



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

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

MATTER OF R-A- INC

DATE: JULY 18, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a wholesale and retail purveyor of women's jewelry and accessories, seeks to extend the Beneficiary's temporary employment as its general manager under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) § 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 an executive or managerial capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish that the Beneficiary would 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 asserts that, during the previous year, it has fulfilled the business plan described in its approved new office petition. The Petitioner contends that this should lead to a conclusion that the Beneficiary will be employed in a managerial capacity as defined by the regulations.

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. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

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

Petitioner does not claim that the Beneficiary will be employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in a managerial 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.

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.

#### A. Evidence of Record

The Petitioner filed the Form I-129 on July 23, 2015. On the Form I-129, the Petitioner indicated that it has three current employees in the United States and a gross annual income of \$337,514. The record shows that the Beneficiary was previously granted L-1A status for a one-year period commencing on August 11, 2014.

In a letter dated July 13, 2015, the Petitioner stated that it is a wholesaler, retailer, and distributor of women’s fashion accessories. The Petitioner indicated that during the first year “it was dedicated to creat[ing] marketing analysis, develop[ing] the structural staff needed, creat[ing] the profits projections,” and “consolidate[ing] local services and growing demand of clients in the United States.” The Petitioner explained that it projects “a considerable amount of potential customers to

distribute our products in the fashion market” and expects to increase exports to the Latin American and Caribbean markets.

The Petitioner stated that the Beneficiary would continue in his position as general manager, and explained this role as follows:

As current General manager of [the Petitioner], [the Beneficiary] is responsible for guiding the company’s strategic plans, engage [*sic*] the company in all types of business relationships, hire new employees and evaluate personnel performance, handle the business management relations of the company, follow-up sales activities, develop new business, design of marketing and sales plan, monitoring the sales and marketing team, deal with potential customers and attract new business accounts, between others [*sic*] managerial duties.

Further, the Petitioner submitted the following duty description for the Beneficiary including percentages of time he spends on his various responsibilities:

- To direct and coordinate the activities of [the Petitioner], in coordination with [the foreign employer’s] foreign operations. This [will] take **5%** of his time.
- To plan, control, direct, organize, analyze, calculate, develop and engages the objectives of the organization. To ensure maximum revenue to the company by complying with the standards of the mission, vision and values of the organization. This [will] take **10%** of his time.
- To sign approval for contracts, acquiring goods and services, bank accounts; approve requisitions and purchase orders and recruitment; sizing the organizational structure and strategic planning of the organization; monitor the sales plan of the company’s sales associate; develop and monitor the budget; define and promote the investment plan to ensure growth of the company. This [will] take **10%** of his time.
- Be responsible for formulating and administering company policies as well as developing long range goals of the company in accordance with [the foreign employer’s] objectives. This [will] take **5%** of his time.
- To review analysis of activities, cost and operations and will forecast data to determine the progress by the company towards stated goals and objectives. This [will] take **10%** of his time.
- To control all of the financial aspect of the corporation including receiving and distributing funds and acquiring debts. This [will] take **15%** of his time.
- To be in charge of obtaining new representation agreements. This will take **5%** of his time.
- To verse negotiations of substantial contracts and will conduct legal negotiations on behalf of the corporation. This [will] take **10%** of his time.
- To confer with [foreign employer] to approve new investments in the United States. This [will] take **10%** of his time.

(b)(6)

*Matter of R-A- Inc*

- To direct and coordinate the sales, new services and marketing operations through a financial manager. This [will] take **10%** of his time.

The Petitioner submitted the Beneficiary's resume which states that he performs the following duties as its general manager: "define the company's strategic plans," engage "in all types of business relationships," perform "business management," participate in the "development of new business," "design of marketing and sales plan," "deal with potential customers," and "attract new business accounts."

The Petitioner provided several invoices reflecting the sale of women's accessories and other related goods. Four of these invoices, including one dated in August 2014, two dated in October 2014, and one in June 2015, listed the Beneficiary as the primary contact for the Petitioner. None of the invoices referenced any other employee of the Petitioner.

