



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

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

MATTER OF B-G-, INC.

DATE: NOV. 23, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an import and export business, seeks to extend the Beneficiary's temporary employment as its managing director under the L-1A nonimmigrant classification. *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 and dismissed the Petitioner's two subsequent combined motions to reopen and reconsider. The matter is now before us on appeal. The appeal will be dismissed.

The Director determined that the record did not establish that the Beneficiary would be employed in either a managerial or executive capacity in the United States. On appeal, the Petitioner asserts that it has satisfied all evidentiary requirements for the requested classification.

I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, a 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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a parent, subsidiary, or affiliate of the foreign employer.

The regulation at 8 C.F.R. § 214.2(l)(3) provides that an individual petition filed on Form I-129 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.

II. THE ISSUE ON APPEAL

The sole issue addressed by the Director is whether the Petitioner established that the Beneficiary will be employed in a qualifying managerial or executive 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.

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;

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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.

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

A. Facts

The Petitioner filed the Form I-129 on June 27, 2013. It stated on the Form I-129 that it operates an import and export business with five employees.

In a letter dated June 21, 2013, the Petitioner stated that the Beneficiary “has been responsible for overseeing the daily sales operations of the US company and ensuring the company’s goals and objectives are met.” The Petitioner added that the Beneficiary “has been and will continue to be in control of all personnel decisions and she will handle the accounts receivable and accounts payable including payroll.” In addition, the Petitioner stated that the Beneficiary is need to “set goals and to develop and acquire contracts with clients.”

The Petitioner listed the Beneficiary’s proposed responsibilities and duties for the U.S. entity as follows:

- She plans the general and specific aims of the company to short and long term.
- She organizes the structure of the current company and its future
- Directs the company, take decisions, supervises and is a true leader
- Controls, with support to the Administration department, the activities planned in the annual budget plan. Compares them with past budgets, detects diversions or differences presented in those reports, and presents them to the Board of directors of the Corporation
- Analyzes, discusses and fixes management indicators requested by the Corporation
- Lead the Unit of Sales with the purpose of planning, executing, and controlling marketing plans and programs identifying opportunities within the market and customer groups that the company wants to attract. Contributes, inside the controllable variables of the company, in the overall planning of sales goals
- Establishes, supervises, and controls the politics of customer service.
- Lead the Buying/purchasing department, including management, suppliers, logistics and international and national traffic of goods.

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- Investigates the trends, needs, and preferences of clients and defines the corporate buying strategies, purchase terms, product categories, quantity, quality, and cost.
- Elaborate implements, controls the buying budget, and does follow-ups to evaluate the fulfillment of forecasts, which help improve the establishment of a price policy depending on the profit or benefits established to be obtained.
- Makes decisions in regards to the selection, contracting and training of personnel, Also, evaluates the performance of the personnel of the company under his supervision.
- Analyzes possible problems within the company in the financial, administrative, or accountable aspect and has mayor [*sic*] decision making in the process.
- Oversees that goals are fulfilled and attained
- Coordinate efforts in the exploration of new business opportunities emphatically in those of major potential.
- Practices and promotes with loyalty the values and philosophy by which he [*sic*] is linked to the Corporation and to the companies. In addition, he guides the operations and evaluates performance of personnel under the policies, plans and procedures of the organization
- Motivates, stimulates and stirs into action the work teams and the emergence of new leaders
- Guarantees the constant improvement in the processes of the company

The Petitioner stated the Beneficiary allocates her time equally among the listed duties. The Petitioner noted that it employs an assistant manager, a marketing manager, a sales manager, and a sales person, in addition to the Beneficiary. The record included an organizational chart and brief descriptions of the duties performed by each position.

The Petitioner also submitted evidence of wages paid to its employees from 2012 through May 2013, including IRS Form W-2, Wage and Tax Statements, Florida quarterly wage reports, and payroll records. This evidence shows that, although the Petitioner paid all five of the employees listed on the organizational chart in 2013, it had only two employees as of May 31, 2013, including the Beneficiary and the sales person. The assistant manager, marketing manager and sales manager identified on the Petitioner's organizational chart had all left the company by April 2013.

The Director issued a request for evidence (RFE) on November 1, 2013, advising the Petitioner that the initial evidence did not establish that the Beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition.

In response to the RFE the Petitioner provided a letter that included the following revised position description for the Beneficiary:

Meeting with Parent Company – 10%

The Managerial Director will attend meetings with the Parent Company and will be responsible for implementing . . . and making recommendations to the Parent Company based on her observations of the US company operations.

