



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

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

MATTER OF S-A-USA, LLC

DATE: JULY 21, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a trucking company, seeks to extend the Beneficiary's temporary employment as its president and chief executive officer 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 a managerial or executive capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner had not established that the Beneficiary will be employed in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred when making the decision.¹

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 proposed 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.*

¹ The Petitioner stated on the Form I-290B, Notice of Appeal or Motion, that it would submit a brief and/or additional evidence to this office within 30 days. The record reflects that the Petitioner has not submitted a brief or evidence and the record will be considered complete as presently constituted.

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 determining that the Petitioner had not established that it would employ the Beneficiary in a qualifying managerial or executive capacity under the extended petition.

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

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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 June 11, 2015. On the Form I-129, the Petitioner indicated that it has four current employees in the United States and a gross annual income of \$346,091.²

In a letter submitted in support of the petition, the Petitioner stated that it was incorporated on August 27, 2013, in the State of Florida. It noted that its principal activity is the provision of commercial transportation and logistics services. The Petitioner claimed that it had purchased four trucks and had signed agreements with freight brokers to provide it with transportation contracts. The Petitioner asserted that it planned to acquire more commercial vehicles and establish additional offices in New York, California, and Texas. The Petitioner stated that the Beneficiary “oversees all aspects of the company’s operation including: client relations, maintenance, finances, team building, and staff development.”³ The Petitioner listed the Beneficiary’s duties and allocated the approximate time the Beneficiary would spend on those duties as follows (bullet points substituted for letters):

- In collaboration with the Financial and Administrative Manager, and with assistance of out-side [*sic*] professionals (such as CPA, Attorneys, etc.), devises strategies, formulates all strategic policies and objectives, implements administrative and operation policies and procedures, establishes marketing, sales, and financial goals, and directs the overall operations of businesses to ensure and enhance profitability – 5%
- Has sole authority to oversee other managers, such as the Financial and Administrative Manager, and directs the entire activities of the company, implements company’s guidelines, and is responsible for purchasing, sales, hiring, training, customer services quality control, and day-to-day supervisory duties – 5%
- Meets frequently with the Financial and Administrative Manager to ensure that the overall operations of the corporation [are] conducted in accordance with established goals and policies – 2%
- Directs company’s financial goals, objectives, and budgets; ensures that resources are used properly and that business is carried out as planned – 5%

² The Petitioner submitted documentation to support the L-1A petition, including evidence regarding the proffered position, its employees, and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

³ The Beneficiary was previously approved for one year in L-1A classification ([REDACTED] valid until June 13, 2015. He had last entered the United States on December 14, 2013, on a B-2 visa.

- Controls the investment of funds, oversees investment performance, and manages associated risks, supervises cash management activities, executes capital-raising strategies to support company's expansion, and plans mergers and acquisitions – 5%
- Makes decisions about the overall technological direction of the company, staff training, and approves proposed purchases of equipment; approves proposed hiring of outsourcing computer specialists, information technology workers, and support personnel to carry out information-technology-related projects – 1%
- Travels considerably among international, national, regional, and local offices to monitor overall international group of companies operations and meet with customers and partners – 10%
- Attend meetings, conferences, and seminars sponsored by various general business and industry specific associations to expand his knowledge of national and international issues that influence the company; can help him to develop a network of useful contracts; and to become familiar with the latest trends in management by attending national or local training programs sponsored by various executive training organizations – 4%
- Selects or approves selection of company's personnel and out-sourced professional services providers such as CPA, Attorneys, PR specialists, IT specialists, logistics services providers, etc. and evaluates their performance; approves firing of personnel based on their performance evaluation – 10%
- Periodically reviews financial statements and analysis of the company's cash flow and profitability – 7%
- Oversees all legal, licensure, permits, and safety compliance matters – 5%
- Represents company in front of all federal, state, and local government agencies – 5%
- Identifies and develops new additional business and investment opportunities – 10%
- Directs and manages the activities and operation in connection with the business development of the company including the development of the Company's marketing, sales and investments – 5%
- Negotiates and executes various contracts on behalf of the company – 8%
- Approves all manufacturers, whole sellers [*sic*] vendors, and suppliers, as well as merchandise orders – 6%
- Acts as a liaison between the U.S. subsidiary and the foreign parent company and has exclusive decision making authority regarding opening of new facilities and representative offices both on the territory of the United States and abroad - 7%

The Petitioner's organizational chart depicted the Beneficiary as directly over a financial and administrative manager who in turn supervises a technical support supervisor and an office supervisor. The chart also shows that outsourced legal counsel and accounting services report to the financial and administrative manager and depicts an outsourced dispatch operator and drivers reporting to the technical support supervisor.

