



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

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

MATTER OF N-C-I-USA, CO.

DATE: OCT. 1, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a steel casting parts manufacturer, seeks to temporarily employ the Beneficiary as its president/general manager in the L-1A intracompany transferee 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 determined that the record did not establish that the Beneficiary would be employed in either a managerial or executive capacity for the U.S. entity. On appeal, the Petitioner asserts that the Director's basis for denial of the petition was erroneous as a matter of fact and law and contends that it has satisfied all evidentiary requirements.

For the reasons that will be discussed below, we agree with the Director's decision that the Petitioner has not established eligibility for the benefit sought. Accordingly, the Director's decision will not be disturbed. The appeal will be dismissed.¹

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 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.

¹ We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

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

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

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.

(b)(6)

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- (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 managerial or executive capacity.

A. Facts

In a letter appended to the petition, the General Manager of the Petitioner's parent company indicated that it manufactures steel casting parts used for construction and mineral machinery, cars, and trains for export to other countries including the United States. The General Manager stated that the Petitioner was organized in [REDACTED], and "was created to promote [the Petitioner's parent company's] existing products in the US market, as well as to provide technical services to [the Petitioner's parent company's] US customers." The General Manager noted further that the parent company employed 1200 people worldwide including one person in the United States.

The General Manager of the Petitioner's parent company stated its desire to transfer the Beneficiary to the United States as the Petitioner's President/General Manager "to establish policies and procedures" and that the duties of the proffered position included:

- Budget and plan yearly business goals;
- Hire and terminate employees;
- Maintain a strong network and relationships with Customers;
- Maintain close contact with [the parent company] to achieve Company goals;
- Day-to-day management of the US Company to ensure overall operation efficiency and high quality services;
- Drive and create capabilities in account management based on agreed inventory plans, business action plans, and sales targets; and
- Grow the size and revenue of the US operation.

In an exhibit attached to the petition, the Petitioner’s parent company added that the Beneficiary “will be responsible for the overall management of [the Petitioner]” and that he will be in charge of the following areas:

Responsible for Company’s overseas business including marketing and distribution, effectively implement plans into results; [s]et sales goal, sales model, sales strategy, budget and reward plan; manage the quality feedback from customer; close contact with [the parent company] and cooperation with all the departments to work out problems and achieve company goals.

The initial record also included an exhibit with a breakdown of the Beneficiary’s proposed duties as follows:

Executive Duties

Budget and Plan Yearly Business Goals	20%
Establish Company Policies and Procedures	15%
Maintain Strong Network and Relationships with Customers	10%
Maintain Close Contact with [the parent company] to achieve Company goals	10%

Managerial Duties

Day-to Day Management of US Company to ensure overall operation efficiency and high quality services	25%
Drive and Create Capabilities in Account Management based on agreed inventory plans, business action plans, and sales targets	20%

In another exhibit to the petition, the duties of the Petitioner’s current employee are described as including “market development, technical support, customer liaison.”

In response to the service center’s request for evidence (RFE), the General Manager of the Petitioner’s parent company expanded upon the Beneficiary’s duties by indicating that as part of the Beneficiary’s executive duties he would also: “[d]etermine and lead new product development direction and projects” and would provide “[a]nalysis of sales data, identify and analyze customer growth, and development direction of potential customers.” The General Manager revised the Beneficiary’s proposed managerial duties as follows:

- Day-to-day management of the US Company to ensure overall operation efficiency and high quality services (previously stated);
- Supervise the normal operation of the day-to-day business;
- Solve the problems of the interdepartmental coordination in business;
- Promote a comprehensive management system;

- Manage marketing, develop preliminary market survey in new projects, audit costs in the development of business, and oversee staff professional knowledge and training;
- Guide actual product sales and employees through the sales target;
- Hire and terminate employees (previously stated); and
- Manage customer complaints and notify related departments (information previously provided).

