



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

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

MATTER OF C-G-S-USA INC.

DATE: SEPT. 23, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a daycare and learning center, seeks to temporarily employ the Beneficiary in the position of general manager under the L-1A nonimmigrant classification. *See* Immigration and Nationality 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 determined that the Petitioner did not establish that the Beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, the Petitioner asserts that it submitted substantial credible and probative evidence sufficient to establish the Beneficiary's eligibility for the requested classification.

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 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.

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
- (v) 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.

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. *See* section 101(a)(44)(C) of the Act.

II. THE ISSUE ON APPEAL

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

A. Facts

The Petitioner filed the Form I-129 on October 22, 2014. The Petitioner stated on the Form I-129 that it operates a day care and learning center with 14 current employees and a gross annual income of \$324,000. The Petitioner intends to employ the Beneficiary as its general manager.

In a letter from its foreign affiliate dated October 24, 2014, the Petitioner provided the following description of the Beneficiary's duties:

Management of Company (42%)

- Plan, organize and direct and coordinate overall business operations, and (12.5%);
- Establish, develop and implement company policies, goals and procedures (5%);
- Responsible for the coordinate of Nigerian company with U.S. company (7.5%);
- Locate new business opportunities to invest in (4%);
- Conduct semiannual and yearly meetings for presenting the company's profits, gains and achievements (5%);
- Integrate technology and develop innovative methods to improve transportation process (2%);
- Hire staff (and fire as necessary) 2%;
- Enter into contractually binding agreements on behalf of the company (2%);
- Obtain necessary operating licenses (2%).

Management of Finance (25%)

- Oversee, direct and assist supervisors and subordinates on all matters relating to company finances and taxes (12.5%);
- Review all expense reports and invoices, direct preparation of financial reports, analyze general ledger activity and assess profitability of company (5%);
- Determine operational budget and oversee preparation of annual budget (2.5%);
- Development of standard operating procedures of reporting revenues income (2.5%);
- Manage and approve payroll, oversee check issuance policies (2.5%)

Management of Staff (24%)

- Oversee and direct Managers and subordinates (17%)
- Make administrative, staff or operational changes to increase efficiency and productivity (2.5%);
- Create standard operating procedures, principles and guidelines for all employees (2.5%);
- Oversee procedures and instruction quality monitoring (2%)

Management of New Client Development (9%)

- Travel as needed to develop new client markets and sourcing channels 3%;
- Manage databases of domestic and international sales information to identify opportunities for market expansion (3%);
- Define logistics, operational, commercial strategies to enable development in alternative markets (3%)

The letter from the foreign entity listed 14 employees of the petitioning company by name, job title, and salary or hourly wage. The listed employees included a salaried director, an assistant director paid an hourly wage of \$10.00, an administrative assistant/secretary paid an hourly wage of \$8.00; a cook, and ten teachers who receive between \$7.80 and \$10.00 per hour. The Petitioner submitted its organizational chart depicting the Beneficiary as the proposed general manager who in turn will supervise a CPA (external), an administrative assistant/secretary, and a director. The chart shows that the director will supervise an assistant director, who in turn will supervise a cook and 10 teachers. The Petitioner explained that the Beneficiary will have direct contact with the secretary, CPA and School Director. The Petitioner stated that the external CPA will “generate financial reports to track the financial health of the company;” and “will advise General Manager regarding tax consequences of business decisions, will prepare taxes as well as audited financial statements.” The Petitioner explained that the school director “supervises all school personnel and develops and implements policies, programs, curriculum activities under the review of the General Manager.” The Petitioner also provided documentation of wages paid to its employees.

In response to the Director’s request for evidence (RFE) issued on November 17, 2014, the Petitioner provided an updated letter from the foreign entity with the following revised position description:

Management of Company (42%)

- Plan, organize, direct and coordinate overall business operations, and review financial consequences with [the foreign entity] (12.5%);
- Establish, develop and implement company policies, goals and procedures (5%);
- Responsible for the coordination of [the foreign entity] with [the petitioner] particularly with regards to planning future financial investment . . . for capital expenditure and market expansion (7.5%);
- Locate new business opportunities to invest in (4%);

(b)(6)

Matter of C-G-S-USA Inc.

- Conduct semiannual and yearly meetings for presenting the company's profits, gains and achievements to [the foreign entity] (5%);
- Integrate technology and develop innovative methods to improve instructional process (2%);
- Hire staff (and fire as necessary) (2%);
- Enter into the contractually binding agreements on behalf of the company (2%);
- Obtain necessary operating licenses (2%).

