



U.S. Citizenship
and Immigration
Services

Non-Precedent Decision of the
Administrative Appeals Office

MATTER OF H-C- CORP.

DATE: JUNE 19, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a construction company, seeks to continue the Beneficiary's temporary employment as its general manager under the L-1A nonimmigrant classification for intracompany transferees.¹ 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 of the California Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner asserts that the Beneficiary supervises professional subordinates and contends that he oversees an essential function of the organization.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary in a managerial or executive capacity for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). 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 or executive capacity. *Id.*

¹ The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period November 1, 2016, until October 31, 2017. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation one year within the date of approval of the petition to support an executive or managerial position.

A petitioner seeking to extend an L-1A petition that involved a new office must submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status; evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii).

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

The sole issue to be addressed is whether the Petitioner has established that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

"Managerial capacity" means an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization; 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; has authority over personnel actions or functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

The statute defines an "executive capacity" as an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

When examining the managerial or executive capacity of a given beneficiary, we will review the petitioner's description of the job duties. 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. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine 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. Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business, its staffing levels, and its organizational structure.

A. Duties

Based on the definition of managerial and executive capacity, the Petitioner must first 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.

The Petitioner stated in a business plan submitted with the petition that it is a "full service construction company including building new residential and commercial houses, property management, brokerage services, and construction management." The Petitioner indicated that as general manager, the Beneficiary devotes 10% of his time to setting up and adjusting the company's "strategic plan," including articulating "the company's focus, mission and goals." Further, the Petitioner explained that the Beneficiary spends 10% of his time establishing the company's accounting system and another 10% setting the company's "rules and policies." It further indicated that the Beneficiary spends 10% of his time arranging the company's organization and another 10% setting up "the company's chain of supervision."

In addition, the Petitioner explained that the Beneficiary devotes 10% of his time to "daily business management," marketing development, support and accounting issues, and another 10% receiving periodical reports. The Petitioner also stated that the Beneficiary devotes 5% of his time to setting "guidelines for each department to follow" and 10% to personnel decisions and changes. It further indicated that the Beneficiary is responsible 10% of the time setting "guidelines for the subordinates in major contract review." The Petitioner also explained that the Beneficiary devotes 5% of his time to "problem solving and the interpretation of specific rules and policies for the company" and another 5% guiding "ensuring quality performance and services to customers."

In response to the Director's request for evidence (RFE), the Petitioner submitted a different duty description for the Beneficiary emphasizing that the Beneficiary uses his judgement "to make policies and operational decisions" and establishes "short term and long term goals, policies and objectives." The Petitioner stated that the Beneficiary spends 40% of his time on "general corporate planning," comprised of establishing corporate objectives, goals, and policies. It further indicated that the Beneficiary devotes 15% of his time to "general administration" and another 15% of the time on "business development," including planning "vertical and horizontal expansion," and keeping "good relationships with sub-contractors, real estate brokers, [and] land/house owners." Lastly, the Petitioner stated that the Beneficiary spends 30% of his time on "marketing and sales of construction service" an "essential function" of the company. It indicated that this essential function is comprised of supervising "the marketing policy," including "attracting investors from China based on EB5 program to develop large commercial construction project[s]."

The duty description submitted in response to the Director's RFE is fundamentally different from that previously submitted on the record. For instance, in the latter description, the Petitioner stated that the Beneficiary spends 30% of his time on "marketing and sales of construction service"; however, this duty is not mentioned in his initial duty description. Further, the Beneficiary's initial duty description indicated that he spends 10% of his time on "establishing the company's accounting system," but this responsibility is not mentioned in his RFE duty description. Likewise, the Petitioner stated in support of the petition that the Beneficiary spends 10% of his time setting up and

modifying the company's "strategic plan," but the description provided in response to the RFE did not discuss strategic plans. As such, it appears that the Petitioner has submitted conflicting duty descriptions for the Beneficiary, leaving question as to his actual duties as of the date the petition was filed and under the extended petition. The Petitioner must resolve inconsistencies and discrepancies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, a petitioner cannot offer a new position to a beneficiary, or materially change a position's job responsibilities. A petitioner must establish that the position offered to a beneficiary, when the petition was filed, merits classification as a managerial or executive position. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). The new duty description provided by the Petitioner in response to the RFE did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description.

