



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

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

MATTER OF Y-E- INC.

DATE: JUNE 17, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a Florida corporation claiming to operate as an importer and exporter of computer parts 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) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not provide sufficient evidence establishing that the Beneficiary's position in the United States would be in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner resubmits various documents and asserts that the Director erred in relying entirely on the size of the petitioning entity. The Petitioner claims that the Beneficiary is currently employed in a "managerial or executive position."

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 (I)(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 (I)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (I)(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. EVIDENTIARY STANDARD

As a preliminary matter, and in light of the Petitioner's references to the requirement that we apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, we follow the preponderance of the evidence standard as specified in the controlling

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precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

.....

The “preponderance of the evidence” of “truth” is made based on the factual circumstances of each individual case.

.....

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “more likely than not” or “probably” true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing “more likely than not” as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

We apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support the Petitioner’s contentions that the evidence of record establishes eligibility for the benefit sought.

III. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

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

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- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

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

A. Evidence of Record

The Petitioner filed the Form I-129 on June 24, 2015. On the Form I-129, the Petitioner indicated that at the time of filing it had four employees in the United States and a gross annual income of \$91,521.

In support of the petition, the Petitioner provided a statement claiming that its business purpose is to operate as an import and export company while investing in two restaurant ventures. The Petitioner provided the following list of the Beneficiary's proposed job duties:

- He will direct and coordinate the activities of [the Petitioner] in coordination with [the foreign entity]'s global operations. This will take 15% of his time.
- He will be responsible for formulating and administering company policies as well as developing long range goals of the company in accordance with [the foreign entity]'s objectives. This will take 5% of his time.
- He will review analysis of activities, cost and operations and will forecast data to determine the progress achieved by the company towards stated goals and objectives. This will take 10% of his time.
- In his sole discretion, [h]e will control all of the financial aspect [*sic*] of the corporation including receiving and distributing funds and acquiring debts. This will take 15% of his time.
- He will be in charge of obtaining new representation agreements. This will take 5% of his time.
- He will oversee negotiations of substantial contracts and will conduct legal negotiations on behalf of the corporation. This will take 20% of his time.
- He will confer with [the foreign entity] to approve new investments in the United States. This will take 10% of his time.
- He will make decision [*sic*] as to the areas in which concentrate [*sic*] marketing efforts and as to which methods to utilize to expand client base on the research and analysis of markets [*sic*] trends and economic conditions. This will take 10% of his time.
- He will direct and coordinate the sales, new services and marketing operations through an [*sic*] financial manager. This will take 10% of his time.

The Petitioner added that the Beneficiary will function at a senior level within the organization and exercise discretion over its daily activities.

The Petitioner also provided an organizational chart depicting the Beneficiary at the top of the hierarchy with an executive assistant, a sales and business manager, an administrative manager, and a customer service executive as his direct subordinates. The chart further shows the sales and business manager overseeing a purchase assistant and the administrative manager overseeing one billing and one administrative assistant. The chart shows that four of the listed positions – executive assistant, customer service executive, purchase assistant, and billing assistant – were vacant at the time of filing.

Finally, the Petitioner provided company-generated job descriptions for the Beneficiary and all the other positions that were included in the organizational chart. The job description listed the following job duties and time allocations for the Beneficiary's proposed position:

- 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 [*sic*] 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[.]
- 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%
- 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 compliance of safety, health and environment in the different countries where the company operates. 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 thus [*sic*] assess organizational departments[.] 5%
- Control and monitoring of the major projects of the company in its different areas. 5%

The Director issued a request for evidence (RFE) on July 7, 2015, instructing the Petitioner to submit evidence that it has attained a level of operation where it can employ the Beneficiary in the United States in a managerial or executive capacity. The Director reviewed the information provided in the Petitioner's organizational chart as well as the Beneficiary's job descriptions and found that the job descriptions the Petitioner provided were overly broad and did not explain what specific tasks the Beneficiary would carry out on a day-to-day basis.

In response to the RFE, the Petitioner submitted, in part, a statement, claiming that the Beneficiary "has been developing a successful business" and that he hired three full-time employees to support him in his position with the U.S. entity. The Petitioner stated that it intends to complete its organizational structure by filling the seven positions that are listed in its organizational chart. The Petitioner also discussed its plans for investing in two restaurant operations, which would have their own staff not including the seven positions listed in the organizational chart. The Petitioner provided supporting evidence, including a feasibility market study, which establishes the Petitioner's underlying considerations prior to making the investment, as well as an investment agreement, a

building permit application, and construction and architecture contracts. The Petitioner explained that the Beneficiary's three managerial subordinates – the sales and business manager, administrative manager, and customer service executive¹ – “will directly supervise each department assistants [*sic*] as well as the operative personnel required to operate” the Petitioner's two restaurants. The Petitioner also resubmitted the company-generated job descriptions for the positions that were included in the organizational chart and provided an additional organizational chart, which listed the same positions and employee names and included the dates of hire for each employee.