(b)(6)

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The Petitioner stated that the Beneficiary's direct subordinate, the financial and administrative manager, will perform the following duties:

- A. Oversee and implement all financial and personnel aspects of the company under the President's direction . . . : 30%
- B. Oversee accurate client records: update payments received from customers to clients. Process all payments and deposits in a timely manner: 45%
- C. Manage the company's quarterly and yearly revenue: 10%
- D. Evaluate the financial aspects of each vehicle purchased. . . : 10%
- E. Research and analyze the truck transportation market . . . , forecast future revenue and profit-loss projections: 5%

The Petitioner further stated that the technical support supervisor spends 35 percent of his time answering and resolving technical questions, 30 percent of his time providing same-day support diagnostics, 25 percent of his time overseeing the work of drivers and dispatch operator(s), and the remaining portion of his time resolving vehicle issues. The Petitioner indicated that the office supervisor spends 50 percent of her time managing the day-to-day activities of the company by performing clerical and administrative work, 20 percent of her time typing, preparing notes, correspondence, and filing, and the remaining portion of her time handling mail, paying bills, making bank deposits, answering the phone, scheduling appointments and arranging travel. Finally, the Petitioner noted that the dispatch operator, who is outsourced through a brokerage contract with [REDACTED] spends 25 percent of his time scheduling and dispatching drivers, 20 percent of his time conferring with customers or supervising personnel, 15 percent of his time arranging for repairs, and the remaining portion of his time relaying messages, overseeing communications within specific territories, and ensuring efficient movement of trucks. The Petitioner included a copy of a month-to-month contract with [REDACTED]

The Petitioner provided a copy of its Florida Form RT-6, Employer's Quarterly Report, which shows that it employed the Beneficiary, the financial and administrative manager, the technical support supervisor and the office supervisor throughout the first quarter of 2015 and paid a total of \$18,910 in wages. The Petitioner also submitted a year-to-date 2015 profit and loss statement prepared by its accountant which showed that the company had paid total wages of \$31,517 as of May 31, 2015, which is consistent with the amount paid per month during the first quarter.

The Petitioner's initial evidence included copies of IRS Form W-4, Employee's Withholding Allowance Certificate, for the Petitioner's employees. According to their Forms W-4, the finance and administration manager resides in California, the office supervisor resides in Missouri, and the technical support supervisor resides in Georgia.

The Petitioner also submitted: photographs of its one-room office with a lease that includes a restriction allowing only three persons to occupy the office; its bank statements, its 2014 IRS Form 1065, U.S. Return for Partnership Income, and other tax documents, among other evidence. The Petitioner also submitted information to show that it had employed truck drivers and that it had

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entered into contracts with four drivers. The contracted drivers are depicted on the Petitioner's organizational chart with one other individual, for a total of five drivers.

The initial record also included a certificate of title for a truck issued to the Beneficiary, a certificate of title for a truck issued to the Petitioner, and three certificates of title issued to [REDACTED] located in the State of Georgia.

In response to the Director's request for evidence (RFE), the Petitioner submitted a letter from its landlord, dated November 2, 2015, who indicated that she was aware that the Petitioner would need additional office space in the next two months and noted that the building had additional office space available. The landlord indicated that the 200 square feet of leased office space could seat four people comfortably.

