



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

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

MATTER OF L- CORP.

DATE: AUG. 9, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, which sells hunting supplies and exercise equipment, seeks to permanently employ the Beneficiary as its general manager and director under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director, Nebraska Service Center, denied the petition. The Director concluded that the evidence of record did not establish that the Beneficiary will be employed in the United States in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner submits copies of previously submitted evidence and asserts that the Director erred because the Petitioner submitted sufficient evidence to establish eligibility by a preponderance of the evidence.

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

I. LEGAL FRAMEWORK

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. – Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

....

- (C) *Certain multinational executives and managers.* An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter

the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file Form I-140, Immigrant Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. A labor certification is not required for this classification.

The regulation at 8 C.F.R. § 204.5(j)(3) states:

(3) Initial evidence—

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:
 - (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
 - (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
 - (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
 - (D) The prospective United States employer has been doing business for at least one year.

II. 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. The Petitioner refers to the Beneficiary's position at times as managerial, and at other times as executive.

The regulation at 8 C.F.R. § 204.5(j)(5) requires the Petitioner to submit a statement which indicates that the Beneficiary is to be employed in the United States in a managerial or executive capacity. The statement must clearly describe the duties to be performed by the Beneficiary.

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 the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.¹

¹ See section 101(a)(44)(C) of the Act.

(b)(6)

Matter of L- Corp.

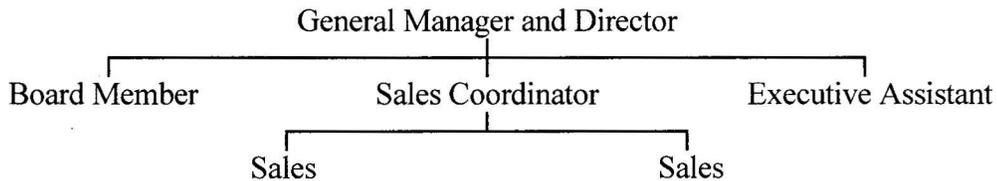
A. Evidence of Record

The Petitioner filed Form I-140 on April 3, 2015. On the Form I-140, the Petitioner indicated that it had six current employees in the United States and a gross annual income of \$1,694,790.

_____ a member of the Petitioner's board of directors, listed the Beneficiary's job duties and the approximate percentage of time spent on each of them:

- Managing the operations of the company (15%)
- Presiding over and providing management for the company and operations (15%)
- Leading company strategic development in the U.S. based on the partnership agreements with _____ (10%)
- Recruiting and training staff (5%)
- Deciding the market niche and leading sales development (5%)
- Meeting and negotiating contracts with existing and potential customers (5%)
- In charge of overall administrative management including daily supervision of company operation, developing and modifying as needed a budget that is consistent with operational and strategic planning, and monitoring employee performance and designing methods of incentives, etc. (15%)
- Managing the operations of [parent company] _____ (30%)

On Form I-140, the Petitioner claimed seven employees in the United States, but _____ identified only six employees. The Petitioner's organizational chart also shows six employees:



_____ provided very brief job descriptions for each of the company's other employees:

Board Member: Director of [the petitioning entity]

Executive Assistant: Assist [the Beneficiary] and _____ with English/Chinese Translations

Sales Coordinator: Coordination of sales orders, accounting and QA with customers

Sales (1): Internet sales and web development

Sales (2): Wholesale and retail customer base

The Director issued a request for evidence (RFE), stating that the Petitioner had not provided sufficient job descriptions for the Beneficiary or his subordinates.

In response, _____ provided "some more details of [the Beneficiary's] job duties":

Matter of L- Corp.

[The Beneficiary] allocates about 55% of his time on exercising his full-scale leadership over the company's daily operation and performance, making [the] company's long-term development strategy, and reviewing and approving [the] company's major transactions and financial issues; and steers and monitors [the] company's daily operation and performance. He supervises the strategic planning and risk management for the company; oversees the development and improvement of standard financial performance; reviews and approves all major commercial and financial issues; sets fiscal objectives and business goals for [the Petitioner]; develops and executes financial budgets to implement for marketing, sales, and public relations strategies in order to achieve key project objectives; creates and implements annual and quarterly budgeting plans that include total market research, planning, and financial return analysis; and reviews and analyzes market reports on existing and new products.

[The Beneficiary] allocates about 30% of his time in managing the operations of [the foreign parent company] and representing [its] interest in the U.S.:

- Decides on major business events, financial plans.
- Approves new investment opportunities and new products, and approves financial support.
- Approves major contracts with [the parent company's] existing and new customers.
- Monitors significant financial and market trends and take[s] appropriate action to diversity clientele and to manage market risk.
- Directs as needed the general manager and department heads of [the foreign company] to manage the operations of the company.