Management of Finance (25%)

- Oversee all matters relating to company finances and taxes with assistance of [CPA] (12.5%);
- Review all expense reports and invoices, direct preparation of profit and loss and balance statement, analyze general ledger activity to assess profitability of company (5%)
- Determine operational budget and oversee preparation of annual budget, including capital expenditure relating to renovation . . . (2.5%);
- Development of standard operating procedures of reporting revenues/income (2.5%);
- Manage and approve payroll, oversee check issuance policies (2.5%)

Management of Staff (24%)

- Oversee and direct the [redacted] including [redacted] Director, who along with Assistant Director [redacted] supervises a staff of twelve teachers (17%);
- Make administrative, staff or operational changes to increase efficiency and productivity (2.5%)
- Create standard operating procedures, principles and guidelines for all employees (2.5%);
- Oversee procedures and instruction quality monitoring (2%)

Management of New Client Development (9%)

- Travel as needed to develop business opportunities and expansion of local market (3%);
- Manage databases of demand for daycare services within the [redacted] Metropolitan area . . . (3%);
- Define risks, competition, logistics, operational, and commercial strategies to provide a more targeted and profitable daycare service (3%).

The Director denied the petition concluding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity in the United States. The Director observed that there were notable inconsistencies between the two submitted job descriptions and determined that many of the described duties were vague and provided little insight into the Beneficiary's expected day-to-day duties.

On appeal, the Petitioner asserts that the Director erred in concluding that the Beneficiary will not be employed in a managerial capacity. The Petitioner emphasizes that the day care center would not have continued operations without its substantial financial investment to purchase the property and

business, and its efforts to increase enrollment and remodel the facility. The Petitioner emphasizes that the existing daycare center staff are not capable of making the business more profitable. The Petitioner contends that it established by a preponderance of the evidence that the Beneficiary will be employed in a qualifying managerial capacity.

B. Analysis

Upon review, the Petitioner has not established that the Beneficiary will be employed in the United States in a qualifying managerial or executive capacity.

When examining whether a beneficiary is employed in an executive or managerial capacity, 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 in either an executive or a managerial capacity. *Id.*

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 fact that the beneficiary manages a business does not necessarily 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”).

On review, the Petitioner provided a vague and nonspecific description of the Beneficiary's proposed duties that does not sufficiently demonstrate what the Beneficiary will do on a day-to-day basis as the general manager for the petitioner's day care/learning center. For example, the Petitioner stated that the Beneficiary's will allocate 42 percent of his time to “Management of Company,” but the duties described therein were general, such as “plan, organize, direct and coordinate overall business operations,” establish develop and implement company policies, goals and procedures, and “coordination of Nigerian company with U.S. operations.” Reciting the 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 any detail or explanation of the beneficiary's 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. at 1108.

Further, the initial description of the Beneficiary's duties was written without reference to the Petitioner's operation of a day care center and included several incongruous duties such as “integrate technology and develop innovative methods to improve transportation process”; “travel as needed to develop new client markets and sourcing channels”; “manage databases of domestic and international sales information to identify opportunities for market expansion”; and “define logistics,

(b)(6)

Matter of C-G-S-USA Inc.

operational and commercial strategies to enable development in alternative markets.” All of these duties are more consistent with the original purpose of the U.S. business, which is described in the record as “chemical purchase activities, services, shipment and logistics.” While the Petitioner has submitted a statement from the Beneficiary indicating that the company transferred these activities to a U.S. joint venture partner as of [REDACTED], the inclusion of these duties in a letter dated October 24, 2014 suggests that the Beneficiary intended to assume these functions upon approval of the instant petition. We note that all of these duties were revised, without explanation in response to the RFE. 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). Without further clarification, we cannot determine to what extent the Beneficiary would be involved in non-qualifying duties associated with the purchase, sale and shipment of chemicals upon returning to the United States.

Beyond the required description of the job duties, we review 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 the beneficiary's actual duties and role in a business.

The Petitioner's organizational chart depicts the Beneficiary as general manager, a secretary, an external CPA, a director, an assistant director, a cook and teachers. The brief job descriptions for the school director and assistant school director indicate that they run the school, handle the curriculum, and supervise the teachers. The Petitioner states that the Beneficiary will allocate 25 percent of his time to “Management of Finance,” but it is not clear who will be in charge of handling all of the financial matters that the Beneficiary is claimed to oversee such as preparing financial reports, bookkeeping, and preparing invoices, who will integrate technology, who will assist with the marketing or commercial strategies when the Petitioner does not employ any individuals to handle these administrative and operational duties. The Petitioner stated that the external CPA will assist with financial reports and tax statements but it did not provide evidence that this individual is actually employed by the Petitioner or indicate the number of hours he works. 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. Comm'r 1972)).

Absent such evidence, the record shows that the Beneficiary will provide many duties that are ancillary to his claimed overall management responsibilities, such as bookkeeping, marketing, technology, and contract negotiations as there is no evidence that he will oversee other employees who will perform these day-to-day tasks. 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 International*, 19 I & N Dec. 593, 604 (Comm. 1988).