The Petitioner submitted an organizational chart indicating that the Beneficiary supervised [redacted] Marketing Executive (listed as hired in November 2014) and [redacted] Sales Executive (noted as hired in December 2014). The chart further reflected that the Petitioner planned to hire an administrative assistant and an e-commerce executive in 2017. The chart specified that the Beneficiary oversees an IT analyst listed as "outsourcing." Lastly, the chart indicated that there was a vacant sales position subordinate to the sales executive. A personnel plan just below the organizational chart reflected that in fiscal year 2015 the Petitioner would pay the IT analyst \$32,400 and the sales executive \$19,200. No salary was listed for the marketing executive for 2015. The personnel plan reflected that the Petitioner would have six employees, including the Beneficiary, by 2016.

The Petitioner provided an additional duty description for the Beneficiary and for each of its current and projected subordinates. In this instance, the Petitioner described the Beneficiary's duties as follows:

- Sign approval for contracts, acquisition of goods and services, bank accounts- 10%
- Approve requisitions and orders, shopping and recruitment – 5%
- Developing business and business processes as well as to monitoring and control of businesses in development –5%
- Sizing up the organizational structure and strategic planning of the Organization –10%
- Monitor sales of the sales plan associates of the organization –5%
- Develop and control the budget of the Organization, in the same way, define and promote the investment plan that will ensure the growth of the company –5%
- Plan the general and specific objectives of the company in the short, medium and long term. – 10%

(b)(6)

*Matter of R-A- Inc*

- Organize the structure of the company and future; as well as the functions and the charges. – 5%
- Business development and business processes, aligning with the plan of sales and/or marketing with organizational strategies of the company. – 5%
- Responsible for the hiring of local staff, according to the requirements of each unit – 5%
- Review and approval of contracts of employment and the conditions. – 5%
- Responsible for evaluating acquisition, development and use of new technologies that enable the development of new service areas. – 10%
- Periodic evaluations of the execution of the functions of the procedures – 5%
- Promote activities for the creation of new techniques of auditing this assess organizational departments – 5%
- Control and monitoring of the major projects of the company in its different areas. – 5%

In addition, the Petitioner stated that [REDACTED] Marketing Executive would be responsible for “launching new products in test markets,” “develop[ing] new territories,” “regional sales strategies,” and “new business acquisition.” The Petitioner indicated that [REDACTED] Sales Executive would be tasked with “greeting and assisting customers,” “answering customer questions,” “seeking out information and knowledge regarding new products,” “placing orders and locating stock,” “maintaining knowledge of current promotions and policies,” and “maintaining displays.”

The position description provided for the IT analyst noted that this position was “to be hired” and that this employee would be responsible for maintaining and enhancing “web business systems,” developing and implementing “global web based e-commerce solutions,” developing “production application support plans,” analyzing “fundamentals and concepts of enterprise,” and developing “specification documents[...with associated solutions.” Further, the Petitioner stated that the e-commerce sales executive “to be hired” would be tasked with “daily operational functions associated with e-Commerce,” “entering descriptions for new arrival items,” “monitoring merchandise by category,” “shipping items sold,” and maintaining “the company records and reports.” Lastly, the Petitioner indicated that the administrative assistant would monitor the “managing member’s” calendar and email, maintain client files, and perform other administrative duties.

The Petitioner provided a Florida Department of Revenue Employer’s Quarterly Report for the second quarter of 2015 reflecting payments to the Beneficiary (\$11,050), [REDACTED] (\$8100.04), and [REDACTED] (\$4800.12). Lastly, the Petitioner submitted pictures of its business reflecting a retail store selling jewelry, purses, and other women’s accessories.

The Director later issued a request for evidence (RFE) requesting that the Petitioner submit information and evidence regarding the educational credentials of the Beneficiary’s subordinates. Further, the Director stated that the evidence provided by the Petitioner did not establish that the Beneficiary would act in a managerial capacity and asked it to provide a letter detailing his typical

*Matter of R-A- Inc*

managerial duties and how he would supervise and control the work of supervisory, professional, or managerial subordinates.