The Director denied the petition on October 16, 2015, concluding that the Petitioner did not establish that the Beneficiary will be employed in an executive capacity under the extended petition. In denying the petition, the Director found that the Beneficiary's job description is vague and lacks sufficient details about the proposed position. The Director also found that the Petitioner has not demonstrated that its current support staff is sufficient to support the Beneficiary in an executive or managerial capacity.² In addition, the Director determined that the position of administrative manager, which the organizational chart indicated as being one of the Beneficiary's subordinates, is not that of a professional and further found that other subordinates of the Beneficiary are not depicted as overseeing supervisory or managerial positions.³

On appeal, the Petitioner submits a brief supported by previously submitted job descriptions and business documents as well as an updated organizational chart reflecting the positions that will comprise the staff of the Petitioner's pizza restaurant. In its brief, the Petitioner asserts that the Beneficiary “is responsible for the overall direction” of the U.S. entity and that the Director's decision must therefore be withdrawn.

¹ We note that while the Petitioner's RFE response statement and original organizational chart both refer to this position as a “customer service executive,” the organizational chart submitted with the RFE response refers to the customer service position as that of a manager. Given that the original job description and the job description provided in response to the RFE were identical and both referred to the customer service position as an executive, it appears that the RFE response statement's reference to this position as “customer service manager” was likely a typographical error rather than a material inconsistency.

² While the Director listed and made a finding pertaining to the position titles that will comprise the staff of one of the Petitioner's restaurants, the RFE response exhibit No. 3 contains a document that constitutes the pizza restaurant's “Hourly Labor Projection Worksheet,” thus indicating that the positions listed were representative of the prospective hires and were not intended to represent the pizza restaurant's current staff. As the Director's finding is not relevant to the Beneficiary's proposed position under an extended petition, it will not be addressed in the body of our decision.

³ Even if the Beneficiary's subordinates would not oversee the work of other supervisory or managerial employees, this factor is not relevant to the key issue in the matter at hand, as only the Beneficiary, rather than his subordinates, would be subject to the criteria listed in the statutory definition of “managerial capacity.” In other words, the Petitioner does not have the burden of establishing that the Beneficiary's subordinates would be employed in a managerial capacity as defined at section 101(a)(44)(A) of the Act. Accordingly, the Director's finding that the Beneficiary's subordinates do not oversee supervisory or managerial subordinates is immaterial and will not be addressed in our discussion.

B. Analysis

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

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

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

In the present matter, while not specifically acknowledged in the Director's decision, the record shows that the Petitioner described the Beneficiary's position in two separate job descriptions, both of which included percentage breakdowns and were submitted in support of the petition. While one job description was contained within the Petitioner's initial supporting statement and the other was presented in the format of an official company-generated job description, neither document provides a detailed account of the actual tasks the Beneficiary would perform within the context of a computer parts import and export operation. Given that the Petitioner provided no insight as to how it conducts its import and export operation and, instead, focused its submissions throughout this proceeding entirely on its investment in two restaurant operations, it is unclear whether the Beneficiary's listed job duties in either job description are intended to reflect the Beneficiary's role within the scope of an import and export business or whether they reflect his role in spearheading a restaurant investment scheme, which is entirely unrelated to importing and exporting computer parts. In fact, other than the initial claim in the petition and the RFE response statement's brief reference to an import and export operation as the source of its gross income, the Petitioner provided no further information about a computer parts import and export operation, nor discussed the Beneficiary's alleged role as head of such an operation. Thus, it is unclear whether the Petitioner continues to operate the import and export operation as originally indicated. 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).

Further, aside from the lack of evidence and clarity establishing what type of business the Petitioner operated and continues to operate, we find that the Petitioner provided job descriptions that offer insufficient information about the Beneficiary's specific daily job duties within the scope of the given operation and do not illustrate the Beneficiary's role in relation to other employees within the

organization. The actual duties themselves 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).

Looking first to the job description incorporated in the initial supporting statement, we find that the Petitioner was vague in stating that 15% of the Beneficiary's time would be allocated to directing and coordinating its "activities." The Petitioner did not identify which specific activities the Beneficiary would coordinate or specify which tasks represent directing and coordinating the unknown activities. The Petitioner claimed that another 10% of the Beneficiary's time would be allocated to reviewing "analysis of activities, cost[s] and operations" and "forecast[ing] data to determine progress achieved" in attaining set goals and objectives. Again, as the Petitioner does not specify any actual "activities" the basis of the Beneficiary's analysis is unknown. The Petitioner similarly neglects to specify what "operations" the Beneficiary would analyze, what data he would forecast, and how forecasting future data relates to previously set goals and objectives. Next, while the Petitioner claimed that 5% of the Beneficiary's time would be allocated to "obtaining new representation agreements," the Petitioner did not explain the role of representation agreements either within the scope of an import-export operation or within the scope of a restaurant business. We are therefore unable to determine the significance of this job duty or assess whether this duty is managerial in nature.

