



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

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

MATTER OF S-C-B-, INC.

DATE: JULY 27, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a coffee shop, 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 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 under the extended petition.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the evidence of record demonstrates that the Beneficiary will be engaged in primarily managerial duties and that he qualifies for an extension of his L-1A status.

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

### I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the 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.*

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 CAPACITY

The Director denied the petition after concluding that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.<sup>1</sup> The Petitioner does not claim that the Beneficiary will be employed in an executive capacity.

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<sup>1</sup> 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.

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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 was incorporated on September 6, 2012, in the State of Delaware.<sup>2</sup> The Petitioner filed the Form I-129 on July 17, 2015. On the Form I-129, the Petitioner stated that it has four current employees in the United States. The Petitioner claimed that its sole owner is [REDACTED] which in turn is solely owned by the Beneficiary’s former foreign employer, [REDACTED] located in Brazil.

In a letter dated July 14, 2015, the Petitioner stated that it “targets consumers seeking superior, specialty coffee” and that it “distinguishes itself from the typical U.S. coffee providers by relying on

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<sup>2</sup> The Petitioner filed a new office petition [REDACTED] on July 31, 2014, on behalf of the Beneficiary, which was approved and which authorized his employment in L-1A classification from August 6, 2014, to August 5, 2015.

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Brazilian brewing methods.” The Petitioner indicated that it had exceeded its projected success and “has estimated revenues in excess of \$200,000 annually.” The Petitioner reiterated that it “now staffs four people.”

The Petitioner also indicated that it wished to extend the Beneficiary’s L-1A classification as its general manager and that the Beneficiary in this position “will continue to expand our presence in the U.S. as a premier, specialty café.” The Petitioner stated that the Beneficiary “will direct the day to day operations of our [REDACTED] location and oversee café employees” and utilize his “knowledge of all aspects of the coffee specialty business, from operating the [REDACTED] café to growing the client base to capture additional market share.” In the same letter, the Petitioner added that the Beneficiary “now oversees a staff of three” and will continue to be responsible for the following duties:

- Lead, direct, and oversee food and beverage provisions;
  - Monitor coffee preparation to ensure adherence to company’s unique brewing methods (French press, Aero Press, and Hario);
  - Oversee presentation of beverage and food to ensure prepared and presented in an acceptable manner;
  - Coordinate assignments of personnel to ensure economical use of beverage and food and timely preparation;
  - Set beverage and food prices based on customer demand and predictions; and,
  - Ensure adherence to environmentally-friendly philosophy, including use of recycled paper products at Boston location;
- Lead, direct, and oversee U.S. operations of [the Petitioner] including:
  - Monitor compliance with health and fire regulations regarding food preparation and serving, and building maintenance in café facility;
  - Count money and make bank deposits;
  - Identify, evaluate, and develop approach for growing client base and capturing new markets;
  - Oversee operating budget and make discretionary determinations regarding budget allocation to general operational needs, sales and marketing efforts, and staffing requirements as the U.S. entity expands;
  - Develop, lead, and implement overall operational, sales, and marketing strategy for the U.S. entity;
  - Maintain primary responsibility for negotiating and entering contractual obligations with vendors;
  - Review financial statements to measure productivity and goal achievement and determine areas needing cost reduction and improvement;
- Lead, direct, and oversee U.S. team including:
  - Direct and oversee the day-to-day activities of U.S. staff. This includes a Food and Beverage manager, two Baristas, and two Coffee shop assistants . . . ;

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- Lead and direct recruitment and development of incentives for U.S. staff. Make discretionary decisions including:
  - Interview, hire, and train new personnel;
  - Assign and reallocate work;
  - Establish policies, procedures, expectations, and goals for staff;
  - Evaluate employees and conduct performance reviews; and,
  - Lead evaluation and firing of staff.

The Petitioner also included its June 1, 2015, business plan and promotional materials. The Petitioner further submitted letters from vendors and local suppliers, including Danish Pastries, Fazenda Coffee Roasters, and Pastry House, which indicated that they worked with the Petitioner.