The Petitioner also revised the Beneficiary's duties and grouped them into seven areas of responsibility. The Petitioner stated that the Beneficiary would spend his time as follows: 20 percent of his time working with the financial and administrative manager, the office supervisor and the technical supervisor, to manage and oversee all the financial and planning activities; 15 percent of his time establishing relationships with strategic partners and distributors; and an additional 15 percent of his time conducting quarterly meetings, reviewing sales reports, developing new projects, establishing pricing policies, as well as managing operation projects. The Petitioner indicated that the Beneficiary would spend the remaining portion of his time designing and approving strategic and operational plans, developing corporate policies and monitoring their implementation – including performance standards and reviews, determining the organizational chart, job descriptions and authority levels, appoint top management positions, work closely with the financial and administrative manager and office supervisor to oversee the human resource function, as well as ensuring that the company matches its project objectives.

The Petitioner paraphrased the description of the duties of the Beneficiary's subordinates previously submitted but did not allocate the subordinates' time to the various duties. The record also included a revised or updated organizational chart, showing the individual previously identified as the office supervisor in the dispatch operator position, and showing a different individual employed as the office supervisor.⁴ The Petitioner noted that both the financial/administrative manager and the new office supervisor possessed bachelor's degrees. The Petitioner submitted IRS Forms 941, Employer's Quarterly Federal Tax Return, and Florida quarterly wage reports for the second and third quarters of 2015, showing the Beneficiary's employment, as well as the employment of the individuals depicted on the updated organizational chart in the positions of financial/administrative manager, office supervisor, technical support supervisor, and dispatch operator. The organizational chart also identified the same five drivers under the supervision of the technical support supervisor.

⁴ This individual, [REDACTED] was not identified as an employee at the time of filing in June 2015 when the Petitioner claimed only four employees. However, her name appears on the Petitioner's Florida quarterly wage report for the second quarter of 2015.

The Director determined that the Beneficiary's job description indicated that he would be responsible for performing non-qualifying duties and that the Petitioner did not provide an explanation for deleting and otherwise revising some of the Beneficiary's duties in its response to the RFE. The Director also determined that the description of the financial and administrative manager's duties did not show that he primarily performed managerial duties. The Director noted the financial and administrative manager and the office supervisor's bachelor's degrees but determined that these degrees did not establish that their positions were professional positions and further that the descriptions of their duties did not indicate that they primarily performed supervisory duties. The Director concluded that the Petitioner had not established that the Beneficiary would be employed in a managerial or executive capacity.

The Petitioner asserts on appeal that the Director's decision is based on a flawed analysis of the facts and misinterpretation of the law and that it has established that the Beneficiary will be employed in an executive capacity. The Petitioner claims that the evidence submitted demonstrates that the Beneficiary's position meets all the necessary criteria to qualify as an executive position. The Petitioner stated that in a brief to be filed subsequently, it would present "persuasive arguments" establishing why the petition should be approved and why it believed the Beneficiary's position qualifies for L-1A classification. As noted, the record does not reflect that the Petitioner submitted the referenced brief.

B. Analysis

Upon review of the petition and the evidence of record, 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 either a managerial or executive capacity. *Id.*

The definitions of executive and managerial 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 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). 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, Inc. v. INS*, 940 F.2d 1533.

The Petitioner here has submitted a lengthy but overly broad statement of the Beneficiary's duties. Upon review of the descriptions submitted, the Petitioner does not include detail regarding the Beneficiary's duties in the context of the Petitioner's operation of a commercial trucking enterprise. For example, the Petitioner indicated that the Beneficiary would devise strategies, formulate strategic policies and objectives, and implement the administrative and operational policies and

procedures, as well as direct the company's financial goals, objectives, and budgets and furthermore, would direct the entire activities of the company and implement company's guidelines. These duties do not convey the actual tasks the Beneficiary will perform, as those duties relate to the Petitioner, but rather merely recite vague job responsibilities and broadly-cast business objectives. The Petitioner also stated that the Beneficiary will direct and manage the activities and operations in connection with business development including the Company's marketing, sales, and investments and will periodically review financial statements and analyze the company's cash flow and profitability. The Petitioner does not connect these activities and operations to the Petitioner's actual business. We cannot ascertain if these generally described duties would be primarily managerial or executive duties or whether they are ordinary operational tasks performed alongside the Petitioner's other employees.