Implementation of budgeting decisions – 10%

Determine and correct budgeting allocation and implementation is a crucial aspect of the operations. Therefore, . . . she will dedicate great care and detail on the supervision of same.

Meetings with staff – 10%

She will implement general directives and specific orders by holding daily meetings with subordinate staff, to identify and correct any problems, troubleshoot the implementation of new procedures, review quality control and ensure processes are integral and fully dependent. During such meetings, she will observe staff and later make recommendations regarding bonuses, promotions, salary increases or termination as needed.

Administration – 10%

She will perform administrative tasks such as signing checks, approving invoices, reviewing documents, reviewing correspondence, taking phone calls from clients and vendors where escalation is required, liaising [*sic*] with outside legal and accounting firms, and also liaising [*sic*] with vendors, clients and other outside sources if staff requires the intervention of the Managerial Director in specific situations.

Implementation of New Contracts – 20%

She will ensure new contracts are fully executed when initiated, by assigning staff to handle each detail needed in order for the relationship with the new customer to start off correctly, until the contract is fully absorbed by the company and a routine is fully established.

Sales and Goals – 20%

Lead the unit of sales with the purpose of planning, executing, and controlling marketing plans and programs identifying opportunities within the market and customer groups that the company wants to attract. Contributes, inside the controllable variables of the company, in the overall planning of sales goals.

Direct the sales and purchasing management, suppliers, logistics and international and national traffic of goods. Review and analyze the trends, needs and preferences of clients and defines the corporate buying strategies, purchase terms, product categories, quantity, quality and cost. Coordinate efforts in the exploration of new business opportunities emphatically in those of major potential.

Marketing, Advertising, Administrative and Legal Issues – 20%

She will determine and approve for implementation marketing and advertising expenditures, as per contracts approved by her, and make recommendations, conduct or order research as needed to give her the tools needed to make major decisions. She will be responsible person to respond for any banking, vendor, legal and accounting issues as needed.

The Petitioner added that the Beneficiary “has a group of 5 employees (including [the Beneficiary]) directly reporting to her” and that the managers and staff of the foreign entity also report to her. The Petitioner submitted its IRS Forms 941, Employer’s Quarterly Federal Tax Return, for all four quarters of 2013. The Form 941s showed that the Petitioner has three employees in the first quarter of 2013, two employees in the second and third quarters, and three employees in the fourth.

The Director denied the petition on April 2, 2014. In denying the petition, the Director emphasized that the Petitioner did not corroborate its claim that the Beneficiary oversees a staff of four employees or that she supervises managers, supervisors or professionals.

The Petitioner filed a combined motion to reopen and reconsider, which the Director dismissed on September 17, 2014. On motion, the Petitioner submitted evidence to clarify the dates of employment for each employee who worked in 2013. The Petitioner acknowledged that from May to November 2013, the Petitioner employed only the Beneficiary and a sales representative. The Petitioner explained that the economy and other external factors required the reduction in its work force.

The Petitioner then filed a second combined motion to reopen and reconsider, which included additional evidence of wages paid to employees in 2013 and a copy of the Petitioner’s 2013 IRS Form 1120, U.S. Corporation Income Tax Return. The Director dismissed the Petitioner’s motion on February 6, 2015.

On appeal, the Petitioner asserts that the Beneficiary does not perform the day-to-day company activities, but rather is focused on its goals. The Petitioner reiterates that economic and political factors impacted the Petitioner’s level of activity in 2013, and states that it “was the victim of a strong scam of a client who made important purchases during 2013.” The Petitioner emphasizes that the Beneficiary is responsible for development of strategic business partnerships, brand development, sales development, and market strategies, duties that could not be performed by a lower-level employee. In support of the appeal, the Petitioner submits copies of invoices from 2014 and early 2015 as evidence of its growth. All of the invoices list the Beneficiary as “Salesperson.”

B. Analysis

Upon review, and for the reasons discussed herein, the evidence of record does not establish that the Beneficiary will be employed in a qualifying managerial or executive capacity.

When examining whether a beneficiary will be employed in an executive or managerial capacity we will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(i)(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 or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The record includes an overly broad description of the Beneficiary's responsibilities as managing director. For example, the Petitioner initially stated that the Beneficiary plans the general and specific aims of the company for the short and long term, organizes the structure of the company, directs the company by making decisions and supervising, and that she is a true leader. This description does not describe the Beneficiary's actual day-to-day duties or otherwise relate the Beneficiary's actual tasks in carrying out these duties. 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 has not provided sufficient detail or explanation of the Beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990).