In response, the Petitioner submitted the Beneficiary's "Temporary Employment Contract" dated July 13, 2015, which set forth additional job duties, indicating that he would "direct and coordinate activities of businesses and departments," "direct administrative activities," hire and fire "supervisors," "monitor suppliers," "establish or implement departmental policies, goals, objectives or procedures," and "update and monitor ecommerce project plans for the company website."

The Petitioner provided a new personnel list reflecting that [REDACTED] acted as IT analyst earning \$32,400 per year and that [REDACTED] worked as a sales executive making \$21,120 per year. The list further specified that [REDACTED] holds a "B.A. in social communication advertising and public relations mention" and that [REDACTED] earned a master's degree in "business management." The Petitioner provided supporting documentation showing that both [REDACTED] and [REDACTED] had received their degrees from universities in Venezuela. The Petitioner submitted various certificates indicating that [REDACTED] had received in information technology related topics such as "Adobe InDesign CS6" and "Internet Development" and a resume indicating that he had significant experience in graphic design. In addition, a resume provided for [REDACTED] reflected that she had worked as a sales executive for the Petitioner for the last year.

The Petitioner submitted the identical duty descriptions for each of its current and proposed positions, except, [REDACTED] was shown as acting in the IT analyst role and [REDACTED] as sales executive. The position description for the IT analyst indicated that it required "a Bachelor's Degree in computer science." The sales executive position description stated that [REDACTED] would be "involved in all aspects of keeping the store looking and functioning at its best," including responsibility to "keep the checkout line moving" and "ensuring that customers have a pleasant and positive shopping experience." The Petitioner provided a similar organizational chart with the Beneficiary directly supervising all the company's current and proposed positions, aside from the difference in positions for [REDACTED] and [REDACTED]. The Petitioner specified that [REDACTED] and [REDACTED] operated on an "executive level," that the Beneficiary acted at a "managerial level," and that the proposed administrative assistant was the sole "operative level" employee."

The Petitioner stated in an additional support letter that the Beneficiary "directly supervise[s] 5 employees." The Petitioner indicated that the Beneficiary "is in charge of plan, direct, and coordinate [*sic*] the operations of the company," including "formulating policies, managing daily operations, and planning the use of materials and human resources." The Petitioner explained that the Beneficiary "currently handled the approval of purchases of merchandise, Purchases orders and requisitions for amounts until US\$150.000."

In addition, the Petitioner submitted another listing of the Beneficiary's duties:

(b)(6)

*Matter of R-A- Inc*

- Manage the company resources and capital flows, and provide a stable source of employment. Develop organizational goals and objectives. – 20%
- Monitor performance of online store www [REDACTED] com – 10%
- Supervise, hire, remove and coach staff including supervisors. Prepare and ensure compliances of staff schedules and work assignments. – 20%
- Monitor performance of shipping companies – 5%
- Develop and Follow Up marketing plans and strategies, for online store and physical store including social networks and digital marketing strategy – 10%
- Analyze financial records to improve efficiency and determine resource needs including determine pricing and monetary policies. Coordinate and supervise the monthly payroll process – 5%
- Supervise compliance of business plan including direct sales and online sales, marketing and customer service activities – 15%
- Implement organizational process and policy changes. – 5%
- Approval for contracts, acquisition of goods and services – 10%

The Petitioner provided several emails between the Beneficiary and [REDACTED] dated throughout 2014 reflecting their coordination on the development and operation of the company's website. The Petitioner submitted an "IT Services Software Requirements" document dated March 2, 2015, showing a meeting between the Beneficiary and [REDACTED] discussing issues with the company's website, such as payment and [REDACTED] failures, amongst other issues. The Petitioner provided form letters drafted by the Beneficiary specific to future termination of employees and employee resignations. Lastly, the Petitioner submitted a performance appraisal for [REDACTED] indicating that she had "low sales" and needed to "close leads" and "make phone calls to existing customers."

In denying the petition, the Director noted that the Petitioner did not provide evidence of sufficient operational employees to relieve the Beneficiary from performing non-qualifying functions and did not consistently identify the number of subordinates he would supervise. The Director stated that the asserted sales executive did not have any subordinates and that evidence indicated that she was not acting as a salesperson as asserted. The Director concluded that the Beneficiary's duties were not supported by the evidence on the record, pointing to the fact that his duties discussed his supervision of a finance division and marketing operations which are not reflected in its proposed organizational chart. Finally, the Director found that the Beneficiary's position description was not sufficient to establish that he primarily performs managerial duties.