The Petitioner referred to an enclosed organizational chart in its support letter, but did not submit one at the time of filing. The Petitioner did submit a weekly employee schedule identifying four employees who were each scheduled to work in the coffee shop on their own for various lengths of time to cover the 84 hours the Petitioner indicated it was opened each week. The employee schedule, which was not dated, showed the Beneficiary working 27 hours, [REDACTED] working 22 hours, [REDACTED] working 25 hours, and [REDACTED] working 10 hours, for a total of 84 hours. The Petitioner provided copies of resumes for the following individuals: [REDACTED] who identified his role with the Petitioner as “barista, cashier, food preparation” and stated that he was hired in February 2014; [REDACTED] a barista who stated she was hired in May 2015; and [REDACTED] a barista who stated he was hired in May 2015.

In a response to the Director’s request for evidence (RFE), dated October 1, 2015, the Petitioner noted its current gross revenue of nearly \$155,000 annually, referenced its 2014 IRS Form 1120, U.S. Corporation Income Tax Return, and indicated that it now staffs between five to seven people, including the Beneficiary. The Petitioner continued by indicating that the Beneficiary “now oversees four employees” and noted that this is a minimum number of employees and that due to seasonal shifts and demands it increases its staff to two shift managers and four baristas.

The Petitioner revised the Beneficiary’s job duties as general manager and provided an allocation of his time. The Petitioner indicated that the Beneficiary will spend 35 percent of his time leading, directing, and overseeing its financial, business development, and marketing operations. The Petitioner explained that these duties include serving as its corporate representative, overseeing the establishment and implementation of an operating budget, directing the creation and development of marketing materials implemented by third-party marketing agencies, maintaining the responsibility for selecting and negotiating contracts with vendors, signing all financial instruments, and reviewing financial statements to measure productivity and goal achievement.

The Petitioner stated that the Beneficiary will spend 30 percent of his time overseeing the evaluation of inventory, reviewing financial revenues and customer demand analyses, directing and overseeing the shift manager(s) to ensure compliance with health and safety codes and to appropriately implement and adhere to its brewing methods and recipes, and directing the shift manager(s) in

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maintaining food/beverage presentation, the store environment, and in adhering to the Petitioner's environmentally-friendly philosophy.

The Petitioner indicated that the Beneficiary will spent 35 percent of his time leading, directing, and overseeing personnel including making the decisions to interview, hire, and fire personnel, establishing the policy expectations for staff, developing employee training and incentive plans, assigning responsibilities, allocating work, supervising two shift managers and two to four baristas, conducting meetings and leading communications regarding employee issues, and receiving feedback from the shift manager regarding employee and customer satisfaction.

The Petitioner further submitted an overview of duties for the shift manager and barista positions. The shift manager is described as assisting the general manager in performing operations, following and implementing store policies and procedures, and directing the baristas to do the same. The baristas are described as selling, preparing, and serving products, following policies and procedures, restocking shelves and inventory, and cleaning adhering to procedures and standards.

The Petitioner submitted an organizational chart depicting the Beneficiary as general manager, overseeing two shift managers ( [REDACTED] and [REDACTED] ), and depicting two baristas [REDACTED] and [REDACTED] each reporting to one shift manager.

The record also includes IRS W-2 Forms, Wage and Tax Statement, for eight employees in 2014, with wages varying from \$1,167 to \$17,990. The Petitioner submitted copies of its Massachusetts Department of Revenue WR-1s, Employer's Quarterly Report of Wages Paid, showing the employment of six individuals in the second quarter of 2014, seven individuals in the third quarter of 2014, and five individuals in the fourth quarter of 2014. The Petitioner further submitted its Massachusetts WR-1 for the first and second quarters of 2015, showing the employment of three individuals in the first quarter and the employment of seven individuals in the second quarter.<sup>3</sup> The record also included the Petitioner's Wage and Tax Register for the second quarter of 2015. This document shows that: [REDACTED] worked about 30 hours per week for 8 out of 13 weeks; [REDACTED] worked about 23 hours per week for 13 weeks; the Beneficiary worked about 40 hours per week for 13 weeks; and four other employees worked between 21 and 27 hours for 3 to 5 weeks. The Wage and Tax Register for the second quarter of 2015 did not include [REDACTED] and [REDACTED] employees the Petitioner identified on the organizational chart submitted in response to the Director's RFE. The Petitioner paid a total of \$36,040 in wages during the first two quarters of 2015, compared to \$50,452 during the last two quarters of 2014.

