the intent of this decision, other case law regarding are consideration of business size, and the applicable statute and regulations. For instance, the statute states 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 us 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). Further, as noted, the regulations applicable to the extension of a petition involving a "new office" specifically require the Petitioner to provide evidence of its staffing levels at the end of its first year of operations. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).

Here, neither we nor the Director unduly considered the size of the Petitioner in denying the petition. In fact, our decision makes no reference to the size of the company as a determining factor, but instead justifiably references the lack of employees in the organization to support the Beneficiary in a qualifying managerial or executive capacity, and the lack of evidence to support the Petitioner's claims that the Beneficiary's duties are primarily managerial or executive in nature. Further, we discuss other insufficiencies and discrepancies in the record reflecting that Beneficiary performance of operational tasks, vague qualifying duties, a lack of supporting evidence indicating the Beneficiary performance of managerial tasks, and a lack of evidence showing that subordinates relieve him from performing non-qualifying tasks. As discussed, we found that the totality of the evidence indicated that the Petitioner had not developed sufficiently during the first year to support the Beneficiary in a qualifying capacity. As such, our consideration of the size of the business was ancillary to our analysis of whether the Petitioner has provided sufficient evidence to demonstrate that the Beneficiary was primarily performing qualifying managerial or executive tasks. As such, we do not find the Petitioner's reliance on *Mars Jewelers, Inc.* persuasive.

Furthermore, the Petitioner submits two non-precedent decisions issued by this office in 2012 where we sustained appeals filed for L-1A managers or executives. We note that while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Regardless, the Petitioner has not established that the facts of the aforementioned non-precedent decisions are analogous to those in the current matter.

Finally, the Petitioner cites *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) as persuasive authority in this matter. The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating a petition pursuant to the preponderance of the evidence standard, we must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Once again, we have discussed our basis for dismissing the appeal and denying the petition at length. The Petitioner has not sufficiently articulated or documented the Beneficiary's performance of qualifying duties, and it has submitted supporting evidence reflecting his significant involvement in performing non-qualifying operational tasks at the end of the Petitioner's initial year in operations. The Petitioner has provided evidence reflecting that it did not have sufficient operational employees to relieve the Beneficiary from performing non-qualifying tasks associated with operating three separate lines of business as of May 2014. Based on the Petitioner's descriptions of the Beneficiary's job duties, the evidence in the record showing his involvement in non-qualifying duties, and the uncertainty regarding the Petitioner's staffing levels and structure at the end of its first year, the record as a whole does not support a finding that the Beneficiary was more likely than

not performing primarily managerial or job duties by the end of the Petitioner's initial year of operations.

In sum, although we concur that *Matter of Chawathe* is applicable to this matter, and indeed every matter we adjudicate, the Petitioner has not established by a preponderance of the evidence that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition. For this reason, the combined motion will be denied.

IV. CONCLUSION

The Petitioner should note that, unless U.S. Citizenship and Immigration Services (USCIS) directs otherwise, the filing of a motion to reopen does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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, that burden has not been met. Accordingly, the combined motion will be denied and our previous decision will not be disturbed.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of U-E-, LLC*, ID# 15202 (AAO Jan. 27, 2016)