The Petitioner also refers to the Beneficiary establishing marketing, sales, and financial goals, but does not identify anyone responsible for performing the operational marketing and sales tasks. Similarly, the Beneficiary is responsible for purchasing, hiring, training, quality control, and day-to-day supervisory duties including evaluating the performance of employees and outside service providers. The Petitioner does not detail the delegation of these duties to other employees with any specificity. The Beneficiary also is the individual responsible for attending meetings, conferences, and seminars to expand his knowledge and to network and is the individual who will negotiate and execute contracts on behalf of the company. Upon review, there is insufficient evidence to assess whether these duties fall within the statutory and regulatory parameters of managerial or executive capacity. It is not possible to ascertain the tangible duties that will engage the Beneficiary from this general list.

The Petitioner also stated that it is the Beneficiary who will identify and develop new business and investment opportunities but does not further elaborate on the actual duties involved or provide information on any new businesses. It is the Beneficiary who also approves the manufacturers, wholesalers, vendors, and suppliers. It is not clear if the Petitioner is referencing companies involved in the trucking business, or in another industry. To reiterate, the majority of the generally described duties do not detail how the Beneficiary will perform duties that are specific to the Petitioner's trucking business. Although the Petitioner initially indicated that the Beneficiary would spend a portion of his time overseeing the legal, licensure, permits, and safety compliance matters, and representing the company before government agencies, tasks that would appear necessary to a trucking business operating in a heavily regulated industry, it deleted these tasks without explanation or delegation in response to the Director's RFE, but did not state that such duties would be assigned to anyone else.

The Petitioner does not clearly distinguish between the duties of its financial and administrative manager and the Beneficiary's duties as the duties relate to the investment of funds, supervision of cash management activities and raising capital. Further, although the Petitioner initially identified the financial and administrative manager as supervising two subordinates, it indicates that the majority of this employee's time will be spent overseeing client records, processing payments and deposits, managing revenue, evaluating financial aspects of purchased vehicles, and researching and

analyzing truck transportation in the United States. While the Petitioner indicates that the financial and administrative manager will spend 30 percent of his time overseeing and implementing the financial and personnel aspects of the company under the Beneficiary's oversight and supervision, the Petitioner does not define these broadly stated components in terms of the actual duties that either the Beneficiary or his subordinate will perform. Upon review of the descriptions of duties submitted, the Petitioner has not detailed the actual duties necessary to operate the company and has not provided sufficient consistent evidence indicating who will perform the daily duties essential to the continued operation of the company.

The fact that the Beneficiary will manage or direct 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" managerial or executive in 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 possess the requisite level of authority with respect to discretionary decision-making, the position descriptions alone are insufficient to establish that his actual duties are 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.

The Petitioner has consistently claimed that the Beneficiary will be employed in an executive capacity. 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.*

A review of the totality of the record reveals that the Beneficiary does not have a subordinate level of managerial employees to direct. The Petitioner has not clearly and consistently described its employees' duties. We note that in response to the Director's RFE, the Petitioner revised the duties of the Beneficiary and his subordinates and did not allocate the time it claimed the Beneficiary's

subordinates would spend supervising or otherwise managing the “day-to-day activities” of the company. The record does not include consistent, probative evidence that the Beneficiary’s subordinates would sufficiently relieve him from performing primarily non-qualifying duties.

Although the Petitioner does not assert that the Beneficiary will primarily perform in a managerial capacity, we will address this issue as it did claim in response to the RFE that the Beneficiary supervises subordinate professionals. 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 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. See 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Here, the Petitioner’s organizational chart shows the Beneficiary directly supervising a financial and administrative manager. As referenced above, the financial and administrative manager’s duties are not clearly detailed. It does not appear that he spends the majority of his time supervising the office supervisor and the technical support supervisor. Similarly, the technical support supervisor appears to perform operational tasks, answering technical questions, providing diagnostics, replacing parts, and resolving vehicle issues. He does not spend the majority of his time supervising the dispatch operation and the drivers. While the Petitioner stated that the office supervisor will spend 50 percent of her time managing the day-to-day activities of the company, the Petitioner does not identify what those activities entail. Her remaining duties appear to be administrative and the organizational chart does not depict her supervising employees. Upon review of the descriptions of the Beneficiary’s subordinates’ duties and the time allocated to performing those duties, these individuals do not primarily perform supervisory duties. Similarly, the record does not include sufficient evidence demonstrating that these individuals manage personnel or functions, rather than performing or assisting in the performance of the necessary operations to continue the Petitioner’s trucking business. Further, the Petitioner has not established that the duties broadly described require a bachelor’s degree in order to perform them.⁵

⁵ 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. 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 explicitly stated that the office supervisor’s position did not “require college education,” but then in response to the RFE, without explanation, stated that a bachelor’s degree in business administration or a minimum of five years of office management experience was required.

