



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

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

MATTER OF MGG-I, LLC

DATE: NOV. 5, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a real estate speculation and investment business, seeks to temporarily employ the Beneficiary as the business development manager¹ of its new office and to classify him as an L-1A nonimmigrant intracompany transferee. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director concluded that the evidence of record did not establish that the Beneficiary would be employed in a qualifying managerial or executive capacity within one year of approval of the petition.

On appeal, the Petitioner asserts that the Beneficiary will be employed in a qualifying managerial capacity and that it provided sufficient evidence to support the approval of the petition.

I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying 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. 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.

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:

¹ The petitioner states on the Form I-129 (page 4) that the Beneficiary will be employed as its "Business Development Manager," but elsewhere in the record refers to the proffered position as "Research and Development Manager."

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

II. THE ISSUE ON APPEAL

The sole issue addressed by the Director is whether the Petitioner established that the Beneficiary would be employed in a qualifying managerial or executive capacity within one year of approval of the new office petition. On appeal, the Petitioner asserts that the Beneficiary will be employed in a managerial capacity.

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

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

A. Facts

The Petitioner submitted a letter dated September 24, 2014, in support of the petition. The Petitioner stated that will engage in the “speculation and renovation of undervalued real estate in the Florida panhandle.” In addition, the Petitioner stated that “[p]urchases and renovations of this kind are intended to be overseen by the Beneficiary after he arrives in the USA, and will support the Beneficiary as a Manager along with the other employees the company intends to hire per the Business Plan.”

In a letter dated September 11, 2014, the Petitioner stated that the Beneficiary will perform the following duties:

Establish and implement tools and specific strategies to achieve operational goals as [the Petitioner’s] Research and Development Manager (35%)

[The Beneficiary's] managerial duties will include the preparation and submission of business plans to the Operations Manager; development and delegation of operational reports and schedules; and setting goals and deadlines for the Department and implementing them by efficient assignment of tasks.

He will additionally be required to monitor the Department's identification of undervalued properties ideal for speculative renovation using online search engines; to facilitate and oversee acquisition, renovation and subsequent re-sale of property; to register the company with an online public auction system and coordinate with Title company for title search before placing bids; to research and analyze recent house sales to perform sales price comparison; and to coordinate with the company's Operations Manager prior to placing bids or offers.

His duties will include ongoing analysis of internal processes and implementation of procedural or policy improvements. Specifically, he will be studying the evolving software, search engines and databases in the field of real estate speculation and renovation in the Florida panhandle so as to develop an edge over competitor speculators who often times are able to make bids on undervalued properties more quickly due to their expertise with said search engines. Additionally, construction renovation software will be sought, acquired and mastered in order to utilize technological tools in the renovations of the properties acquired.

Oversee and manage the accounting department (25%)

In addition, [the Beneficiary] will guide the company with his review of financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to ascertain cost feasibility. Ultimately, [the Beneficiary's] business development expertise is required to assure the company carries out its overall investment mission in as profitable a manner as possible.

Liase with vendors and professionals (15%)

[The Beneficiary] will also work with sub-contractor construction companies and workers, including plumbers, electricians, flooring installers, roofers, HVAC technicians, drywall installers, and landscapers. He will be required to communicate with them what renovations are desired, negotiate a price through written estimates, oversee the work and guide these sub-contractors toward a prompt, high-quality result, as well as reviewing all invoices for work completed and assuring payment is made. Furthermore, [the Beneficiary] will have to maintain ongoing relationships with essential professionals such as an accountant, a real estate broker, lawyers, housing/termite inspectors, surveyors, and government officials of various agencies.

(b)(6)

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[The Beneficiary] will coordinate with professionals involved in property acquisition, such as government employees, realtors, title companies, home/termite inspectors, surveyors, insurance agents. Finally, post-renovation, [the Beneficiary] will list and promote refurbished property to potential buyers on public auction websites and online search engines, such as [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED], accept offers for purchase and issue counteroffers.

Supervise and control the work of other professional employees (25%)

[The Beneficiary's] managerial duties in such capacity will include overseeing, directing and coordinating the Research and Development Team, in addition to recruiting and training new staff as outlined by the Business Plan.

The *Research Assistant (RA)* will be required to have a Bachelor Degree in a business related field and will devote 85% of his/her time primarily to administrative duties and as support to the R&D Manager. The RA will be trained by [the Beneficiary] to navigate and operate any software or website specific to the company's needs. The RA will carry out other daily tasks as directed by the R&D Manager, assisting him in every way as a permanent, full-time position. Subsequent RA's could be hired depending on the profitability of the company.

