

(b)(6)



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

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

MATTER OF [REDACTED]

DATE: AUG. 18, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a company operating an English school and a cellular telephone retail store, seeks to extend the Beneficiary's employment as its general manager 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 would be employed in a managerial or executive capacity under the extended petition.

The matter is now before us on appeal. In its appeal, the Petitioner contends that the Director incorrectly applied the law to the facts of this case. Specifically, the Petitioner asserts that the Director assessed only whether the Beneficiary would be employed in an executive capacity but did not consider the Petitioner's claim that she would be employed in a managerial capacity.

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:

(b)(6)

Matter of [REDACTED]

- (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. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the Petition based on a finding that the evidence of record did not establish that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.<sup>1</sup>

In its appeal, the Petitioner contends that the Director addressed only whether the Beneficiary qualifies as an executive and did not address the Petitioner's claim that she qualifies as a manager. In light of the Petitioner's claim on appeal that the Beneficiary qualifies as a personnel manager, we will restrict our analysis to whether the Beneficiary will be employed in a managerial 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;

---

<sup>1</sup> Upon review of the Director's decision dated November 18, 2015, we note that the Director cited the statutory definitions of both managerial capacity and executive capacity. While the Director stated that she would focus on the definition of "executive capacity," the decision reflects that she conducted a thorough review of the evidence submitted and also considered the elements of the statutory definition of "managerial capacity." For example, the Director analyzed whether the Beneficiary would supervise a staff of subordinate managerial, supervisory, or professional personnel under the extended petition. See section 101(a)(44)(A)(iii)-(iv) of the Act.

(b)(6)

Matter of [REDACTED]

- (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.

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 July 30, 2015. The Petitioner stated on the Form I-129 that it earned \$433,134 in 2014 and noted in a support letter that it has "7 full time employees." The Petitioner indicated that it "engages in the operations [*sic*] of [REDACTED] brand language school in [REDACTED] Florida and a cellphone/accessories retail store." The Petitioner explained that "the school offers intensive English language courses [...] using innovative technology" allowing students "to learn to speak in English in a short period of time." Further, the Petitioner stated that it "opened a cellphone/accessories retail store on February 13, 2014."

The Petitioner indicated that as general manager, the Beneficiary "plans and manages the resources and assets of our operations for optimal profitability and is responsible for managing the day to day business and operations," noting that she "establishes solid and long term relations with customers." The Petitioner further described the Beneficiary primary responsibilities as follows:

- To manage the operations of the [Petitioner];
- To provide leadership to the day-to-day operations of the school, while maintaining focus on [REDACTED] corp. goals and cellphones/accessories company;
- To develop management reports;
- To manage franchise reports;
- To analyze sales statistics to determine franchise growth potential;

Matter of [REDACTED]

- To establish [sic] performance goals for all employees, and monitor performance on a continual basis;
- To develop and participate with senior staff in the development of the strategic marketing plan for the [REDACTED] school;
- To coordinate activities for business operation to ensure that goals and objectives are accomplished within prescribed time frame and budget parameters;
- To establish and enforce operating procedures and work standards that ensure adequate efficiency; and
- To perform any other managerial function as necessary, and delegate responsibilities as necessary to ensure smooth operation of the business.

The Petitioner submitted a copy of its 2014 IRS Form 1120, U.S. Corporation Income Tax Return, and evidence of wages paid to a total of eight full- and part-time employees during the first quarter of 2015. The Petitioner did not submit an organizational chart illustrating the company's staffing and management structure.

The Director later issued a request for evidence (RFE) stating that the initial evidence lacked documentation reflecting the scope and structure of the Petitioner, the services it provides, and the Beneficiary's role within the organization. As such, the Director requested that the Petitioner submit a letter describing the Beneficiary's typical managerial or executive decisions and the percentage of time she would devote to each of her tasks. Further, the Director asked the Petitioner to provide an organizational chart listing all employees by name and job title along with information on their duties, education levels, and salaries. The Director also requested that the Petitioner submit state quarterly wage reports for the second and third quarters of 2015.