In addition, the submitted duty descriptions were not sufficiently detailed and do not describe the Beneficiary's day-to-day managerial or executive-level duties or credibly establish that he would devote his time primarily to qualifying tasks. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *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 Beneficiary's duty descriptions include several generic duties that could apply to any manager or executive acting in any business or industry and they do not provide insight into the actual nature of his role. The Petitioner provided insufficient examples and little supporting documentation to demonstrate the Beneficiary's performance of qualifying duties, such as strategic plans he put in place, missions and goals he defined, future plans for management he determined, accounting systems he established, or rules and policies he set up. The Petitioner did not articulate or document contract negotiations the Beneficiary handled, contract negotiation procedures he developed, adjustments he made to day-to-day management and operation, policies and objectives he established, or human resource policies and rules he defined. In addition, it did not detail or provide supporting evidence to substantiate short and long term goals the Beneficiary established, corporate objectives he set, goals for progress, growth, and expansion he set forth, operation or growth policies he tailored, subcontractor and buyer relationships he promoted, vertical and horizontal expansion he planned, or marketing policies he created. This lack of detail and documentation leaves uncertainty as to the credibility of the Beneficiary's asserted qualifying duties.

Even though the Beneficiary holds a senior position within the organization, the fact that he will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44)(A) and (B) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial or executive in nature. *Id.* 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; however, the position descriptions alone are insufficient to establish that his actual duties would be primarily managerial or executive in nature.

B. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, we 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.

The Petitioner submitted an organizational chart reflecting that the Beneficiary supervised a secretary and a vacant vice general manager position. The chart further indicated that the Beneficiary oversaw financial, marketing, and engineering department managers, as well as a "builder/subcontractor." The engineering department manager was also shown to supervise one "staff" member. On appeal, the Petitioner emphasizes the Beneficiary's supervision of subordinate managers and professionals and his oversight over an essential function of the organization.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 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. Contrary to the common understanding of the word "manager," 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) of the Act. 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. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

First, it is noteworthy that only the marketing department manager is shown to have a subordinate in the provided organizational chart; as such, the submitted evidence does not indicate that the Beneficiary oversees several subordinate managers as asserted. Further, the Petitioner did not submit sufficient duty descriptions for the Beneficiary's subordinates to demonstrate that they act as managers and professionals. For instance, the Petitioner indicated that the financial manager determines what services are necessary, acts in charge of human resources, gives personnel recommendations, reviews and approves the company's marketing plan, makes "stage plans," and directs budget planning. However, the Petitioner provides little detail and supporting documentation to corroborate the activities of the financial manager, such as what services they introduced, personnel decisions they made, marketing plans they approved, or budgets they set. In fact, the financial manager's duties state that he or she is tasked with guiding and supervising subordinates, but the organizational chart reflects that this employee has no subordinates.

Likewise, the Petitioner states that the marketing department manager is tasked with "creating and delivering marketing programs," establishing connection methods with clients, writing "promotional recaps," and making a "marketing development plan." However, again, the Petitioner provides little

indication of the marketing manager's actual daily tasks, such as marketing or promotional programs he has created or clients he has connected with. Indeed, the Petitioner's business plan states that the first year marketing budget for the company was only \$5,000, but asserts that the Beneficiary, the financial manager, and the marketing manager all focus on the company's marketing plans. These claimed duties are not credible in light of the Petitioner's asserted level of operation.

In addition, the asserted duties of the engineering manager are similarly vague and inconsistent. The Petitioner indicates that this subordinate manager is tasked with supervising the "project process," processing submittals and qualification applications, cooperating with the "material trading department," solving technical problems, and qualifying subcontractors. However, the Petitioner provided little detail regarding the projects this employee oversaw, submittals and qualifications he handled, or technical problems he solved. In fact, the engineering manager's duties mention his subordinates and a "material trading department," neither of which are reflected in the company's organizational chart.

On appeal, the Petitioner emphasizes the Beneficiary's supervision of a "builder/subcontractor," and notes that this claimed employee holds a bachelor's of science degree. However, the submitted documentation indicates that this asserted subordinate is the owner of his own construction company. The Petitioner submits invoices and other documentation indicating that this subcontractor holds a construction license in the name of his own company and that he has completed small scale remodeling work for the company. The Petitioner also states that this asserted employee oversees two construction workers, but it does not substantiate these employees with details or supporting documentation to demonstrate that they should be considered part of its organizational chart. Otherwise, the provided organizational chart does not demonstrate that the Beneficiary supervises managerial subordinates as asserted, but that he more likely than not oversees operational level employees and subcontractors who perform the services of the business.

The Petitioner has also not established that the Beneficiary oversees professional subordinates. In determining whether a 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 U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, 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."