The *Bookkeeper/IT Expert*, to be hired in 2016, will be a permanent but part-time position to reduce the monthly administrative costs of an accountant, tax preparer, computer consultant and computer repair technicians. Under [the Beneficiary's] management, this expert will spend the majority of his/her time completing accounts payable/receivable, tax filings, and utilizing accounting software, and will provide additional support to [the Beneficiary] as delegated.

The Petitioner also provided a business plan that outlined the projected personnel for 2015 and 2016. According to the business plan, the Petitioner will have a chief executive officer based at the foreign company and an interim operations manager, the Petitioner's minority owner, who will train the research and development manager and will remove himself from this position once the research and development manager can function independently. The business plan states that the Beneficiary will serve as the research and development manager and will hire a research assistant in January 2015, and a part-time bookkeeper/IT expert in 2016.

The business plan further describes the research assistant position, noting that the position will require a degree in a business-related field and that the employee hired will allocate 85% of his or her time to "administrative and research duties" in support of the Beneficiary's position. The business plan notes that this employee will be expected "to have competence with computer search engines, word processors, and basic spread-sheets upon being hire, and will be trained to navigate and operate any software or website specific to the company's needs." Finally, the business plan

states “the first [research assistant] is expected to be hired once [the interim operations manager] departs the company’s daily operations in approximately January of 2015.”

The Petitioner also stated that the Bookkeeper/IT Expert will be a part-time position and that this “expert will spend the majority of his/her time completing accounts payable/receivable, tax filings, and utilizing accounting software, and will provide addition support to [the Beneficiary] as delegated.”

In a request for evidence (RFE) issued on October 7, 2014, the Director requested, among other items, evidence to demonstrate how the company will grow to be of sufficient size to support a managerial or executive position within one year and evidence that the Beneficiary’s proposed position will be in a managerial or executive capacity. Specifically, the Director requested information regarding the proposed nature of the office and the size of the U.S. investment, as well as an overview of the organizational structure of the new office.

In response to the RFE, the Petitioner explained that it will hire a new research assistant who will have a bachelor’s degree and thus, the beneficiary will be managing a professional employee. The Petitioner also stated that it submitted a business plan with the initial petition.

The Director denied the petition on November 21, 2014, finding that the Petitioner had not established that the Beneficiary would be employed in a qualifying managerial or executive capacity within one year of the petition’s approval. The Director noted that the evidence does not establish that the Beneficiary will be involved in the supervision and control of the work of supervisory, professional, or managerial employees who will relieve him from performing non-qualifying activities.

B. Analysis

Upon review, the Petitioner has not established by a preponderance of the evidence that the Beneficiary would be employed in a qualifying managerial capacity within one year of the approval of the petition.

If a petitioner indicates that a beneficiary is coming to the United States to open a “new office,” it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a “new office,” a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

When examining the executive or managerial 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 either in an executive or managerial capacity. *Id.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The petitioner's evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally* 8 C.F.R. § 214.2(l)(3)(v).

On review, the Petitioner provided a vague and nonspecific description of the Beneficiary's duties that provides little insight into what he will do on a day-to-day basis. For example, the Petitioner states that the Beneficiary will be responsible for the "preparation and submission of business plans to the Operations Manager"; "development and delegation of operational reports and schedules"; "setting goals and deadlines for the Department and implementing them by efficient assignment of tasks"; and "ongoing analysis of internal processes and implementation of procedural or policy improvements." The Petitioner did not provide sufficient detail regarding the business plans to be prepared by the Beneficiary and the strategic goals and processes for the business operations. Reciting a beneficiary's vague 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 did not provide sufficient detail or explanation of the Beneficiary's proposed activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990).

The job description also includes several non-qualifying duties such as the Beneficiary will "facilitate and oversee acquisition, renovation and subsequent re-sale of property"; "register the company with an online public auction system and coordinate with Title company for title search before placing bids"; "research and analyze recent house sales to perform sales price comparison"; "studying the evolving software, search engines and databases in the field of real estate speculation and renovation"; "work with sub-contractor construction companies and workers"; and, "communicate with them what renovations are desired, negotiate a price through written estimates, oversee the work and guide these sub-contractors through a prompt, high-quality result." In addition, the Petitioner states that the Beneficiary will spend 25% of his time overseeing and managing "the accounting department," but the company does not indicate that it intends to hire any accounting staff during the first year of operations. Moreover, the Beneficiary's duties associated with this area of responsibility include using Quickbooks and internal software to provide internal

reports and charts of the company's profit and loss and balance sheets, thus suggesting that he will be performing the accounting duties rather than overseeing or managing these activities, as well as performing duties that would later be assigned to the proposed bookkeeping position to be filled in 2016.

