



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

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

MATTER OF C-G-, LLC

DATE: AUG. 15, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a company engaging in international retail and wholesale of fashion and construction products, seeks to extend the Beneficiary's temporary employment as its president and chief executive officer under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in an executive or managerial capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish that the Beneficiary will be employed in an executive capacity in the United States.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by not reviewing all of the evidence submitted in support of the Beneficiary's executive position and that the Beneficiary will be employed in an executive capacity in the United States.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a 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. Section 101(a)(15)(L) of the Act. 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. *Id.*

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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary will be employed in an executive capacity under the extended the petition. The

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Petitioner does not claim that the Beneficiary will be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in an executive capacity.

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.

A. Evidence of Record

The Petitioner filed the Form I-129 on December 11, 2015. On the Form I-129, the Petitioner indicated that it had six current employees in the United States and a gross annual income of \$312,142. On its L Classification Supplement to Form I-129, where asked to describe the Beneficiary’s proposed duties in the United States, and again in its letter of support, the Petitioner simply restated the description of an executive contained in the regulations. In its letter of support, the Petitioner explained that its U.S. company conducts business as two departments: a fashion department and a construction department.

The Petitioner stated that its company’s fashion department became the exclusive franchisee of the [REDACTED] retail brand in Puerto Rico, whose store officially opened in November 2013. The Petitioner’s letter stated that the store “uses six to seven employees,” comprised of a full-time store manager, a full-time assistant store manager, and four to five sales clerks, while the Petitioner’s business plan states that its fashion department has four full-time employees and 2 part-time employees.

The Petitioner stated that its company’s construction department has started to import construction materials through the foreign entity from Bulgaria to Puerto Rico and has become the exclusive representative of several Bulgarian and international manufacturers in Puerto Rico. The Petitioner stated that its future project, [REDACTED] project, is

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designed as a specialized trading retail and wholesale store, whose start of operations is planned from September to October 2016 in Puerto Rico. The company then plans to open a second store in [REDACTED] Florida in September 2017 and a third store in [REDACTED] Florida in October 2018. According to the Petitioner, this project will create 18 total jobs, 6 at each location, by 2018. The Petitioner also submitted a business plan which specifically states that its U.S. company's construction department "uses a wide portfolio of marketing and publicity materials prepared by [the foreign entity in] Bulgaria, where that company has its own Marketing Department," and that its construction department will have 6 full-time employees starting in July/August 2016 when its first retail location opens in Puerto Rico.

The Petitioner submitted an organizational chart depicting the Beneficiary as the CEO, supervising an accounting company, [REDACTED] lawyers; its [REDACTED] fashion department; and its new business venture [REDACTED]. Its [REDACTED] appears to be supervised by the foreign entity, which is also supervising the Beneficiary. Its fashion department is shown to include one full-time store manager, one full-time assistant store manager, and four part-time "Sellers."

The Petitioner submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, for the first, second, and third quarters of 2015, indicating that it had seven employees at the end of the first quarter, five employees at the end of the second quarter, and three employees at the end of the third quarter,

The Director issued a request for evidence (RFE), advising the Petitioner that it did not submit sufficient evidence describing the Beneficiary's duties at the U.S. company or how he will be supported by subordinate staff. The Director instructed the Petitioner to submit evidence that the Beneficiary will be primarily employed in an executive capacity.

In response to the RFE, the Petitioner submitted a letter clarifying that it only had three employees in the fashion department at the time of filing and did not provide any information about employees in the construction department, other than the Beneficiary. The Petitioner also explained that it rents warehouse space and services from [REDACTED] for products that are not directly delivered to customers, so it does not require its own warehouse or warehouse staff for its wholesale of construction products in Puerto Rico.

The Petitioner described the Beneficiary's proposed duties as follows:

- Direct the company's financial operations to maximize investments and increase efficiency.
- Analyze and monitor financial sales reports to evaluate the performance of the strategic goals planned.
- Establish, direct, and implement corporate and operational policies, objectives, and activities of company pursuant to local and federal laws and regulations.

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- Serve as the primary liaison with all the companies represented regarding contractual obligations, supply and inventory, branding policies, etc.
- Make all policy and business decisions to develop the [REDACTED] (Fashion Department) brand and its respective image in Puerto Rico.
- Negotiate and approve contracts or agreements with suppliers, distributors, federal or state agencies, or other organizational entities.
- Manage the recruiting, coordination, promotion and remuneration of [the Petitioner's] staff.
- Prepare budgets, plan and organize the staffing of new operations as part of the expansion plan.
- Represent foreign manufacturers and locate prospective marketing channels for placing construction products and technologies in the Puerto Rican and the U.S. market overall.
- Negotiate contracts with distributors in Puerto Rico and facilitate the import of materials from overseas manufacturers.

The Petitioner also listed the Beneficiary's imposed duties and goals for 2015 as follows:

- Develop the WHOLESale relations and build solid and long-term cooperation with both U.S. and local Puerto Rican chains,
- Launch WHOLESale operations,
- Lay the grounds for future expansions,
- Start developing the project: [REDACTED]

(Emphasis in original.)