While the Petitioner claimed that 20% of the Beneficiary's time would be allocated to overseeing contract negotiations and conducting legal negotiations, the Petitioner did not explain who would actually negotiate the contracts, as none of the Beneficiary's subordinates' job descriptions include contract negotiation as a listed job duty, nor did the Petitioner specify what types of contracts would be negotiated. Further, the Petitioner did not establish that the Beneficiary has the legal background to directly engage in legal negotiations, nor is there any information to suggest that the Beneficiary would engage in such negotiations with the assistance of legal counsel. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (quoting *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). While the Petitioner also indicated that the Beneficiary will allocate 10% of his time to reviewing market research and economic activities to expand its client base, it did not clarify who within the organization would analyze the market and economic activities that would serve as the basis for the Beneficiary's decisions. Lastly, while the Petitioner claimed that the Beneficiary would coordinate sales, new services, and marketing operations through a financial manager for 10% of his time, we note that none of the organizational charts the Petitioner submitted throughout this proceeding include a financial manager position. As such, we are unable to gauge the Beneficiary's specific role or determine the job duties he would perform with respect to the sales, new services, and marketing operations functions; nor did the Petitioner specify what new services it intends to provide or whether such services would be part of its computer parts operation or whether such services would apply to the restaurant business the Petitioner seeks to operate in the future.

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

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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 present matter, while the Petitioner claims that it engaged and would continue to engage in business as an importer and exporter of computer parts and accessories, the only evidence so support this claim consists of photographs of a warehouse; the Petitioner did not provide any business invoices, shipping receipts, or customs documents to support its claim regarding the nature of its business. In fact, the Petitioner provided a business plan, contractor estimates and invoices, a building permit, commercial lease, various business invoices, and a payroll projection worksheet, which demonstrate that the Petitioner intends to operate two restaurants – [REDACTED] – rather than an import-export operation.

We note that neither the Beneficiary's job descriptions nor the job descriptions of the Beneficiary's subordinates acknowledge or account for the differences in the demands of operating an import-export business versus those of operating a restaurant. We are therefore unable to determine whether the Petitioner's three-person support staff would be capable of relieving the Beneficiary from having to allocate his time primarily to non-managerial or non-executive job duties and if so, how the limited support staff would accomplish this objective in order to ensure that the Beneficiary meets the statutory requirement of primarily performing managerial-level tasks. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Further, while the Petitioner's organizational chart shows a number of positions the Petitioner intends to fill, which will eventually contribute to supporting the Beneficiary in a primarily managerial or executive role, the record shows that the positions of executive assistant, customer service executive, and the purchasing and billing assistant positions were vacant at the time 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. 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). Accordingly, the additional organizational chart the Petitioner provides in support of the appeal to further demonstrate the growth of the organization and the addition of employees is not sufficient to establish eligibility, given that the organizational hierarchy depicted in the updated chart did not exist at the time the instant petition was filed. Moreover, the updated organizational chart shows the elimination of the customer service executive position, which was part of the Petitioner's original organizational chart. We note that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Here, the Petitioner's appellate brief does not acknowledge this change or discuss how the elimination of a position, which was originally depicted as a direct subordinate to the Beneficiary, would alter the Beneficiary's position and the underlying job duties he would perform. In fact, while the elimination of this position further suggests that the Petitioner intends to alter the nature of its business operation, the Petitioner does not address how this change would affect the other support staff and the job duties they would have to perform going forward.

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).

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."

In the present matter, while the original organizational chart indicates that the Beneficiary would oversee the work of four employees, including an executive assistant, a sales and business manager, an administrative manager, and a customer service executive, only two of those subordinate positions – the sales and business manager and the administrative manager – were filled at the time of filing and neither of the job descriptions the Petitioner offered with regard to the Beneficiary's proposed position establish that the Beneficiary's primary focus would be to oversee the work of those two subordinates. Further, the Petitioner did not establish that the position of the sales and business manager is supervisory, professional, or managerial in nature. We note that while the Petitioner's organizational chart indicates plans to hire a purchase assistant, a position that is depicted as subordinate to the sales and business manager, the chart shows this as an "open position" thus indicating that despite the sales and business manager's position title, he currently does not manage or supervise anyone.

The Petitioner has not established, in the alternative, that the Beneficiary will be employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act.

The term “essential function” is not defined by statute or regulation. If a petitioner claims that a beneficiary will manage an essential function, a petitioner must clearly describe the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary’s daily duties dedicated to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, a petitioner’s description of a beneficiary’s daily duties must demonstrate that the beneficiary will manage the function rather than perform the duties related to the function.