Based on the current record, it is evident that significant portions of the Beneficiary's time will be spent on research, coordinating the work of contractors and payments to contractors, and various administrative functions and we are therefore unable to determine whether the claimed managerial duties would constitute the majority of the beneficiary's duties, or whether the beneficiary will primarily perform non-managerial administrative, operational and first-line supervisory duties by the end of the first year of operations. Although the Petitioner divided the Beneficiary's areas of responsibility into four categories and assigned a percentage to each area, each category includes non-qualifying duties. Therefore, the Petitioner's description of the Beneficiary's job duties does not establish what proportion of his duties will be managerial in nature, and what proportion will be actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988).

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, 8 U.S.C. §§ 1101(a)(44)(A)(i) and (ii). 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)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). 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).

The Petitioner states that the Beneficiary will eventually manage a research assistant and a part-time bookkeeper/IT expert; however, only the research assistant is expected to be hired during the first year of operations. In evaluating 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. 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." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor.

Matter of Sea, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, we must focus on the level of education required by the position, rather than the degree that will be held by the subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the Petitioner stated that the position of research assistant will require a bachelor's degree in a "business related field." However, upon review of the job description of the research assistant, it does not appear that a degree would be necessary to perform duties such as "navigate and operate any software or website specific to the company's needs" and be responsible for "administrative duties." Thus, the record does establish that the Beneficiary would supervise a subordinate professional and the Petitioner has not claimed that he will supervise a subordinate manager or supervisor.

On appeal, the Petitioner for the first time states that the Beneficiary will manage an essential function. 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, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes 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 attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

The Petitioner has not provided evidence that the Beneficiary will manage an essential function. In its brief, the Petitioner asserts that "the issue in question . . . would seem to be whether the function being managed is of such complexity so as to require a degree." The Petitioner asserts that the Beneficiary qualifies as a function manager because "the nature of the tasks required to oversee the accounting and operations departments of the Petitioner are complex in nature." The Petitioner maintains that a non-professional could not identify "speculation-worthy properties through the use of complicated software and search engines," determine what types of renovations would make a property profitable, ascertain the estimated costs of renovations, or understand the property closing procedures and understand HUD Settlement sheets. The Petitioner, however, provides no support for its assertion that a professional position equates with a qualifying function manager position. As discussed above, the Petitioner has not established that the Beneficiary's actual duties would be primarily managerial in nature and we cannot conclude that he would be employed as a function manager.

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 us to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company, or a “shell company” that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The reasonable needs of the Petitioner will not supersede the requirement that the Beneficiary be “primarily” employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the Petitioner cannot qualify a beneficiary who will spend the majority of his or her time on non-qualifying duties at the end of the initial one-year new office period. Here, there is a noted absence of projected employees to perform several of the non-managerial functions of the company within one year, and the Petitioner expressly states that the Beneficiary will perform those duties until employees are hired.

The Petitioner further cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1574 (N.D. Ga. 1988), in support of its assertion that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, we note that the Petitioner has not furnished evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS), or *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, we are not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In both *National Hand Tool Corp.* and *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner’s business operations in its review of an alien’s claimed managerial or executive capacity. We interpret the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, a petitioner is required to establish that the beneficiary’s position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on the conclusion that the evidence is insufficient to establish that the Beneficiary will be primarily performing executive or managerial duties at the end of the Petitioner’s initial year of operations; our decision does not rest on the projected size of the petitioning entity.

The Petitioner refers to a number of unpublished decisions in which we determined that a beneficiary met the requirements of serving as an L-1A manager or executive, including cases in which the beneficiary was a sole employee or the petitioner maintained a small staff, among others.

However, the Petitioner has furnished insufficient evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Upon review, the Petitioner has not submitted sufficient evidence to establish that the intended United States operations, within one year of approval, will support an executive or managerial position. Accordingly, the appeal will be dismissed.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons. 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 MGG-I, LLC*, ID# 13612 (AAO Nov. 5, 2015)