The Petitioner's parent company also re-allocated the Beneficiary's time as follows:

Executive Duties

Formulate Growth and Increase Revenue of US operations	20%
<ul style="list-style-type: none">• Budget and Plan Yearly Business Goals• Determine and lead new product development direction and projects• Drive and Create Capabilities in Account Management based on agreed inventory plans, business action plans, and sales targets• Analysis of sales data, identify and analyze customer growth, and development direction of potential customers• Develop Preliminary Market survey in New Projects, Audit Costs in the Development of Business	
Establish Company Policies and Procedures	15%
Maintain Strong Network and Relationships with Customers	10%
Maintain Close Contact with [the parent company] to achieve Company goals	10%

Managerial Duties

Day-to-Day Management of the US Company to Ensure Overall Operation Efficiency and High Quality Services	35%
<ul style="list-style-type: none">• Supervise the normal operation of the day-to-day business• Hire and Terminate All US Employees• Promote Comprehensive Management System	
Manage Marketing and Oversee Staff Professional Knowledge and Training	10%
<ul style="list-style-type: none">• Guide Actual Product Sales and US Employees Through the Sales Target	

On appeal the Petitioner re-submits this last description of the Beneficiary's proposed duties and the allocation of time as the duties the Beneficiary will perform. The Petitioner states that it provided the Petitioner's parent company's organizational chart which identifies a sales manager.² The Petitioner notes that the day-to-day management of the company is estimated to take only 35 percent

² It appears, although it is not asserted, that the Petitioner is claiming that the foreign entity's sales manager performs the Petitioner's sales function.

of the Beneficiary's time, implying that this will not be the Beneficiary's primary duty. The Petitioner asserts that the "fact that an executive or manager may have some additional duties is not disqualifying" and that the majority of the Beneficiary's proposed duties are executive or managerial in nature. The Petitioner contends that it is "factually incorrect" to find that the Beneficiary will be primarily assisting with the day-to-day non-supervisory duties of the business. The Petitioner asserts further that "L-1A status is not precluded where there is a small staff, particularly in a relatively new organization." The Petitioner also asserts that the Beneficiary is a function manager. The Petitioner does not describe the function managed by the Beneficiary but states "it is difficult to envision how a President of an organization could *not* be considered a function manager or executive since he has ultimate responsibility for every aspect of that business."

The Petitioner submits several non-precedent decisions in support of its claims and assertions.

B. Analysis

We have reviewed the Petitioner's descriptions of the Beneficiary's duties in order to determine if the Petitioner has provided a description sufficient to establish that the Beneficiary would be employed in the United States in a managerial or executive capacity as defined at 101(a)(44)(A) or (B) of the Act.

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).

When examining the executive or managerial capacity of the Beneficiary, we 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.* In this matter, the Petitioner claims that the Beneficiary will be primarily engaged in an executive capacity (spending 55 percent of his time on executive matters) under section 101(a)(44)(A) of the Act. However, merely asserting or referencing that the Beneficiary is a manager or an executive does not meet the Petitioner's burden of proof. The Petitioner must demonstrate that the Beneficiary's responsibilities will meet the requirements of one or the other capacity. In this matter, the record does not provide probative consistent evidence demonstrating that the Beneficiary's proposed position satisfies either the executive or manager definition.

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. A review of the totality of the record reveals that the Beneficiary does not have a subordinate level of managerial employees to direct. Rather, the Petitioner currently employs one individual in the position of Customer Liaison and Engineering Manager.³ The brief description of this individual’s duties do not include managerial tasks, rather, this position appears to perform some duties involved in market development, technical support, and customer liaison. The description does not include information regarding the actual daily tasks that will engage the Customer Liaison and Engineering Manager in executing these broadly described duties of the position. The record regarding this position is insufficient to establish that it involves any managerial duties.

The Petitioner’s allocation of the Beneficiary’s proposed executive duties indicates that the Beneficiary will spend 20 percent of his time formulating growth and increasing the revenue of the Petitioner’s US operations. When expanding upon the actual duties involved in this vaguely stated task, the Petitioner indicates that the Beneficiary will spend a portion of the 20 percent amount of time allocated, determining and leading new product development direction and projects, analyzing sales data, identifying and analyzing customer growth and the development direction of potential customers, developing preliminary market surveys and auditing costs in the development of business. These duties as generally stated appear to require the Beneficiary to perform the operational and administrative tasks associated with these responsibilities. The record does not substantiate that the Petitioner employs anyone who is primarily performing the duties associated with the sales strategy, marketing, and new product development for the Petitioner.⁴

The undetermined remaining portion of the Beneficiary’s 20 percent of allocated time requires the Beneficiary’s involvement in budgeting and planning for the Petitioner’s yearly business goals and driving and creating capabilities in account management based on inventory, business plans and sales targets. However, it is not possible to ascertain from these generally described duties what the Beneficiary will actually be required to do when engaging in these duties. As these duties are generally described, it is not possible to conclude that they are primarily managerial or executive duties.