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<sup>3</sup> The Petitioner filed the Form I-129, on July 17, 2015, and submitted its response to the Director's RFE on October 1, 2015. When the Petitioner responded to the Director's RFE, the Massachusetts WR-1 for the third quarter of 2015 was not yet available. Accordingly, the record did not include documentary evidence confirming the Petitioner's number of employees when the petition was filed. We note that the Petitioner claimed in its July 14, 2015, letter in support of the petition that it employed four employees, including the Beneficiary, at that time.

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The Director denied the petition determining that the Petitioner had not submitted evidence establishing who performed the day-to-day finance, budgetary, administrative, human resources, and other functions of the coffee shop, as the Petitioner's employees were directly involved in the store's day-to-day operations. The Director determined further that the record did not establish that the Beneficiary would be involved in the supervision and control of supervisory, professional, or managerial employees or the management of an essential function. The Director concluded that the record did not establish that the Beneficiary will be employed in either a managerial or an executive capacity.

On appeal, the Petitioner asserts that the initial job description submitted and the job description submitted in response to the Director's RFE unequivocally satisfied the requirements for a managerial position as defined in the Act. The Petitioner avers that it clearly distinguished between the Beneficiary's duties and the duties of the shift managers and that it established that there are two levels of employees beneath the Beneficiary. The Petitioner maintains that it demonstrated that the Beneficiary is relieved from performing the day-to-day duties of operating the café. The Petitioner claims that the Beneficiary performs high-level functions as specified in the job descriptions and that he will direct and oversee other supervisory personnel. Finally, the Petitioner asserts that the Director ignored the overwhelming evidence in the record and that it has established that the Beneficiary is qualified as a personnel or function manager by a preponderance of the evidence. The Petitioner cites to a 2010 unpublished Administrative Appeals Office decision in support of its claim.

Also in support of the appeal, the Petitioner re-submits the organizational chart provided in response to the RFE, which shows the Beneficiary supervising two shift managers ( [redacted] and [redacted] ) who each supervise one barista. The Petitioner's evidence on appeal also includes a statement on the foreign entity's letterhead titled "Organizational Chart for [the Petitioner]" which identifies the Beneficiary as "General Manager" supervising three baristas ( [redacted] and [redacted] ).<sup>4</sup>

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 an executive or a managerial capacity. *Id.*

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<sup>4</sup> The payroll documents in the record do not include evidence of payments to [redacted] or [redacted]. Therefore, while this chart is not dated, it appears to post-date the filing of the petition.

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.

As the Petitioner emphasized on appeal, it must prove by a preponderance of evidence that the Beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). In evaluating the evidence, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Id.*

The Petitioner has submitted an overly broad description of the Beneficiary's duties. For example, the Petitioner initially indicated that the Beneficiary would identify, evaluate, and develop the approach for growing the client base and creating new markets, oversee the operating budget and make discretionary decisions regarding budget allocation, lead the operational, sales, and marketing strategy, review financial statements to measure productivity and goal achievements, and be responsible for negotiating and entering into contracts with vendors. This overview of job responsibilities and broadly-cast business objectives does not convey the actual tasks the Beneficiary will perform. Additionally, the description suggests that the Beneficiary will perform the administrative tasks associated with carrying out these operational responsibilities, rather than managing these functions. 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).

The initial description submitted also identified the Beneficiary as actually performing operating and administrative tasks, such as counting money and making bank deposits, setting beverage and food prices, and monitoring compliance with health and fire regulations. The majority of the remaining duties referenced directly overseeing the routine tasks of preparing, serving, and maintaining the premises of a coffee café. For example, the Petitioner stated that the Beneficiary will "monitor coffee preparation to ensure adherence to company's unique brewing methods," and "oversee presentation of beverage and food." These duties, as well as the Petitioner's direct references to supervising the coffee shop staff, suggest that the Beneficiary's primary responsibilities would be those of a first-line supervisor.

Further, at the time of filing, the Petitioner submitted an employee work schedule which indicated that the Beneficiary was scheduled to work in the Petitioner's shop as the sole employee on duty for a total of 27 hours during a seven-day period. While not included in either of the Petitioner's job descriptions for the Beneficiary, based on this employee schedule, it is reasonable to expect that a significant portion of the Beneficiary's actual duties would include tasks such as operating a cash register and preparing and serving food and coffee beverages.