In response, the Petitioner clarified that it operates a franchise business, namely [REDACTED] English courses, and a [REDACTED] retail store at a different location. The Petitioner submitted evidence of its business activities at both locations, including its franchise agreement for the [REDACTED] language school and copies of individual student agreements, as well as receipts for cell phones and accessories sold at its retail store. The Petitioner submitted a profit and loss statement covering January through September 2015 indicating that it earned \$652,636.87, \$495,874.02 of which was garnered through the retail store.

In an additional support letter, the Petitioner stated that the Beneficiary "has the overall responsibility for the management and direction of the company's administrative, human resources, finance, customer service, and operational functions of the company" and makes "executive decisions related to the company's administrative and operational management, staff recruitment, and management, financial performance, and sales and customer service functions."

In an additional duty description, the Petitioner indicated that the Beneficiary would devote 10% of her time to coordinating "general operations" including "supervising the reports and work that is performed by the accounting firm (subcontractor) and the Commercial Manager," "establishing

Matter of [REDACTED]

policies and objectives,” and overseeing the preparation of reports.” The Petitioner explained that the Beneficiary would spend 15% of her time providing “leadership to the day-to-day operations of the school and the mobile store,” including “supervising and evaluating performance.” The Petitioner stated that the Beneficiary will focus 5% of her time reviewing “management reports submitted by the Managers” related to “adherence [to] adopted strategies.” The Petitioner indicated that the Beneficiary will devote 5% of her time to managing franchise assets comprised of “actively engag[ing] in the decision of the purchase of new educational materials of [REDACTED] via the “Education Manager” and “evaluating and performing administrative and finance planning.”

Further, the Petitioner explained that the Beneficiary will spend 10% of her time on reviewing and analyzing sales reports involving “potential cost reduction, program or policy change,” “ensuring uninterrupted product and service supply,” “determining trends in products,” and “establishing products and service pricing and credit policies.” The Petitioner stated that the Beneficiary will focus 10% of her time on establishing performance goals for employees and monitoring their performance and performing “annual performance reviews.” The Petitioner indicated that the Beneficiary will devote 10% of her time on the “development and budget of the strategic marketing plan” including reviewing the “market research report” and managing “advertisement strategies.” The Petitioner explained that the Beneficiary will spend 10% of her time reviewing and deciding on “internal forms, procedures and tools aimed at increasing operational efficiency and risk management” and “establishing operational standards and metrics.” Finally, the Petitioner stated that the Beneficiary will focus 10% of her time on establishing and enforcing “operating procedures and work standards,” 5% “meeting with managers,” and the remaining 10% on “auditing of merchant and operational accounts” and establishing “budgetary guidelines.”

The Petitioner submitted an organizational chart indicating that the Beneficiary would act as the general manager of both the [REDACTED] and [REDACTED] sections of the business. In the Beneficiary’s capacity as general manager of [REDACTED] the chart indicated that she would supervise [REDACTED] education manager/teacher and [REDACTED] commercial manager. As general manager of the [REDACTED] store, the chart indicated that the Beneficiary will oversee [REDACTED] manager supervisor, who in turn will supervise [REDACTED] store manager. The chart further showed that [REDACTED] will oversee three sales employees, [REDACTED] and [REDACTED] who is designated as a supervisor, as well as two “promoters,” [REDACTED] and [REDACTED]

The Petitioner provided duty descriptions for each of the above listed positions. The Petitioner indicated that the education manager would be tasked with supervising “educational activities,” establishing and enforcing operating procedures and work standards, preparing and teaching classes, conducting assessments, and completing training in [REDACTED] teaching methods. The Petitioner asserted that the education manager position requires a bachelor’s degree in a foreign language and five years of managerial experience. The Petitioner indicated that [REDACTED] in his commercial manager and manager supervisor roles, would be responsible for “the development of the strategic marketing plan for the [REDACTED] school,” implementing “performance evaluations to develop and control sales program,” determining “monthly sales targets,” processing new enrollments,

Matter of [REDACTED]

developing and following up on leads, coordinating “with the headquarters sales director,” “making sure the company’s leadership is staffed correctly at all times,” and providing “employee operations manuals.” The Petitioner noted that [REDACTED] position requires a “bachelor’s in Business Administration or equivalent.”