In its appeal, the Petitioner contends that it is "carrying out exactly" its business plan, a plan which previously led to the approval of the Beneficiary's new office visa petition. The Petitioner emphasizes that *Family Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006) states "it is an abuse of discretion for the Service to act in this manner if there is no evidence to support the decision, or if the decision is improper based on an improper understanding of the law." The Petitioner asserts that *Family Inc.* "perfectly supports" the proposition that the Director acted in error by not considering how its staffing levels correspond to its size and comply with its originally approved business plan. The Petitioner contends that its statement that the Beneficiary

would oversee a financial manager was not in error, as this position is projected to be filled in 2016. The Petitioner contends that the evidence establishes that the Beneficiary devotes a majority of his time to managerial duties and contests the Director's conclusion that there are discrepancies in the Beneficiary's number of subordinates, indicating that it has consistently stated that he currently supervises two employees.

## 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 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.

In the current matter, the Petitioner has submitted three conflicting duty descriptions for the Beneficiary thereby leaving question as to his actual job duties. In each description, the Petitioner discusses duties not reflected in the other descriptions, but each list of duties nevertheless purports to account for 100% of the Beneficiary's time. For instance, the Petitioner specifies in its initial description that the Beneficiary will devote 15% of his time to financial aspects of the business, with another 10% to be spent on overseeing a financial manager. However, neither of the Beneficiary's other two duty descriptions stated that he will allocate this amount of time to financial matters, nor does any other evidence submitted on the record, including the company's proposed organizational charts. Indeed, the second duty description described herein, also provided in support of the petition, makes only passing reference to his focus on developing and controlling the budget 5% of the time, while his duty description in response to the RFE indicates that he will spend 20% of his time managing capital and company resources and 5% on "financial records" and "monetary policies." Likewise, the Beneficiary's first duty description references his responsibility for the negotiation of "substantial contracts" and "representation agreements," duties not referenced in his two other duty descriptions.

The Petitioner indicates in the Beneficiary's second duty description that the Beneficiary will spend 5% of his time on business development, processes and sales plans, 5% on "employment contracts," 10% on "evaluating acquisitions" and "new technology," 5% on "new techniques of auditing," and

5% on “monitoring major projects,” all duties not expressly listed in either of the two other duty descriptions. Lastly, the Petitioner states in the Beneficiary’s duty description in response to the RFE that the Beneficiary will spend 10% of his time monitoring the company’s online store, 20% on “hiring supervisors,” 5% on “monitoring shipping,” and 10% on “social networks and digital market strategy.” Again, each of these specific duties are not mentioned in the other two duty descriptions. In fact, the Beneficiary’s description in response to the RFE stressed IT-related duties not previously discussed. Further, the Petitioner states that the Beneficiary will spend a significant amount of time hiring employees and “supervisors,” however, the company’s organizational chart and personnel plan include no subordinate supervisors, and the other two job descriptions do not indicate that he will spend much time on hiring responsibilities.

Therefore, in sum, the Petitioner has provided a confusing array of assertions with respect to the Beneficiary asserted and proposed duties and the amount of time he will allocate to specific tasks. As such, it is difficult to ascertain his actual duties and those he will perform under the extended petition. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). We are not able to determine which, if any, of the three different breakdowns of the Beneficiary’s duties is accurate.