In response to the Director's RFE, the Petitioner deleted the Beneficiary's previously noted responsibilities of monitoring compliance with health and fire regulations, counting the money and making deposits, directly supervising coffee preparation, and assigning and reallocating the staff's work. The Petitioner also limited the Beneficiary's oversight of subordinates to the direction of "shift managers," a subordinate position that was not identified at the time of filing. The Petitioner reiterated that the Beneficiary will oversee its financial, business development, and marketing operations which would include serving as its corporate representative, overseeing the establishment and implementation of an operating budget, directing the creation and development of marketing materials implemented by third-party marketing agencies, maintaining the responsibility for selecting and negotiating contracts with vendors, signing all financial instruments, and reviewing financial statements to measure productivity and goal achievement. While the Petitioner submitted evidence of contracts with third-party marketing agencies to carry out the marketing duties, the Petitioner did not identify who would establish and implement the operating budget, select vendors and negotiate contracts, and perform the routine financial responsibilities of the café, other than the Beneficiary. The Petitioner also reiterated the Beneficiary's responsibilities for overseeing the staff, including making the decisions to hire, fire, counsel, and establish employee policies. We note that the description of the Beneficiary's subordinates' duties does not identify anyone who will carry out the administrative tasks associated with a human resource function.

Whether the Beneficiary is a managerial or executive employee turns on whether the Petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the Petitioner does not document what proportion of the Beneficiary's duties would be managerial functions and what proportion would be non-qualifying duties. When the description of duties is so broad that the duties described include supervisory, administrative, and operational tasks, it is necessary to identify with specificity the portion of duties and time spent on those duties that the Petitioner claims comprise the managerial duties. As noted above, the Petitioner's descriptions of the Beneficiary's duties suggest that he will be performing administrative and financial functions as well as performing the duties of a supervisor, while the supporting evidence indicated that he likely performs the duties of a barista when his subordinates are not available to work in the shop.

We note here that the fact that a portion of the Beneficiary's duties will include managing or directing a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act. While the Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, here the position descriptions alone are insufficient to establish that his actual duties would be primarily managerial 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

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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 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 on appeal claims that the Beneficiary oversees four to six employees, depending on the season and customer demand, and that he also works with the coffee shop's vendors. The Petitioner also asserts that there are two levels of employees beneath the Beneficiary. However, the Petitioner's assertion is not supported by the record. The record includes numerous inconsistencies and deficiencies regarding the Petitioner's organizational structure. For example, the Petitioner in its initial letter in support of the petition, dated July 14, 2015, claimed that it employed a food and beverage manager, two baristas and two "coffee assistants." The Petitioner did not identify a "shift manager" position. The employee schedule submitted at the time of filing showed the Beneficiary working by himself in the coffee shop for 27 hours per week and also identified three part-time employees. None of the part-time employees could be working as a "shift manager" because each of the part-time employees is shown working by themselves. That is, they are not identified as supervising or managing others but as performing the routine duties involved in operating a coffee shop. The organizational chart submitted in response to the Director's RFE included two individuals for whom no payroll records have been submitted. The organizational chart submitted on appeal only mentions a "General Manager" (the Beneficiary) and three baristas. It does not include "shift managers" and also includes two individuals for whom no payroll records have been submitted.

Upon review of the totality of the record, we find that the Petitioner has not submitted sufficient probative, consistent evidence to establish that the Beneficiary primarily supervises supervisory or managerial employees. First, as noted above, the evidence submitted at the time of filing indicated that the Beneficiary spends a majority of his time (27 out of a 40-hour work week) as the only individual available to perform the actual duties of a barista, server, and cashier. Thus, the Beneficiary is not primarily supervising or managing other employees. Additionally, the record includes inconsistent information regarding the employment of individuals in a "shift manager" position and does not include corroborating evidence that one of the individuals, [REDACTED] identified as a shift manager, was employed when the petition was filed.<sup>5</sup> Moreover, based on the

<sup>5</sup> The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be

nature of the Petitioner's business including the time it claims to be open to the public, and the lack of full-time employees who will perform the routine preparation, service, and maintenance of the coffee shop, the record does not establish that a supervisory tier of employees will primarily manage, supervise, and control the work of other employees. Additionally, we note that the description of duties for both the shift manager and the barista positions do not support a claim that these positions are professional positions.<sup>6</sup>