The Petitioner then goes on to list "particular & specific duties" for the Beneficiary's position and states that he determines and communicates the organization's vision and strategic direction to both his management team and employees, keeps a proper balance of resources for all the separate groups and initiatives per the company's goals, builds the company culture, works closely with his management team and employees and consultants for their expertise to assist him in making decisions, and oversee and deliver the company's performance.

The Petitioner provided a brief description of the Beneficiary's daily, weekly, and monthly activities, stating that he is regularly meeting with the owners of chains, stores, or groups of retailers at a minimum of two business meetings a day and providing presentation on the company's products. The Petitioner also stated that "as the sole person skilled in the matter, [the Beneficiary] himself has regular meetings with architects, technical bureaus, and general contractor offices in order to implement the European energy saving systems and materials in Puerto Rico." The Petitioner also stated that the Beneficiary is the only executive with the requisite knowledge and experience with these specialized construction products and technologies to successfully represent these

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manufacturers in the Puerto Rican market and negotiate with local construction materials retailers for the prosperity of his company.

The Petitioner submitted a revised organizational chart depicting the Beneficiary as the CEO, supervising an accounting company, [REDACTED] lawyers; its [REDACTED] fashion department; its wholesale activity of the construction department; and its new business venture [REDACTED]. Its fashion department is shown to include one full-time store manager and two full-time “Sellers.”

The Director denied the petition on January 25, 2016, concluding that the Petitioner did not establish that the Beneficiary will be employed in an executive capacity under the extended petition. In denying the petition, the Director found that the evidence in the record indicates that the Petitioner’s fashion department had only three employees at the time of filing and that its construction department has never paid any employees. The Director found that the Petitioner’s business, specifically its construction department managed by the Beneficiary, continues to be a one-person operation with the Beneficiary, the sole employee, fulfilling all the day-to-day tasks such as taking and filling orders for imported goods and materials. The Director noted that the Beneficiary works on developing business for the construction department, contacting and meeting with prospective and current suppliers and customers and ordering and arranging for the import of goods from Europe to Puerto Rico, and that there is no evidence that the Petitioner has anyone else fulfilling these operational duties.

On appeal, the Petitioner states that the Beneficiary will be employed in a primarily executive capacity as “the evidence shows that it works closely with its Bulgarian affiliate, which employs technical and administrative staff who are dedicated to supporting the growth of the group’s business in Puerto Rico and the Americas.” The Petitioner stated that the Beneficiary “is responsible for all executive decisions, policy making, all operations, the hiring and firing of personnel, and the overall development of both the U.S. Petitioner and its related company in Bulgaria” and enjoys the full support of his administrative and sales staff of employees in Bulgaria and at the [REDACTED] store in Puerto Rico, which is sufficient to relieve him from primarily performing non-executive tasks. The Petitioner also stated that its fashion department had seven employees at its [REDACTED] franchise in Puerto Rico throughout 2014 and 2015.

B. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that the Beneficiary will be employed in an executive capacity under the extended petition.

As previously noted, the Petitioner has consistently asserted that the Beneficiary will be employed in an executive capacity in the United States. As such, we will focus our analysis of the Beneficiary’s position and job duties on whether or not the Beneficiary will be employed in an executive capacity under the extended petition.

The statutory definition of the term “executive capacity” focuses on a person’s elevated position within an 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.*

The definitions of managerial and executive capacity each have two parts. First, the Petitioner must show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the Petitioner’s other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533. It is the Petitioner’s burden to establish that someone other than the Beneficiary carries out the day-to-day, non-executive functions of the organization.

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner’s description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner’s description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.*

Here, the Petitioner characterized the Beneficiary’s role as the president and chief executive officer of its U.S. company, and initially did not provide a description of his job duties, other than reiterating the statute. 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. *See 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.).

In response to the RFE, the Petitioner provided a broad description of the Beneficiary’s proposed job duties and a brief description of his daily, weekly, and monthly activities, but did not indicate the amount of time the Beneficiary will devote to each. Whether the beneficiary is an executive employee turns on whether the petitioner has sustained its burden of proving that his duties are *primarily* executive. *See* sections 101(a)(44)(B) of the Act. The Petitioner lists the Beneficiary’s duties as including both executive and operational tasks, but does not quantify the time the Beneficiary spends on them. While some of the listed duties appear to be executive, such as directing the company’s financial operations; analyzing and monitor financial sales reports;

