



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

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

MATTER OF A-USA, INC.

DATE: NOV. 6, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a retail business, seeks to extend the Beneficiary's temporary employment as its President under the nonimmigrant L-1A classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Director, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director concluded that the Petitioner did not establish that the Beneficiary will be employed in the United States in a qualifying managerial or executive capacity.

On appeal, the Petitioner asserts that the evidence of record establishes that the Beneficiary will be employed in a qualifying executive capacity. The Petitioner submits a brief in support of the appeal.

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:

- (i) Evidence that the Petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the Beneficiary for the previous year and the duties the Beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the Beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

II. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue addressed by the Director is whether the Petitioner established that it will employ the Beneficiary in a qualifying managerial or executive capacity under the extended petition. On appeal, the Petitioner asserts that the Beneficiary "should not be measured against the definition of a manager as listed in INA § 101(a)(44)(A), as he is an Executive as defined by INA § 101(1)(44)(B)."

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;

(b)(6)

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- (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.

Further, 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. Section 101(a)(44)(C) of the Act.

A. Facts

The Petitioner filed the Form I-129 on December 16, 2014. The Petitioner stated on the Form I-129 that it had five employees and gross annual income of approximately \$900,000. The Petitioner stated that the Beneficiary will continue to serve as its President.

In a letter dated November 18, 2014, submitted in support of the initial petition, the Petitioner stated that it acquired one business in Illinois, [REDACTED] and is “conducting due diligence of its second location in [REDACTED] Georgia at this time.” The Petitioner also indicated that it acts as a “computer resale company” for its foreign parent company.

The Petitioner stated that the Beneficiary is “responsible for all executive functions of the U.S. business.” The Petitioner provided a multi-page description of the Beneficiary’s duties noting that he allocates his time as follows

- 1) Mergers, Acquisitions and Expansion, including acquisitions, negotiations, “expansion, sales and profitability,” and contracts (30%)
- 2) Financial and Budget Functions, including managing and executing “financial components,” directing and managing gross profit margins, and analysis of business performance (25%)
- 3) Executive, Business Management, Marketing and Market Research Functions, including contracts, business development, advertising, and market, market research and revenue operations (20%)
- 4) Public and Client Relations and Liaison between U.S. and Indian Offices, including community and client relationships (20%)
- 5) Administration Management/Human Resources Functions, including operations management and hiring and firing authority (5%)

The letter of support provided a description for each listed area of responsibility. The Petitioner also explained that the Beneficiary supervises a Business Advisor as well as an Operations Manager who supervises two to three store clerks.

(b)(6)

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The Petitioner provided additional documentation in support of the petition including a purchase agreement, IRS Forms 941, Employer's Quarterly Federal Tax Returns, paystubs, copies of invoices, photos of the retail space, bank statements, and business licenses. The most recent payroll evidence provided, dated November 12, 2014, showed that the Petitioner employed five hourly workers earning \$8.25 per hour. The Petitioner indicated that the Beneficiary fired one of these employees prior to the date the petition was filed, while two employees had been promoted to the salaried positions of Operations Manager and Business Advisor as of December 1, 2014. The Petitioner provided copies of offer letters indicating that these employees would be paid annual salaries of \$25,000 and \$27,500 respectively, from that date forward.

The Director issued a request for additional evidence (RFE) on December 22, 2014, requesting, among other items, a more detailed description of the Beneficiary's duties, further explanation regarding the Petitioner's staffing, a detailed organizational chart, and evidence of wages paid to employees.

The Petitioner submitted a letter in response, providing a lengthy narrative description of the Beneficiary's duties during the previous year and his expected duties under the extended petition, which it summarized as follows:

Description of Job Duty	Number of Hours Spent on Each Per Week
Growth, Expansion, Sales, and Profitability and Smooth Operations	15-20 hours approximately (50% of his time)
Marketing and Market Research	10 hours approximately (20% of his time)
Legal/Human Resources Management	5-7 hours approximately (10% of his time)
Finance and Budget	5-7 hours approximately (10% of his time)
Client Relations	2-4 hours approximately (5% of his time)
Liaise with Parent Company	2-4 hours approximately (5% of his time)

The Petitioner also explained changes in staffing that had occurred subsequent to the date of filing. The Petitioner stated that the employee who is claimed to have held the position of Business Advisor left the company and that the Beneficiary demoted the Operations Manager to Sales Associate based on lack of performance. According to the new organizational chart, the Petitioner employs the Beneficiary as President who in turn supervises three sales associates. The chart depicts position openings for an operations manager and a business advisor, as well as future openings for positions in its [REDACTED] Georgia store.