Upon review of the totality of the information in the record, the Petitioner has not established that the Beneficiary would be primarily supervising and controlling the work of other supervisory, professional, or managerial employees.

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 attributed 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.

Here, the Petitioner does not identify a specific function that the Beneficiary will manage. Additionally, the broad descriptions of the Beneficiary’s duties do not include sufficient information regarding what the Beneficiary will actually do, such that we may conclude that the Beneficiary will manage a specific function. The actual duties themselves will reveal the true nature of the employment. Finally, the descriptions of the Beneficiary’s duties do not depict the management of a function but rather duties that appear to be generally operational tasks. See *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).

Based on the current record, the Petitioner has not submitted a consistent description of the duties and the time the Beneficiary spends on specific defined duties. We cannot ascertain what proportion of duties would be managerial and non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Accordingly, we cannot conclude that the Beneficiary primarily performs managerial 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). 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. v. USCIS* 469 F.3d 1313 (9th Cir. 2006); *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 does not believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15.

Upon review of the totality of the record, we find that the Petitioner has not presented a consistent probative account of its structure and staffing. We note, for example, that the Petitioner initially did

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not identify [REDACTED] on its organizational chart although she is included on the Petitioner's Florida Employer Quarterly Report for the second quarter of 2015. Additionally, the Petitioner does not explain the increase in wages between the wages paid as listed on its Form 941, Employer's Quarterly Federal Tax Return and Florida Employer Quarterly Report for the first quarter of 2015, an amount totaling \$18,910, and the wages listed on its Florida Employer Quarterly Report for the second quarter of 2015, an amount totaling \$34,680. We note that the Petitioner's profit and loss statement prepared by its accountant indicated that the Petitioner had paid total wages of \$31,517 as of May 31, 2015. The profit and loss statement amount is consistent with the Petitioner's statements on its Federal and Florida Quarterly Reports prepared for the first quarter of 2015, but inconsistent with the information the Petitioner provided on its Petitioner's Florida Quarterly Report for the second quarter of 2015.

We also note that the copies of IRS Forms W-4, for the Petitioner's employees identifies the finance and administration manager residing in California, the office supervisor residing in Missouri, and the technical support supervisor residing in Georgia. It is unclear why these individuals would be listed on the Petitioner's Florida Employer Quarterly Reports rather than on reports for the states where the employees reside, nor is it clear how they would contribute to the day-to-day operations of the petitioning company from other states. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The Petitioner has not submitted a clear picture of its number of employees, its revisions to its organizational chart, or the wages it claims to pay to these individuals.

Finally, the Petitioner has not provided evidence that it had sufficient premises for five employees when the petition was filed. We have reviewed the Petitioner's landlord's letter submitted in response to the Director's RFE and observe that the Petitioner's physical premises could seat four persons. However, the photographs of the office with one desk and two chairs do not show how the office could accommodate five persons working in the various capacities claimed by the Petitioner. The Petitioner's lease also includes a contractual restriction limiting occupancy to three occupants, and while the Petitioner may obtain additional offices in the future, the record did not establish it had sufficient accommodations for its claimed employees when the petition was filed. 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. *See* 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).

Upon close review of the descriptions of duties set out in the record and the lack of substantive information regarding the Beneficiary's and the claimed subordinates' roles in the business, the record does not include sufficient probative details demonstrating that the Petitioner's organization is sufficiently developed to support a managerial or executive position as statutorily defined. Based on the deficiencies and inconsistencies as discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity.

III. CONCLUSION

The burden is on the Petitioner to show 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.

ORDER: The appeal is dismissed.

Cite as *Matter of S-A-USA, LLC*, ID# 17609 (AAO July 21, 2016)