The Petitioner's claim that it demonstrated that the Beneficiary is relieved from performing the day-to-day duties of operating the café is not persuasive. The record does not support a conclusion that the Beneficiary's subordinates are supervisors, managers, or professionals or that the Beneficiary spends the majority of his time supervising these individuals. Instead, the record indicates that the Beneficiary and the other employees perform the actual day-to-day tasks of operating the café. The Petitioner has not provided evidence of an organizational structure sufficient to elevate the Beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the Beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

We have also considered whether in the alternative, the Beneficiary will primarily perform 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's general 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. It appears that the Petitioner expects the Beneficiary to generally develop the Petitioner's business including handling its finances and budget, engaging

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eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

<sup>6</sup> To determine whether the Beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Cf. 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

vendors, overseeing a third-party marketing firm, and supervising employees. However, the record lacks evidence regarding who will perform the duties necessary to implement the Petitioner's objectives regarding its business development, to perform its administrative and financial operations, and to provide first-line supervision to its employees, other than the Beneficiary. Moreover, the Petitioner has not provided a specific allocation of the Beneficiary's time to daily duties attributed to managing an essential function.

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.

Further, the present matter involves an extension of a new office petition. 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). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only 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 a business does not have the necessary staffing after one year to sufficiently relieve the Beneficiary from performing operational and administrative tasks, the Petitioner is ineligible by regulation for an extension.

We acknowledge that the Petitioner was established for just over a year when the petition was filed and recognize that at this stage of development it is not a robust operation. However, upon close review of the record, including the descriptions of duties set out in the record and the lack of probative, consistent information regarding the Beneficiary's and his subordinates' actual roles in the business, the record does not establish that the Petitioner's organization is sufficiently staffed to relieve the Beneficiary from performing operational and administrative tasks as detailed above. The Petitioner has not established that it is sufficiently developed to support a managerial or executive position as defined in the Act.

The Petitioner also refers to an unpublished decision in which we determined that a beneficiary met the requirements of serving in a managerial capacity for L-1 classification as he would supervise *bona fide* supervisory employees while a 21-member staff, many of whom worked full-time, would carry out the day-to-day operations and perform the administrative and financial functions of the restaurant. Here, the Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision, other than that both petitioners operate in the food industry. Further, while 8 C.F.R. § 103.3(c) provides that our precedent decisions are

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binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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. FOREIGN EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

We note an additional issue not addressed by the Director that also precludes approval of the petition. The Petitioner stated that [REDACTED] employed the Beneficiary in a managerial capacity in Brazil from September 2010 to December 2011. The initial L-1A petition was filed on July 31, 2014. The Petitioner must establish that the Beneficiary was employed by a qualifying organization for at least one continuous year within the three years prior to filing the July 31, 2014, petition. See 8 C.F.R. § 214.2(l)(3)(iii). Based on the Petitioner's claims, the Beneficiary was employed by the foreign entity for only five months within the three years preceding the filing of the initial L-1A petition on July 31, 2014. Accordingly, the Petitioner has not established that he had one year of full-time employment abroad with a qualifying organization within the three years prior to filing the initial L-1A petition and the petition cannot be approved for this additional reason.<sup>7</sup>

### IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above reasons, with each considered as an independent and alternative basis for the decision. 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 S-C-B-, Inc.*, ID# 17930 (AAO July 27, 2016)

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<sup>7</sup> Further, the Petitioner stated in its letter in support of the instant petition that the Beneficiary worked for [REDACTED] from 2007 to August 2010 and began working for the foreign entity, [REDACTED] in September 2010 as General Manager of its coffee shops in Brazil; however, U.S. Department of State records show that when the Beneficiary applied for an F-1 student visa at the U.S. Consulate in [REDACTED] Brazil in October 2011, he stated on his nonimmigrant visa application that his current occupation was in the "medical/health" field and that he was working for [REDACTED]. While we are not making an adverse determination based on this information obtained from the U.S. Department of State, the Petitioner may need to address the Beneficiary's statements regarding his employment abroad in any future petition filed by the Petitioner on his behalf.