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establishing, directing, and implementing corporate and operational policies, objectives, and activities of company; and making all policy and business decisions to develop the [REDACTED] (Fashion Department) brand and its respective image in Puerto Rico, the Petitioner has not shown that the Beneficiary will *primarily* perform these duties. This lack of documentation is important because several of the Beneficiary's daily tasks do not appear to be qualifying duties. Specifically, serving as the primary liaison with all the companies represented regarding contractual obligations, supply, inventory, and branding policies; negotiating and approving contracts or agreements with suppliers, distributors, federal or state agencies, or other organizational entities; representing foreign manufacturers and locating prospective marketing channels for placing construction products and technologies in the Puerto Rican and the U.S. market overall; negotiating contracts with distributors in Puerto Rico and facilitating the import of materials from overseas manufacturers; developing wholesale relations and building solid and long-term cooperation with both U.S. and local Puerto Rican chains; regularly meeting with the owners of chains, stores, or groups of retailers at a minimum of two business meetings a day and providing a presentation on the company's products; meeting regularly with architects, technical bureaus, and general contractor offices in order to implement the European energy saving systems and materials in Puerto Rico; and representing foreign manufacturers in the Puerto Rican market, do not fall directly under traditional executive duties, as defined in the statute. The Petitioner's description of the Beneficiary's duties and his daily, weekly, and monthly activities clearly indicate that he devotes a portion of his time to day-to-day operational duties. Without a specific and detailed breakdown of how the Beneficiary will spend his time, we are unable to conclude that the Beneficiary would primarily perform executive duties.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed 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.

In this case, the Petitioner only has three employees in its fashion department and zero employees in its construction department, other than the Beneficiary. As such, it appears that the Beneficiary will perform all of the non-executive tasks associated with sales, inventory, logistics, imports, and marketing associated with the construction department. Even if the non-qualifying duties discussed above had not been clearly assigned to the Beneficiary, the Petitioner does not demonstrate that it has any employees to relieve the Beneficiary from performing these operational and administrative tasks.

The Petitioner now claims, for the first time on appeal, that the Beneficiary's position in the United States will be supported by current employees at the foreign entity. The Petitioner specifically states that the Beneficiary is employed in a primarily executive capacity and enjoys the support of his administrative and sales staff in Bulgaria and at its [REDACTED] store in Puerto Rico, which is sufficient to relieve him from primarily performing non-executive tasks. However, the Petitioner's

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claims are not supported by the record. First, the only evidence provided by the Petitioner of its fashion department staff is its Forms 941 for 2014 and 2015; the Petitioner did not submit copies of any employment contracts or position descriptions for its U.S. employees and it appears that they are sales staff for its clothing retail store. Given that the Petitioner does not have any employees within its construction department, it appears that the Beneficiary does not have any support staff to relieve him from performing non-executive duties in the United States. Second, in examining the evidence submitted with regard to the Petitioner's foreign staff, it is not apparent that this staff will support the Beneficiary in the proffered position. The Petitioner submitted an organizational chart for the foreign entity indicating that it has a "property management and rental" employee supervising three subordinate "auxiliar employees," an "export to the Puerto Rico, USA and Caribbean" employee, and a "sales manager" and "technical manager," both supervising two "worker waterproofing" positions. The Petitioner also submitted six employment contracts for its employees at the foreign entity, five of which are listed on the foreign entity's organizational chart. The employment contracts do not list any of the employees' duties in their listed positions or indicate that they perform or will perform any duties related to the U.S. company or in support of the Beneficiary's position in the United States. The Petitioner did not submit any additional information in support of its claim that the foreign employees support the Beneficiary in his executive position in the United States or that they relieve him from performing day-to-day operational tasks associated with sales, inventory, logistics, imports, and marketing. 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) (quoting *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Further, while the Petitioner's business plan stated that the U.S. company would use the marketing materials created by the foreign entity, and provided samples of those materials, the actual marketing tasks of circulating those materials and promoting the U.S. company would have to be performed by the Beneficiary, as he does not have any subordinates or other support staff to do so.

Furthermore, the Petitioner's insistence that it will hire an additional six employees at each of its future construction retail and wholesale locations in Puerto Rico, [REDACTED] and [REDACTED] Florida, is not sufficient to show that the Beneficiary currently has sufficient staff to relieve him from performing non-executive duties. Not only would that potential staff only be available to perform the tasks associated with running their respective retail storefronts, rather than relieving the Beneficiary from the non-executive duties of running the construction department of the business, but they cannot be considered in this petition as they are speculative employees for a future endeavor of the company. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

While the Beneficiary may represent a high-level employee of the Petitioner; this alone is not sufficient to establish that he will be *primarily* employed as an executive. The designation hinges on whether or not the Petitioner demonstrates that it has the requisite level of subordinate staff capable of carrying out the duties associated with the day to day operation of the business. In this case,

incorporating our earlier discussion of the deficiencies of the job description provided and the lack of evidence regarding the entity's staffing, we find that the Petitioner has not established that it has an organizational structure sufficient to elevate the Beneficiary to a position that is primarily executive in nature.

We note 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* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. USCIS* 469 F.3d at 1316 (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d at 42; *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). 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., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Here, it is not the size of the company that is determinative, but rather that the Petitioner has not shown that it has current employees to relieve the Beneficiary from performing the non-executive tasks associated with sales, inventory, logistics, imports, and marketing of its construction department in the United States.

Further, in the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). 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 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. In the instant matter, the Petitioner has not reached the point that it can employ the Beneficiary in a predominantly executive position.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary will be employed in an executive capacity under the extended petition.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above reason. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013). Here, that burden has not been met.

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ORDER: The appeal is dismissed.

Cite as *Matter of C-G-, LLC*, ID# 18337 (AAO Aug. 15, 2016)