The Petitioner provided the following description for the sales associate positions:

1. Implement sales; Perform tasks necessary to serve customers and assist supervisors; serve and check out customers; maintain cleanliness and hygiene; stock inventory; report to Store Supervisors – **Number of House Per Week: 20 approximately.**

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2. Handle customer care and customer complaints; answer routine questions, billing complaints, report billing issues to Store Supervisor and establish and maintain relationship with customers and suppliers. Assist with marketing, advertising and public relations work. Assist with reporting of management and financial information to the Store Supervisor. **-Number of Hours Per Week: 10 approximately**
3. Stock Inventory and take deliveries. Check inventory at regular intervals; prepare Inventory order and confirm with Operations Manager or Store Supervisor before ordering – **Number of Hours Per Week: 10 approximately.**

The Petitioner submitted payroll records for the pay period ended on February 17, 2015 which showed that one sales associate worked full-time (80 hours), while the two other sales associates worked part-time hours (33 and 39.5 hours, respectively) during the two-week period. The Petitioner also provided its payroll records for all employees for the fourth quarter of 2014. This evidence shows that the two sales associates claimed to have received promotions to the salaried positions of Business Advisor and Operations Manager on December 1, 2014 continued to earn an hourly wage of \$8.25 after that date.

The Petitioner provided job duties for the positions of Business Advisor and Operations Manager and stated that all positions would be filled “in the coming weeks.” The Petitioner also stated that the Beneficiary currently performs the duties of the Business Advisor and stated “[w]e recognize that we are currently understaffed, but the unforeseen events that happened put us in this predicament. Besides, that is the nature of any new business.”

The Director denied the petition, finding that the Petitioner had not established that the Beneficiary will be employed in a managerial or executive capacity under the extended petition. The Director determined that based on the organizational structure described, the Beneficiary would be assisting in the day-to-day non-supervisory duties of the business. The Director found that the Petitioner did not employ a sufficient number of personnel to staff a retail operation, and the Petitioner did not establish that a bachelor's degree or higher is actually necessary to perform the duties of any of the positions subordinate to the Beneficiary.

On appeal, the Petitioner claims that the Beneficiary is an “executive both in title and duties.” The Beneficiary further states that the Beneficiary is not a first-line supervisor. The Petitioner states that the staffing levels fit the reasonable needs of the organization, and that the Petitioner plans to continue expanding its operations in future years. The Petitioner asserts that the Beneficiary does not have time to perform the day-to-day duties of the [REDACTED] in Illinois as he splits his time between Illinois and Georgia and is out of the state for weeks at a time. The Petitioner cites several non-precedent decisions in which this office determined that a beneficiary was eligible for L-1A classification where most of the day-to-day non-managerial tasks associated with the employer's business were carried out by a beneficiary's subordinates.

B. Analysis

Upon review, and for the reasons stated herein, the Petitioner has not established that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition.

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 definitions of executive and managerial capacity each have two parts. First, the Petitioner must show that the Beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the Petitioner must show that the Beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the Beneficiary manages a business or a component of a business does not establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

In response to the Director's RFE, the Petitioner submitted a job description for the Beneficiary's position, including a breakdown of the percentage of time spent on each duty. The Petitioner indicated that the Beneficiary will spend 50 percent of his time responsible for directing the management of the company which includes: "conducting due diligence for and acquiring businesses," "visited several properties and analyzed the sales and profitability of each potential business," "hire and fire personnel," "managed the financial components of our organization," "analyzing business performance," "review our sales reports and tax filings," "direct and manage gross profit margins," and "coordinates, and oversees our business operations." Since the Beneficiary supervises three sales associates that do not handle financial reports or assist with the expansion strategies, it appears that the Beneficiary will primarily be performing non-managerial duties such as preparing the financial reports, performing the business development tasks, negotiating, and performing the due diligence required for expansion.

The Petitioner also stated that the Beneficiary will spend 30 percent of his time in exercising wide latitude in discretionary decision-making. For example, the Petitioner states that the Beneficiary: "makes the necessary decisions of entering into contracts with vendors and suppliers, purchase and sales agreements, loan agreements, and other contracts on behalf of the business as needed"; "drives all phases of the business development process"; "develops and supervises the implementation of marketing strategies and programs"; and "develops and implement marketing plans." As the Petitioner employs only three sales associates and the Beneficiary, it appears that a large portion of the Beneficiary's time will be devoted to non-executive duties rather than directing such activities through subordinate employees. Based on the current record, we are unable to determine whether the claimed executive duties constitute the majority of the Beneficiary's duties, or whether the Beneficiary will primarily perform non-executive administrative or operational duties. Again, 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

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or executive duties); *see also Matter of Church Scientology International*, 19 I & N Dec. 593, 604 (Comm. 1988).