In addition, the Petitioner does not provide sufficient clarity or supporting documentation to substantiate many general duties set forth in the Beneficiary’s duty descriptions. For instance, the Petitioner indicates that the Beneficiary will be responsible for “objectives,” “contracts” and “contract negotiation,” “strategic planning,” “investment plans,” “policies,” “goals,” “business development,” “sales plans and processes,” “monitoring major projects,” and “social networks and digital market strategy.” However, in each case, the Petitioner has not articulated in detail nor supported with documentation objectives the Beneficiary set, contracts he negotiated, strategic planning he implemented, investment plans in place, policies or goals he set, business development he fostered or planned, sales plans or processes he created, or market strategies he has developed. It is reasonable to expect that the Petitioner could articulate more specifics after he has been acting in his capacity as general manager for more than a year. 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, to the extent that the Petitioner provides detail and supporting documentation regarding the Beneficiary’s tasks, this evidence reflects that he performs many non-qualifying operational tasks. For instance, the Petitioner indicates in the Beneficiary’s various duty descriptions that he will be responsible for a number of operational tasks, such as monitoring suppliers and shipping, monitoring and updating “ecommerce including the company’s website,” creating project plans and overseeing “major projects,” managing weekly payroll and employee schedules, and approving all requisitions of goods under \$150,000. These duties suggest that the Beneficiary is delegating little

*Matter of R-A- Inc*

responsibility and that he is not acting as more than a first-line supervisor. In addition, the Petitioner has submitted several vendor invoices reflecting that the Beneficiary acts as the company's primary contact and emails demonstrating the Beneficiary's direct involvement in daily operational tasks related to maintenance of the company's website and online store. Further, as noted, the Petitioner has provided little evidence to reflect the Beneficiary's performance of qualifying tasks, beyond a few form letters related to human resources which do not suggest the allocation of a great deal of his time. On the whole, the evidence regarding the Beneficiary's duties suggests that it is more likely than not that he devotes a majority of his time to non-qualifying operational tasks.

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.

In the current matter, the Petitioner asserts that the Beneficiary acts in a managerial capacity. 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." 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).

The Petitioner has submitted conflicting organizational charts leaving us unable to determine the actual positions filled by the Beneficiary's subordinates and whether he acts as more than a first line supervisor. At the time of filing, the Petitioner stated that [REDACTED] acted as sales executive and that [REDACTED] worked as marketing executive. Further, the IT analyst was identified as an outsourced employee. However, less than three months later in response to the RFE, the Petitioner submitted different roles for its two employees, indicating that [REDACTED] was acting as IT analyst and that [REDACTED] was a sales executive. The Petitioner offers no explanation for this discrepancy.

Further, the record contains inconsistent information regarding [REDACTED] role in the company. For example, [REDACTED] duty description in response to the RFE indicates that she acts as a clerk in the Petitioner's retail store, while elsewhere her resume and performance review suggest that she is acting as a regional sales executive calling clients, handling "national and international sales," and "closing leads." Indeed, the Petitioner's company's walk-in store is open 48 hours per week, leaving question as to whether [REDACTED] could act in any role but a store clerk since she is asserted to

(b)(6)

*Matter of R-A- Inc*

work 40 hours per week.<sup>1</sup> In addition, this leaves question as to who is performing the operational duties of running the store when [REDACTED] is not working as its sole clerk. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Further, the Petitioner's organizational chart clearly reflects that the Beneficiary will not act as more than a first line supervisor, as none of his current or projected subordinates are shown to have subordinates of their own. Although a beneficiary is not required to supervise personnel, if a petitioner claims that a beneficiary's duties involve supervising employees, then a petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See section 101(a)(44)(A)(ii) of the Act. In addition, the lack of operational employees leaves question as to whether the Beneficiary is relieved from primarily performing non-qualifying operational tasks, such as purchasing goods for sale, attending to customers at the company's retail location and online, and fulfilling orders received online or by phone. As discussed, the Petitioner's supporting documentation and portions of the Beneficiary's various duty descriptions suggest that he is significantly involved in these non-qualifying tasks.

Therefore, whether the Beneficiary can qualify as a personnel manager hinges on whether the Petitioner has demonstrated that his subordinates are professionals as defined by the regulations. 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."