[The Beneficiary] allocates about 15% of his time in networking, maintaining and developing business relationships with customers and seeking out new business opportunities for [the foreign parent company]. He represents and promotes [the parent company] in major local, national and international business events and trade shows; meets regularly with business partners and major accounts to obtain customer feedback regarding [the parent company's] products and areas for improvement and to introduce new products and services; maintains executive level contacts and relationships with key customers, channel partners, industry influencers and decision makers; and consults with CPAs, attorneys and government agents to ensure legal compliance of [the parent company's] international trade operation.

█ also repeated essentially the same percentage breakdown submitted previously.

As an example of the Beneficiary's leadership of the petitioning company, █ described how the Petitioner, under the Beneficiary's direction, purchased partial ownership of a hunting supply company in 2012.

(b)(6)

Matter of L- Corp.

The Director denied the petition, concluding that the Petitioner had not established that the Beneficiary would serve in a managerial or executive capacity. The Director stated that the percentage breakdown of the Beneficiary's duties did not identify specific tasks, and therefore "[t]he petitioner has not provided a clear and detailed description of the beneficiary's proposed duties in the United States."

On appeal, the Petitioner states that it had submitted all requested evidence. The Petitioner quotes from [REDACTED] letter in response to the RFE, and states that this letter "provided detailed duties of the beneficiary."

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 in the United States.

When examining the executive or managerial capacity of a given beneficiary, we will look first to the petitioner's description of the job duties.² 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.³

The Petitioner, on appeal, disputes the Director's finding that the Petitioner did not identify the Beneficiary's specific tasks in sufficient detail, but the record supports the Director's finding. In the percentage breakdown, the Petitioner listed, as distinct and separate elements of the job, "[m]anag[ing] the operations of the company," "providing management for the company and operations," and "daily supervision of company operation." The Petitioner has not explained how these similar-sounding elements are different enough from one another to qualify as separate duties.

The Petitioner stated that the Beneficiary devotes more than half of his time to leading and developing the company and monitoring its performance. The Petitioner described these duties in vague terms that do not specify what the Beneficiary does to perform those functions. The Petitioner stated that the Beneficiary "supervises the strategic planning and risk management for the company [and] oversees the development and improvement of standard financial performance," but the Petitioner has not specified who actually performs the strategic planning, risk management, development, and improvement that the Beneficiary is said to oversee and supervise.

Furthermore, the duties described are generic, with no indication of tasks or responsibilities specific to the sale of hunting supplies and exercise equipment. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting

² See 8 C.F.R. § 204.5(j)(5).

³ *Id.*

the definitions would simply be a matter of reiterating the regulations.⁴ The actual duties themselves reveal the true nature of the employment.⁵ Therefore, reciting general job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties.

The Petitioner states that the Beneficiary "allocates about 30% of his time in managing the operations of" the Petitioner's parent company in China. The Beneficiary's authority over a foreign company does not qualify him for immigration benefits simply because he now exercises that authority within the United States.⁶

The Petitioner has not provided enough detailed information about the Beneficiary's duties to establish that those duties are primarily managerial or executive.

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 statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers."⁷ 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."⁸ 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.⁹

The Petitioner has indicated that the Beneficiary has authority over a supervisory employee, specifically the sales coordinator who supervises two sales employees. This authority is a necessary, but not sufficient, element of the definition of a personnel manager. Hiring authority and oversight over a supervisory employee are consistent with managerial authority, but they do not, by themselves, show that the Beneficiary meets all of the relevant qualifications.

⁴ *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).

⁵ *Id.*

⁶ See 8 C.F.R. § 204.5(j)(2), which states that "the mere presence of an agent or office" in the United States does not constitute "doing business." From this definition, it is clear that an official of an existing foreign business cannot qualify for immigration benefits simply by moving to the United States while continuing to control the foreign business.

⁷ See section 101(a)(44)(A)(i) and (ii) of the Act.

⁸ Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 204.5(j)(4)(i).

⁹ 8 C.F.R. § 204.5(j)(2).

Matter of L- Corp.

Also, the Petitioner has not shown that supervisory duties are a significant element of the sales coordinator's job. The Petitioner's own brief description of the position indicates that the sales coordinator's principal responsibilities are "[c]oordination of sales orders, accounting and QA [questions and answers] with customers." At \$32,500 per year, the salary of the sales coordinator is lower than the \$33,800 paid to one of that person's stated subordinates.

The executive assistant performs administrative functions, and the Petitioner has not shown that this individual holds a supervisory, managerial, or professional position. The Petitioner has provided minimal information about the duties allocated to [REDACTED] as "board member," an individual with no designated subordinates on the organizational chart.

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's managerial role arises not from supervising or controlling the work of a subordinate staff but instead from responsibility for managing an "essential function" within the organization.¹⁰ The statute and regulations do not define the term "essential function." If a petitioner claims that a beneficiary will manage an essential function, that 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 the beneficiary's daily duties dedicated to managing the essential function.¹¹ 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 this case, as discussed above, the Petitioner has provided minimal and repetitive information about the Beneficiary's duties. The submitted job description indicates that the Beneficiary has authority over the company, but does not include enough information to demonstrate that he primarily serves as a function manager. It cannot suffice to assert, as the Petitioner does on appeal, that "the beneficiary devotes essentially his entire time directing the management of [the Petitioner's and the parent company's] operations."