Furthermore, the Petitioner explained that the store manager would be tasked with “leadership and direction to the entire store team,” overseeing “sales management, operational and personnel functions,” “creating long-term strategies and leading company initiatives,” and “operational excellence and compliance with company procedures.” The Petitioner indicated that this position also require a bachelor’s degree in business administration or “equivalent experience.”

The Petitioner stated that the education manager and commercial manager hold full-time positions paid at an hourly rate of \$19 and \$12.50, respectively. The Petitioner stated that the store manager, sales representatives and promoters are part-time employees earning \$8.00 to \$8.05 per hour.

In support of its RFE response, the Petitioner submitted the requested Florida quarterly wage reports, as well as IRS Forms 941, Employer’s Quarterly Federal Tax Returns, for the second and third quarters of 2015, and its detailed payroll register for 2015. These records confirm that the Petitioner had seven employees at the time of filing in July 2015. The employees working at that time were paid the following wages during the quarter:<sup>2</sup>

<u>Position</u>	<u>Wages Paid</u>	<u>Average Hours/Week</u>
General Manager	\$7500	40
Commercial Manager	\$6200	40
Education Manager	\$4763.50	19
Store Manager	\$1408.10	13.5
Sales Representative Supervisor	\$2249.98	21.5
Sales Representative	\$2095.01	20
Promoter	\$1997.09	19

In denying the petition, the Director found that the Beneficiary’s duties were not consistent with the Petitioner’s scope and structure and not probative of the Beneficiary’s actual qualifying tasks. The Director stated that the submitted duty descriptions were generic and repetitive, and they appeared to paraphrase the statutory definitions of managerial and executive capacity. The Director concluded that the Petitioner did not establish that the Beneficiary would be sufficiently relieved from performing non-qualifying operational tasks. The Director found that the duties of the Beneficiary’s asserted subordinates indicated that they are performing the operational duties of the business and not acting in their asserted managerial or professional capacities.

---

<sup>2</sup> The record reflects that the Petitioner hired one of the sales representatives and one of the promoters subsequent to the filing of this petition.

Matter of [REDACTED]

In its appeal, the Petitioner contends that the Director mistakenly based the decision on whether the Beneficiary qualifies as an executive and not on the basis of whether she acts in a managerial capacity overseeing managerial and professional subordinates. The Petitioner asserts that the evidence demonstrates that the Beneficiary devotes a majority of her time to managerial functions and that the organization supports her in a qualifying managerial capacity. The Petitioner acknowledges the Director's finding that the record does not establish that the Beneficiary's subordinates are professionals. However, the Petitioner emphasizes that the Beneficiary is not a first-line supervisor, but a personnel manager, pointing to her supervision of the manager supervisor who has subordinate employees.

## 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 a managerial capacity under the extended petition.

When examining the managerial or executive capacity of the Beneficiary, we will look first to the Petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(1)(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 a managerial or executive capacity. *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.

In the current matter, the Petitioner has submitted a vague duty description that does not demonstrate that the Beneficiary would devote her time primarily to qualifying managerial tasks. Although the Petitioner submits a lengthy duty description for the Beneficiary, the description is so general that the listed tasks and responsibilities could apply to any manager in any company or industry. For instance, the description indicates that the Beneficiary is responsible for "establishing policies and objectives," "overseeing the preparation of reports," providing "leadership to the day-to-day operations of the school and the mobile store," "developing and implementing company policies," "implementing employee incentive initiatives," reviewing "management reports," "evaluating and performing administrative and finance planning," "ensuring uninterrupted product and service supply," "establishing products and service pricing and credit policies," deciding on the "strategic marketing plan," reviewing and deciding on "internal forms, procedures and tools," and establishing and enforcing "operating procedures and work standards," amongst various other vague duties.

However, at no point does the Petitioner articulate or provide supporting documentation to substantiate the Beneficiary's performance of her asserted managerial duties. The Petitioner

(b)(6)

Matter of [REDACTED]

provides no details or documentation to corroborate policies and objectives she established, management reports she reviewed, employee incentive initiatives she implemented, financial planning she completed, product or supply issues she dealt with and overcame, pricing and credit policies she established, evidence of the company's strategic marketing plan, or forms, procedures, tools, operating procedures or work standards she implemented in her capacity as general manager. It is reasonable to expect that the Petitioner would provide some detail and documentation regarding the Beneficiary's specific actions, particularly since it has employed her as general manager since 2012. 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. Conclusory assertions regarding a beneficiary's employment capacity are not sufficient. 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).