As noted, the Petitioner emphasizes on appeal that the builder/subcontractor reporting to the Beneficiary has a bachelor's degree in science. However, the submitted evidence leaves significant question as to whether this claimed employee can be considered the Beneficiary's subordinate. As previously stated, the Petitioner submitted documentation indicating that the builder/subcontractor is the owner of his own construction company, and that he has been paid semi-regularly for the completion of remodeling work. This evidence does not demonstrate that he could be considered the Beneficiary's professional subordinate. Further, the Petitioner does not submit supporting documentation to substantiate that the builder/subcontractor holds his asserted degree, nor does not

articulate why this position requires a specific bachelor's degree. Indeed, as we have noted, the evidence appears to indicate that this asserted employee performs remodeling work and that he holds a construction license, evidence not suggestive of a professional level position requiring a specific bachelor's degree in science.

Otherwise, the Petitioner also states that the financial manager has a bachelor's degree in business and that the engineering manager holds a Master of Science degree. However, it does not document that these subordinates hold bachelor's degrees or describe in detail why these positions require specific bachelor's degrees. Therefore, in sum, the Petitioner has not sufficiently demonstrated that the Beneficiary is primarily devoted to overseeing professional subordinates.

The Petitioner also contends that the Beneficiary qualifies as a function manager overseeing "the engineering department and subcontractors to perform our construction service." The Petitioner refers to the "essential function" of marketing and sales and states that this takes up to 30% of the Beneficiary's time. 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. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that "(1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations." *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

In this matter, the Petitioner has not sufficiently articulated the Beneficiary's essential function or provided evidence that he primarily manages an essential function. First, the Petitioner refers to the function managed by the Beneficiary as "inherent and indispensable," but it does not state why this is the case. Further, as we have discussed, the Petitioner submits vague duties for the Beneficiary that do not sufficiently articulate his day-to-day activities, or in turn, the function he manages. The asserted function is also not clearly defined, as it is only generically referred to as "marketing and sales of construction" and oversight of his subordinates. The Petitioner mentions large commercial construction projects pursued by Chinese investors and "marketing and logistics strategies" when describing the Beneficiary's claimed essential function, but it does not describe or document any large construction projects or marketing and logistics strategies. In fact, as we have noted, the Petitioner's business plans indicate that the company was to spend only \$5,000 on marketing during its first year of operation, leaving question as to whether the Beneficiary's oversight of sales and marketing would qualify as an essential function. It is also noteworthy that the Petitioner appears to indicate that the Beneficiary would only devote 30% of his time to the asserted essential function of marketing and sales of its construction services.

Lastly, the Petitioner also refers to the Beneficiary's position on the record as that of an executive. We note that a petitioner claiming that a beneficiary will perform as a "hybrid" manager/executive will not meet its burden of proof unless it has demonstrated that the beneficiary will primarily

engage in either managerial or executive capacity duties. *See* section 101(a)(44)(A)-(B) of the Act. While in some instances there may be duties that could qualify as both managerial and executive in nature, it is the petitioner's burden to establish that the beneficiary's duties meet each criteria set forth in the statutory definition for either managerial or executive capacity. A petition may not be approved if the evidence of record does not establish that the beneficiary will be primarily employed in either a managerial or 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. 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 they 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 the 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.*

Here, the Petitioner has not demonstrated that the Beneficiary would act primarily in an executive capacity. As noted, the Petitioner has submitted generic and conflicting duty descriptions for the Beneficiary which do not sufficiently detail his daily executive-level tasks. For instance, the Petitioner states that the Beneficiary would be focused on several broad goals and policies of the organization, such as corporate objectives and policies, "goals for the progress growth and expansion," and "vertical and horizontal expansion," to name a few, but it does not sufficiently articulate or document these activities. In addition, the Petitioner does not demonstrate that the Beneficiary oversaw subordinate managers when this petition was filed. In fact, the evidence indicates that the Beneficiary's subordinates are more likely operational level employees and contractors performing the services of the business, such as the builder/subcontractor, who appears to be a construction contractor providing remodeling services for the company. Therefore, the Petitioner did not establish that the Beneficiary has a subordinate level of managerial employees to allow him to primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise.

Therefore, for the reasons discussed above, the Petitioner has not established that the Beneficiary would act in a managerial or executive capacity under the extended petition.

III. CONCLUSION

The appeal must be dismissed because the Petitioner has not established that the Beneficiary would be employed in the United States in a managerial or executive capacity.

Matter of H-C- Corp.

ORDER: The appeal is dismissed.

Cite as *Matter of H-C- Corp.*, ID# 1200225 (AAO June 19, 2018)