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.¹² 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

¹⁰ See section 101(a)(44)(A)(ii) of the Act.

¹¹ See 8 C.F.R. § 204.5(j)(5).

¹² Section 101(a)(44)(B) of the Act.

Matter of L- Corp.

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.”¹³

originally referred to the Beneficiary’s position as managerial, but the appellate brief (prepared by counsel) states that the Beneficiary will serve in an executive capacity, “directing the management of [company] operations, establishing the goals and policies of the companies, and exercising wide latitude in discretionary decision-making.” These phrases simply repeat the language of the statutory definition, which cannot suffice to meet the Petitioner’s burden of proof.¹⁴

The Petitioner has not established an organizational hierarchy that would require layers of management and executive authority. Instead, the Petitioner’s organizational chart shows six employees, with only one of the Beneficiary’s subordinates exercising any apparent direct supervisory authority.

The fact that the Beneficiary manages or directs 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.¹⁵ While the Beneficiary may exercise discretion over the Petitioner’s day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, the position description alone is insufficient to establish that his actual duties, as of the date of filing, would be primarily managerial or executive in nature.

We also consider the proposed position in light of the nature of the Petitioner’s business, its organizational structure, and the availability of staff to carry out the Petitioner’s daily operational tasks. Federal courts have generally agreed that, in reviewing the relevance of the number of employees a Petitioner has, USCIS “may properly consider an organization’s small size as one factor in assessing whether its operations are substantial enough to support a manager.”¹⁶ Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company’s small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a “shell company” that does not conduct business in a regular and continuous manner.¹⁷

The Director found that the Petitioner did not “show who . . . will handle the non-qualifying tasks related to shipping and receiving, marketing, budgeting, inventory and customs.” The Petitioner, on

¹³ *Id.*

¹⁴ See *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1108.

¹⁵ Sections 101(A)(44)(A) and (B) of the Act.

¹⁶ *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d at 42; *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003).

¹⁷ See, e.g., *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

(b)(6)

Matter of L- Corp.

appeal, has not addressed this finding except for the summary declaration that the record “clearly shows that the beneficiary spends essentially all of his time on executive duties.”

Judging from the submitted job descriptions, the Petitioner appears to be largely a sales office for its foreign parent company. Three of its six employees have sales-related duties. Of the remaining employees, one is an administrative assistant and another is [REDACTED] who sits on the Petitioner’s board of directors (apparently with the Beneficiary) but who has no defined duties with the company.

[REDACTED] is also the president of [REDACTED] which owns 2% of the petitioning company. A joint marketing agreement between [REDACTED] and the Petitioner’s parent company indicates that “[REDACTED] is a company engaged in the business of designing, developing, selling and distributing various fitness products.” The Petitioning entity appears to have been formed under the terms of this agreement. The agreement defined no specific purpose for the formation of the company apart from the marketing and sale of the parent company’s products and inventory purchased from [REDACTED], conducted from “one (1) office space located at [REDACTED] principal place of business.” This information indicates that the Petitioner essentially functions as a distributor for [REDACTED] products. The Petitioner’s role in such an arrangement appears to be substantially more limited than other descriptions of the company indicate or imply. This information is relevant when considering the question of whether the Petitioner’s business activity and organizational structure warrant a qualifying managerial position within the company.

[REDACTED] stated that, following its 2012 purchase of a partial ownership interest in a hunting supply company, the Petitioner “has been focusing on new product development and introductions,” but the record does not show that this activity continues or identify the employees performing it. [REDACTED] stated that the Petitioner previously employed a new product development manager who “left the company in April 2015.” The Petitioner does not state that it hired a replacement, and product development is not part of any of the submitted job descriptions. The Petitioner has not specified who, if anyone, performs this non-qualifying operational function.

The Petitioner, on appeal, states that “[t]he RFE response . . . included . . . a detailed organizational chart demonstrating the beneficiary’s executive role and the functions managed/performed by her [*sic*] subordinates.” The subordinates’ job descriptions in the RFE response are slightly longer than those provided previously, but still contain minimal detail:

Board Member: Assist [the Beneficiary] in overseeing company operations and report to [him].

Executive Assistant: Assist [the Beneficiary] and [REDACTED] in administrative and HR management

Sales Coordinator: Coordination of sales orders, accounting and QA with customers

Sales (1): Internet sales and web development

Sales (2): Wholesale and retail customer base

New Product Development Manager: Design and develop new products (Hunting and Exercise)

Matter of L- Corp.

The Petitioner's characterization of the Beneficiary's duties as being primarily managerial (or, on appeal, executive) is simply not realistic in light of the company's structure and minimal documented activity.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above reason. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner.¹⁸ Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of L- Corp.*, ID# 18087 (AAO Aug. 9, 2016)

¹⁸ Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013).