When examining the managerial or executive capacity of a Beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a Beneficiary's duties and those of his or her subordinate employees, the nature of the Petitioner's business, the employment and remuneration of employees, and any other facts that contribute to an understanding of a Beneficiary's actual role in a business.

The Petitioner claims on appeal that the Beneficiary is employed in a qualifying executive capacity. The Petitioner's organizational charts and staffing levels, however, cast doubt on the Petitioner's claims. 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 the Beneficiary to direct and the 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 the owner or sole managerial employee. The 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.*

At the time of filing, the Petitioner provided evidence that it employed five employees including the beneficiary. Although the Petitioner claimed that two employees had recently been promoted to salaried positions of Operations Manager and Business Advisor, the Petitioner's payroll records do not support its claim that either employee ever received the promotion or the substantial increase in salary that would have accompanied it. Rather both employees continued to earn an hourly wage of \$8.25 after the date of the claimed promotion. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As noted, at the time the Petitioner responded to the RFE in March 2015, neither of the claimed supervisory positions was filled.

The organizational chart submitted in response to the RFE shows the Beneficiary supervising three sales associates, and the Petitioner's payroll records indicated that only one of them worked on a full-time basis. The Petitioner provided a job description for the sales associates which reflects that they mainly work with customers, handle customer complaints, accepting deliveries, and assist with marketing, advertising and public relations work. Therefore, it appears that the Beneficiary is the only individual handling the financial operations, business development, market research and ordering of inventory, duties which have not been established as executive in nature.

Further, the Petitioner did not explain how a staff of three sales associates would be sufficient to relieve the Beneficiary from involvement in more routine store functions. According to the Petitioner's statements in the record, its store is open for business for 17 to 18 hours per day, seven days per week for a total of 121 hours. The sample work schedule in the record is from September 2015, when the Petitioner employed five sales associates. This schedule indicates that these employees were able to cover all operating hours, although it appears to overstate the number of hours worked by some employees when compared with the company's payroll records.

The Petitioner has not explained how its reduced staff of three sales associates, who may work a combined total of less than 75 hours per week, is able to staff its store during the same operating hours. While the Petitioner insists that the Beneficiary does not perform any day-to-day store operations, and claims that he travels outside of Illinois for weeks at a time, it is unclear how the store maintains its operating hours without the Beneficiary performing the duties of a sales associate during those times when no other employees are available.

The job descriptions for the store associates also state that the sales associates will report to the store supervisor but that position is not listed on the organizational chart. As noted, the record reflects that, the Beneficiary was shown on the organizational chart to be performing non-qualifying roles for the Petitioner including serving as a first-line supervisor over cashiers at the retail store. Accordingly, the Petitioner has not established that the Beneficiary is employed in a qualifying executive capacity.

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. 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. *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).

Further, the applicable regulations for the extension of a "new office" petition require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).¹ The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial

¹ Following the enactment of section 101(a)(44)(C) of the Act in 1990, the former Immigration and Naturalization Service (INS) recognized that that managerial capacity could not be determined based on staffing size alone and deleted reference to "size and staffing levels" at 8 C.F.R. § 214.2(l)(3)(v)(C)(3) (1990), setting out the evidentiary requirements for initial new office petitions. *See* 56 Fed. Reg. 61111, 61114 (Dec. 2, 1991). However, the INS chose to maintain the review of the new office's staffing, among other criteria, at the time that the new office seeks an extension of the visa petition. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).

position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. Here, the Petitioner has not shown that it has grown to the point where it has a reasonable need for the Beneficiary to primarily perform executive duties rather than assisting with the day-to-day operations of the business. While we do not doubt that the Beneficiary is the senior employee in the company and exercises discretionary authority over the business, the Petitioner has not established that it has the staff to relieve him from performing non-qualifying duties.

The Petitioner has cited several unpublished AAO decisions in support of its assertion that it need only establish that the majority of the day-to-day duties of the business are performed by someone other than the Beneficiary. The Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions cited. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. As discussed, the Petitioner in this matter has not in fact established that its other employees are able to relieve the Beneficiary from significant direct involvement in the day-to-day operations of its gas station and convenience store business.

Based on the foregoing discussion, the Petitioner has not established that it will employ the Beneficiary in an executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

III. CONCLUSION

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of A-USA, Inc.*, ID# 14539 (AAO Nov. 6, 2015)