Additionally, the Petitioner states that the Beneficiary will lead the buying/purchasing department, investigate the trends, needs, and preferences of clients, will lead the sales unit, and hire and train personnel. However, upon review of the totality of the record, from May to November 2013, the Petitioner employed only one individual in addition to the Beneficiary, a salesperson. The brief position description provided indicates that this individual is primarily involved in selling the Petitioner's products. The record does not include evidence of any individual who will perform the administrative and operational tasks of buying and purchasing products, researching trends and marketing products, or negotiating with suppliers and clients, when the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978). Notwithstanding the Petitioner's claim that it experienced only a temporary reduction staffing, the evidence submitted on appeal reflects that the Beneficiary herself has been acting as a salesperson in 2014.

It appears from the general description of these duties that the Beneficiary will be responsible for carrying out many of the day-to-day operational tasks of the business. The record does not show that the Petitioner employed or contracted with others to perform these functions, so it is not possible to conclude that there are individuals who will relieve her from performing the administrative and operational tasks of the company.

Upon review of the additional information submitted in response to the Director's RFE, the Petitioner indicated that the Beneficiary will spend 10 percent of her time supervising budget

allocations, 10 percent of her time meeting with staff, 20 percent of her time assigning staff to handle details of new contracts, and 20 percent of her time leading the sales unit and directing the sales and purchasing management. However, as observed above, the record shows that the Petitioner employed only one sales representative when the petition was filed, thus requiring the Beneficiary to participate in and perform these duties, not direct or manage them. Further, the Petitioner noted that the Beneficiary will spend 10 percent of her time on administrative tasks and as the liaison for vendors, clients and outside legal and accounting firms, and an additional 20 percent of her time on marketing, advertising, administrative and legal issues. The record does not establish that these duties are those of an executive or manager as defined in the regulations.

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. Here, the record does not include probative evidence that the Beneficiary has a subordinate level of employees to direct who could perform the day-to-day operations of the company and allow her to spend her time primarily on its broad policies and goals. 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.* Moreover, the Petitioner here has not adequately described the specific duties of the proffered position such that we may conclude that these are primarily executive duties as defined in the statute and regulation.

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, 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).

Upon review, the record in this matter does not establish that the one employee identified as subordinate to the Beneficiary holds either a professional or managerial position. The Petitioner does not state that the sales representative performs any supervisor or managerial duties. Additionally, the Petitioner has not established that the sales representative position as described

requires a bachelor's degree, such that it could be classified as a professional position.¹ The record is deficient in this regard. Moreover, the Petitioner's allocation of the Beneficiary's time spent on interaction with its staff demonstrates that the Beneficiary will not primarily engage in the management of personnel. The record does not establish that the Beneficiary is primarily a personnel manager.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. However, if a petitioner claims that a 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.

Upon review of the totality of the record, the Petitioner does not claim that the Beneficiary will be employed as a function manager. It does not articulate the nature of a particular essential function she would manage and does not describe what proportion of the Beneficiary's daily duties would be attributed to managing an essential function. To meet its burden, the Petitioner must describe in sufficient probative detail the nature and duties of the function and establish how the function is essential to the Petitioner's operations. In addition, the Petitioner must show that the Beneficiary is not the individual performing the operational duties or providing the services of the function. Here, the record does not supply sufficient probative information establishing that the Beneficiary would be relieved from performing the daily operational and administrative tasks of any particular function. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

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 petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business. While we recognize that several of the overbroad duties

¹ When evaluating whether the Beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. 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."

described by the Petitioner may fall generally under the definitions of managerial or executive capacity, the lack of specificity in the description of duties and the lack of evidence regarding the employment of subordinate employees, when the petition was filed, raises questions as to the Beneficiary's actual primary responsibilities.

L-1A status is not precluded where there is a small staff, however, there is no provision in USCIS regulations that allows a business, that is not a new office as set out in 8 C.F.R. § 214.2(1)(3)(v), additional time to establish that it can employ a beneficiary in a predominantly managerial or executive position. Again, the Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978).

We also acknowledge 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 to a multinational manager or executive. See section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as 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). Here, it is not the Petitioner's size that raises questions regarding its eligibility; rather it is the lack of substantive evidence regarding the Beneficiary's actual proposed duties and the lack of probative evidence regarding who, other than the Beneficiary, will perform the operational and administrative tasks of the organization.

The Petitioner did not provide sufficient probative and descriptive evidence regarding the Beneficiary's duties and subordinates demonstrating that she would be relieved from performing the operational and administrative duties of the U.S. entity. Accordingly, we will uphold the Director's determination that the Petitioner did not establish that the Beneficiary will be employed in a qualifying managerial or executive capacity in the United States, and the appeal will be dismissed.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reason. 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.