Here, the fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act. While the Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, the position descriptions alone are insufficient to establish that her actual duties, as of the date of filing, would be primarily managerial or executive in nature.

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

The Petitioner's primary contention on appeal is that the Beneficiary will act primarily as a manager by virtue of her supervision of managerial subordinates, namely, the commercial manager/manager supervisor. 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. 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. 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).

The Petitioner's organizational chart shows that the commercial manager/manager supervisor has no subordinates in his capacity at the [REDACTED] while he is depicted as overseeing the store

(b)(6)

Matter of [REDACTED]

manager at the mobile phone retail store. The record reflects that he works 40 hours weekly. However, the Petitioner does not state how the commercial manager/manager supervisor divides his time between the two separate businesses, and most of his stated duties relate to the [REDACTED] and include few supervisory responsibilities. Otherwise, [REDACTED] duties are reflective of a sales representative or operational employee, stating that he is responsible for delivering sales presentations, communicating with prospective clients, processing new enrollments for [REDACTED] and developing and following up on leads. The store manager is depicted as a supervisor, but the record shows this employee works very limited hours and earns the same hourly wage as the sales representatives and promoters she is claimed to supervise. The evidence must substantiate that the duties of a beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; job titles are not probative of an employee's managerial or supervisory role and will not establish that an organization is sufficiently complex to support a qualifying personnel manager position. Here, the record does not establish that the Beneficiary would be primarily supervising subordinate managers or supervisors.

Further, as noted by the Director and acknowledged by the Petitioner on appeal, the evidence of record does not demonstrate that the Beneficiary would primarily supervise professional subordinates to qualify her as personnel manager.<sup>3</sup> Although the Petitioner suggested that the positions of education manager, commercial manager/manager supervisor, and store manager require a bachelor's degree, the Petitioner neither claims nor submits supporting evidence that these employees actually hold the required degrees or that they act in positions and perform duties that normally require the completion of a bachelor's degree. As such, the evidence provided does not establish that the Beneficiary qualifies as a personnel manager based on the supervision of professional subordinates.

Further, based upon the nature of the Petitioner's business and the number and types of employees working at the time of filing, the totality of the record does not support a conclusion that the Beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates would perform the actual day-to-day tasks of operating the [REDACTED] and a retail cell phone store.

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 petition for classification as a 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 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

---

<sup>3</sup> In evaluating whether a 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. Cf. 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). 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."

(b)(6)

Matter of [REDACTED]

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).

Although the Petitioner stated in its initial letter of support that it employs seven full-time workers, it later stated and provided evidence that five of the seven employees were working on a part-time basis. Of these employees, only three are claimed to work at the [REDACTED] where no one is claimed to work on a full-time basis. The sole instructor at the school also serves as education manager, and works an average of less than 20 hours per week. The Beneficiary and commercial manager are the school's other employees, but are claimed to divide their time between the school and the retail store. The terms of the Petitioner's franchise agreement with [REDACTED] suggest that the franchised schools are typically staffed by administration/operational managers, commercial/sales managers and multiple instructors and it is unclear how the Beneficiary is relieved from performing non-qualifying duties given the staffing levels at its [REDACTED] location.

The Petitioner's retail mobile phone store is likewise staffed entirely by part-time employees who worked a combined average of 74 hours per week during the quarter in which the petition was filed. Assuming that the store is likely open daily for eight or more hours, the record does not show how its staffing levels would be sufficient to handle more than routine sales functions in the store, notwithstanding the Petitioner's claim that it has a four-tiered management structure with a general manager, manager supervisor, store manager, sales supervisor overseeing one sales person, and one promoter.

Therefore, as noted by the Director, given the Petitioner's operation of two businesses with extended operating hours and its staffing levels, the Petitioner has not established that its organizational structure is sufficient to support the Beneficiary in a managerial capacity and relieve her from significant involvement in the day-to-day operation of the Petitioner's two businesses.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity under the extended petition.

### 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 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.

**ORDER:** The appeal is dismissed.

Cite as *Matter of* [REDACTED] ID# 17925 (AAO Aug. 18, 2016)