Similarly, the Petitioner provides a generic description of duties that encompass the remaining 35 percent of the Beneficiary’s time that will be spent on claimed executive duties. The Petitioner does not include the necessary detail to convey the specific tasks that the Beneficiary will perform when

³ The Petitioner also refers to this position as a “Technical and Customer [L]iaison Manager.”

⁴ The description of the duties for the Beneficiary’s U.S. subordinate, does not include sufficient information to determine that he is primarily involved in developing market surveys or any other specific marketing duties. We acknowledge that the Petitioner references its parent company’s employment of a sales manager; however, the record does not include sufficient probative evidence that this individual performs the sales function for the Petitioner. We note that the Petitioner’s organizational chart does not include a sales manager and does not reference that the foreign entity’s sales manager will continue to report to or relieve the Beneficiary from performing sales functions.

establishing company policies and procedures, maintaining a strong network and relationships with customer and maintaining close contact with the parent company. These statements do not provide sufficient insight into the actual work the Beneficiary is expected to perform. Even if the Beneficiary spends the majority of his time performing these duties, the record is insufficient to demonstrate that the actual daily tasks fall within the parameters of the executive definition. The Petitioner 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. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

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 position identified as subordinate to the Beneficiary is either a professional or managerial position. As discussed above, the Petitioner does not ascribe any managerial duties to the Beneficiary’s subordinate’s position. Additionally, the Petitioner has not established that this position as described requires a bachelor’s degree, such that it could be classified as a professional position. The record is deficient in this regard. Nor has the Petitioner shown that this employee supervises subordinate staff members or manages a clearly defined department or function of the Petitioner, such that this position could be classified as a managerial or supervisory position. Thus, the Beneficiary’s position as depicted on the organizational chart and throughout the record is at most that of a first-line supervisor of non-professional employees. The Petitioner has not demonstrated that the Beneficiary’s subordinate employee is a supervisory, professional, or managerial employee, as required by section 101(a)(44)(A)(ii) of the Act. Moreover, the Petitioner’s allocation of the Beneficiary’s 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 in this matter 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 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. Again, an employee who "primarily" performs the tasks necessary to produce a product or to provide services 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* *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)). The record is insufficient to establish that the Beneficiary will primarily manage an essential function.

Upon review of the totality of the record, the Petitioner does not articulate the nature of a particular essential function and does not describe what proportion of the Beneficiary's daily duties would be attributed to managing an essential function. We acknowledge the Petitioner's claim on appeal that it is "difficult to envision how a President of an organization could not be considered a function manager . . . since he will has ultimate responsibility for every aspect of that business." However, the Petitioner's emphasis on the Beneficiary's senior role and level of authority is insufficient to establish that it is more likely than not that the proffered position is a function manager. That is, as discussed above, 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, 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 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 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 description of duties for any subordinate employees raises questions as to the Beneficiary's actual primary responsibilities. While the Petitioner contends that it is "factually incorrect" to find that the Beneficiary will be primarily assisting with the day-to-day

non-supervisory duties of the business, the record here does not include sufficient probative evidence to conclude otherwise.

We acknowledge the Petitioner's observation that "L-1A status is not precluded where there is a small staff, particularly in a relatively new organization." However, we point out here that 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(l)(3)(v), additional time to establish that it can employ a Beneficiary in a predominantly managerial or executive position. 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 will perform the operational and administrative tasks of the organization.

We have reviewed the non-precedent decisions submitted on appeal in support of the Petitioner's assertions. 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. Moreover, the Petitioner does not articulate how the proffered position in this matter is analogous to the positions in the decided cases, other than in the most general terms. The Petitioner does not elaborate on specific facts or its claims to demonstrate that this petition and the underlying facts are similar to those in the non-published decisions. Neither does the record include sufficient probative documentary evidence in support of its claims and assertions so that we may compare and analyze this petition to the unpublished decisions. As such, we cannot find that this case is analogous to the unpublished decisions. Accordingly, the Petitioner's reliance on these decisions is misplaced.

In this matter, the Petitioner did not provide sufficient probative and descriptive evidence regarding the Beneficiary's and his subordinate's duties. 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.

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III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reason. 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of N-C-I-USA, Co.*, ID# 13855 (AAO Oct. 1, 2015)