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.”¹ Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(4). 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).

In this matter, the Petitioner submitted an organizational chart which shows that the Beneficiary will directly supervise a secretary and a director and indirectly supervise an assistant director, a cook and the instructional staff. The Petitioner did not provide any information regarding the educational level obtained by its employees, nor did it provide the educational requirements for the director, assistant director or teacher positions to establish that these directly supervised employees are professionals. Due to the nature of the school as a daycare and learning center primarily for infants, toddlers and preschool-aged children, we cannot conclude that the instructional staff are professionals without evidence to establish the claim. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm’r 1972)). At most, the Beneficiary would supervise one subordinate supervisor, the director, while his supervisory responsibilities as a whole are stated to require only 25 percent of his time. The record does not establish that the Beneficiary would primarily supervise a staff of subordinate managers, supervisors or professionals.

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

¹ In evaluating whether the beneficiary manages professional employees, we 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’r 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 focus on the level of education required by the position, rather than the degree held by a 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.

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. 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 Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988). In this matter, the Petitioner has neither claimed nor provided evidence that the Beneficiary will primarily manage an essential function.

Similarly, the Petitioner has not established that the Beneficiary would be employed in an executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 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.* Here, the Petitioner states that the Beneficiary will establish the company's goals and policies, but it has not shown that such duties are his primary responsibilities or otherwise claimed that the Beneficiary will be employed in an executive capacity.

In sum, the Petitioner has not provided a sufficiently detailed and consistent explanation of the Beneficiary's duties within the context of its business, nor has it established that it has staff available to perform non-qualifying duties associated with the company's administrative, financial and marketing activities. For these reasons, the Petitioner has not established that the Beneficiary will be employed in a qualifying managerial or executive capacity, and the appeal will be dismissed.

III. FOREIGN EMPLOYMENT

Beyond the decision of the Director, the Petitioner did not submit sufficient evidence to establish that the Beneficiary has been employed by a qualifying foreign entity in a primarily managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(iv).

First, the Petitioner did not provide a detailed job description of the duties that the beneficiary performed as "Executive Director (Operation)" for its foreign affiliate. Rather, it generally stated

(b)(6)

Matter of C-G-S-USA Inc.

that he has been responsible for the general oversight of the foreign entity's Engineering and Technical Services Division," including responsibility for review of technical service proposals, review of quality procedures, and training of technical sales representatives. Further, the Petitioner submitted a resume for the Beneficiary which included different dates of employment and job duties than those provided in the foreign entity's letter. The Petitioner stated that the Beneficiary has been employed by the foreign entity since 2006; however the Beneficiary states in his resume that he worked for [REDACTED] as a "Country Manager/Technical Consultant" from 2006 until 2010, and that he has been employed by the Petitioner's claimed affiliate, [REDACTED] only since 2011. Further, the Beneficiary states that his job title with [REDACTED] is [REDACTED] and he describes his duties as "updating [REDACTED] with changing needs and selling new technologies to existing and prospective customers," "drawing up of core plans and strategies for the downstream division of [REDACTED] Company in Nigeria," and "responsible for the [REDACTED] in Nigeria." These duties are not clearly consistent with the "Executive Director (Operations)" duties briefly described by the foreign entity in its letter in support of the petition.

Finally, we acknowledge that the Petitioner submitted an organizational chart for the foreign entity which depicts the Beneficiary as subordinate only to the Chairman. The chart depicts a total of 40 employees identified by name and job title, including five subordinate managers, and separate divisions for procurement/logistics, administration/human sources, finance and operations. At the same time, the Petitioner provided a copy of the latest audited financial statements for [REDACTED] which states at page 12 that the average number of persons employed by the foreign entity during the years 2012 and 2013 was 12, not 40 as depicted on the organizational chart. Specifically, the financial statement states that the foreign entity employed four management staff, five technical staff and three administration staff during these years. Due to this unexplained inconsistency regarding the foreign entity's organization and staffing levels, we cannot determine the number or types of employees the Beneficiary actually supervised during his tenure with the foreign entity.

Again, 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). Here, there are inconsistencies in the record with respect to the Beneficiary's actual job duties, job title and dates of employment with the foreign entity, as well inconsistencies regarding the foreign entity's staffing levels and organizational structure. As a result of these inconsistencies, the evidence of record does not establish that the Beneficiary has been employed in a qualifying managerial or executive capacity abroad, and the petition cannot be approved for this additional reason.

IV. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal.

Matter of C-G-S-USA Inc.

2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

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 C-G-S-USA Inc.*, ID# 13691 (AAO Sept. 23, 2015)