In the present matter, the Petitioner does not offer a discussion of an essential function the Beneficiary would manage. The Petitioner also does not establish that either of the Beneficiary’s job descriptions contains a detailed account of the specific job duties the Beneficiary would perform to manage a function or explain how the job duties performed by other company employees would support the Beneficiary’s role in managing an essential function.

We also find that the record does not support a finding that the Beneficiary would 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.*

As previously noted, the Petitioner has not provided evidence to establish what type of business it conducts; nor has the Petitioner offered an adequate job description with meaningful information that can be properly assessed within the scope of a specific business operation. Despite claiming that its gross wages were generated from importing and exporting computer parts and accessories, the record contains not documentary evidence to support this assertion. Without providing USCIS with this most basic information establishing precisely how the Petitioner generates an income and what specific role the Beneficiary assumes within that given enterprise, we are unable to conclude that the Petitioner would employ the Beneficiary in an executive capacity.

The Petitioner correctly observes 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 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.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a “new office” petition and 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.

As discussed above, the Petitioner has not provided sufficient evidence to establish that it has the organizational hierarchy that would be capable of supporting the Beneficiary in an executive capacity. Moreover, other than broadly stating on appeal that the Beneficiary “is responsible for the overall direction of the United States Corporation,” the Petitioner has provided not basis upon which we can conclude that the Beneficiary’s proposed position would be in an executive capacity.

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.

IV. DOING BUSINESS FOR ONE YEAR PRIOR TO FILING

Beyond the Director’s decision, we find that the Petitioner did not provide sufficient evidence to establish that it was doing business for one year prior to filing the instant petition. 8 C.F.R. § 214.2(l)(14)(ii)(B).

A visa petition which involved the opening of a “new office” may be extended by submitting evidence that the petitioner “has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year.” 8 C.F.R. § 214.2(l)(14)(ii)(B). “Doing business” is defined in part as “the regular, systematic, and continuous provision of goods and/or services.” *See* 8 C.F.R. § 214.2(l)(14)(ii)(A) and 8 C.F.R. § 214.2(l)(1)(ii)(H).

In this matter, the current petition was filed on June 24, 2015. As briefly discussed above, while the Petitioner indicated at Part 5, Item 12 that it is engaged in the export and import of computer parts and accessories, the record lacks evidence to show that any importing or exporting activities actually

took place during the one year prior to filing the petition to extend the Beneficiary's period of employment. The Petitioner's submission of bank statements, quarterly and annual tax returns, and invoices showing that the Petitioner paid for accounting services from October 2014 to May 2015 are not sufficient to establish that the Petitioner engaged in the import or export of goods. As stated earlier, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

If the business is not sufficiently operational after one year, the Petitioner is ineligible for an extension by regulation. The record contains insufficient evidence to establish that the Petitioner has been doing business for the previous year through the regular, systematic, and continuous provision of goods or services.

V. PRIOR APPROVALS

Lastly, the Petitioner asserts that USCIS previously granted the requested status, thereby recognizing that the Petitioner and the Beneficiary qualify for the immigration benefit sought herein. It must be emphasized that each petition filing is a separate proceeding with a separate record. In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). That said, while we acknowledge that the same statutory definitions for managerial and executive capacity are uniformly applicable in all L-1 petition filings, the question of overall eligibility requires a comprehensive review of all applicable provisions, not just the definitions of managerial and executive capacity. There are significant differences between the filing of a new office petition, which was the case with the Petitioner's earlier filing, and the filing of an L-1 extension petition, which is the subject of the current adjudication. For instance, whereas in the case of the current filing of an extension petition the Petitioner is required to establish that (1) it has been doing business for one year prior to filing the petition and (2) it would employ the Beneficiary in a managerial or executive capacity as of the date of filing the petition, a new office petition filing is not subject to either of these requirements, as it is anticipated that a new office would not necessarily be doing business at the time of filing and would require one year of operation in an initial stage of development before it is able to employ the Beneficiary in a managerial or executive capacity.

There is no guarantee that an entity that files and qualifies for a new office petition will ultimately reach a level of operation such that it would qualify for approvals of L-1 petitions going forward. As discussed earlier in this decision, we find that the Petitioner has not established that it has reached a stage of development where it can now employ the Beneficiary in a managerial or executive capacity. 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. *See Matter of Church Scientology Int'l*, 19 I&N Dec. at 597. USCIS is not required to treat acknowledged errors as binding precedent. *Sussex Eng'g. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not bound to follow a contradictory decision of a service center. *See La. Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 1999). Accordingly, we will not rely on the service centers decision pertaining to a previously filed nonimmigrant petition as means to guide the outcome in the matter at hand.

VI. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated 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 entirely 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 Y-E- Inc.*, ID# 17269 (AAO June 17, 2016)