Here, the Petitioner has not established that the Beneficiary's subordinates are professionals. Although the Petitioner has provided evidence indicating that both of the Beneficiary's subordinates have bachelor's degrees, the possession of a bachelor's degree does not demonstrate that a subordinate is a professional as defined by the regulations. As noted above, the Petitioner must demonstrate that the position filled by the subordinate requires a certain baccalaureate level degree for entry into that field. First, as previously discussed, the Petitioner has not provided a consistent description of [REDACTED] duties. However, the evidence suggests that she is more likely than not acting primarily as a clerk in the Petitioner's store, and not in a position that would require attainment of a bachelor's degree. The Petitioner has also provided conflicting job titles and position descriptions for [REDACTED]. Even if he is in fact employed in the position of IT analyst, the Petitioner has not submitted evidence that he meets its stated minimum qualifications for this position, which it describes as a "bachelor's degree in computer science." Finally, there is conflicting information in the record as to the amount of time the Beneficiary actually allocates to

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<sup>1</sup> The Petitioner's website [http://www.\[REDACTED\].com](http://www.[REDACTED].com), referenced on the record, reflects that the company's retail location is open from 9:30 to 5:30, Monday through Saturday.

supervision of personnel, and no indication that he is acting primarily as a supervisor, even if the Petitioner did establish that one or both of his subordinates as professionals.

In the alternative, the Petitioner has not established 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.

First, as we have discussed at length, the Petitioner has submitted a confusing array of duty descriptions for the Beneficiary leaving significant question as to his actual duties and whether he devotes a majority of his time to qualifying tasks. Further, the Petitioner does not assert that the Beneficiary qualifies as a function manager. The Petitioner does not identify a function with specificity, articulate the essential nature of such function, and establish the proportion of the Beneficiary's daily duties dedicated to managing the essential function. As such, the Petitioner has not demonstrated that the Beneficiary qualifies as a function manager.

In its appeal, the Petitioner asserts that it has followed its business plan set forth in the previous L-1A filing and contends that, since USCIS approved its new office petition based on these projections, it follows that we must approve the extension. First, it is noteworthy that the Petitioner has not submitted its business plan to confirm that it has met its goals during the previous year. Regardless, even if the service center director had previously approved a petition based on a business plan reflecting the Petitioner's current state of operations, this does not obligate this office to sustain the appeal and approve the petition. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be unreasonable for USCIS or any agency to treat acknowledged errors as binding precedent. *Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center Director had approved the nonimmigrant petitions on behalf of the Beneficiary, we would not be bound to follow the contradictory decision of a service center. *La. Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). It is noteworthy that there are different regulatory requirements applicable to a new office petition as compared to the current matter involving a new office extension. *See* 8 C.F.R. §§ 214.2(l)(3)(v) and 8 C.F.R. § 214.2(l)(14)(ii). In

short, the Petitioner is required to establish that the Beneficiary would act in a managerial capacity under the extended petition, and based on our previous discussion, it has not met this burden.

In addition, the Petitioner contends that the Director was mistaken for focusing on references made to a finance department and manager in the Beneficiary's initial duty description, and notes that this employee will be hired in the future. The Petitioner specifically referenced the Beneficiary's significant management of financial matters, and a financial manager, in his initial duty description. However, these duties were not reflected in either of his other duty descriptions and the Petitioner's organizational chart does not indicate that it plans to hire a finance manager. Again, the Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Lastly, the Petitioner references *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006), suggesting that the Director overemphasized the size of the company and did not properly take into account the reasonable needs of the company. First, we acknowledge that the Director may have over-emphasized the Petitioner's size in her decision. 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). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as 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.*, 469 F.3d at 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15.

However, for the reasons discussed above, the evidence of record does not demonstrate the Beneficiary's eligibility. The Petitioner has submitted conflicting and vague position descriptions for the Beneficiary and inconsistent information regarding the positions held by his subordinates, and for the reasons discussed above, has not established that he will perform primarily managerial duties or act as a personnel or function manager under the extended petition. Further, as noted above, the Petitioner's small size can become especially relevant when there are discrepancies on the record, as there are here. While we are required to consider the Petitioner's reasonable needs, the Petitioner is required to establish that the Beneficiary's position consists of primarily managerial duties and that it has sufficient personnel to relieve the Beneficiary from performing operational and administrative tasks. The Petitioner has not established how its two subordinate employees sufficiently relieve the Beneficiary from performing non-qualifying duties associated with operating its on-line and retail store, such as purchasing, order fulfillment, marketing, and administrative tasks.

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 stated reasons. 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 R-A- Inc*, ID# 17328 (AAO July 18, 2016)