



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

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

MATTER OF T-H-B-, INC.

DATE: AUG. 19, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a holding company, seeks to temporarily employ the Beneficiary as its president 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 had not established that the Beneficiary will be employed in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Beneficiary will be employed in a qualifying capacity and that the Director erred by not considering the Beneficiary's responsibility for oversight of its subsidiary companies.

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 proposed 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.

II. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition determining that the Petitioner had not established that it would employ the Beneficiary in a managerial or executive capacity.

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

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

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

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- (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 July 27, 2015. On the Form I-129, the Petitioner claimed it had 15 current employees in the United States and a gross annual income of \$1,383,849.¹

In a letter dated July 23, 2015, the Petitioner stated that it was incorporated on September 5, 2012, in the Commonwealth of Virginia. The Petitioner noted that it has been acquiring and developing businesses and required the Beneficiary's services to oversee these efforts. The Petitioner indicated that in 2012, it acquired [REDACTED] a used car company, and in 2015 acquired [REDACTED] a full-service restaurant operation, and [REDACTED] a catering company. The Petitioner shares its office address with [REDACTED]

The Petitioner also stated that it "intends to continue acquiring and/or developing additional businesses in different industry sectors to add to the list of Portfolio Companies." The Petitioner noted that in the position of President, the Beneficiary "shall oversee the management of the Portfolio Companies as well as its efforts to further diversify its holdings." The Petitioner submitted its business plan which included the Beneficiary's proposed job duties and its organizational chart.² The organizational chart included the three companies established or acquired by the Petitioner and identified the staff positions for each of the companies as follows: [REDACTED] with one general manager, an assistant manager (car sales and finance), a sales person, a technician (workshop), a title clerk, and a lot boy (detailer); [REDACTED] with one general

¹ The Petitioner submitted documentation to support the L-1A petition, including evidence regarding the proffered position, its employees, and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

² In response to the Director's request for evidence (RFE), the Petitioner provided a list of the Beneficiary's duties and the approximate time he will spend on those duties. Those duties will be discussed below.

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manager, two chefs, one assistant manager, two prep cooks, and two individuals in the position of driver/host/server; and [REDACTED] with a catering manager, two cooks, a prep cook and a driver. The organizational chart provided the names of employees in each of the positions, except for the positions listed for [REDACTED]³

The initial record also included the following: the Petitioner and [REDACTED] 2014 IRS Forms 1120, U.S. Corporation Income Tax Return; [REDACTED] IRS Form 941, Employer's Quarterly Federal Tax Return, for the second quarter of 2015, indicating five individuals were employed in the quarter; the organizing and ownership documents for [REDACTED] and [REDACTED] and the business license for [REDACTED] noting the business started on November 20, 2013, and the business license for [REDACTED] showing the license was issued on June 18, 2015.

In a letter dated October 26, 2015, submitted in response to the Director's RFE, the Petitioner repeated the initial description of the Beneficiary's duties, expanded upon some of the duties, and allocated the Beneficiary's time to the duties as follows:

- Work with the President of the foreign parent company to develop the Petitioner's and the Portfolio Companies' long-term vision, goals, values and mission (5%)
- Develop and implement policies and procedures that allow the Petitioner and the Portfolio Companies to reach the long-term vision, goals, values and mission by: monitoring trends, issues, and challenges in order to facilitate policy-making and recommending policies[] (5%)
- Oversee the General Managers of the Portfolio Companies and insure [*sic*] that their operations remain in line with established policies and procedures, including providing general oversight of the General Managers in their managing of day-to-day operations, and by assisting them when needed in order to assure smoothly functioning, efficient operations (25%)
- Evaluate, modify and implement policies and procedures on an ongoing basis, as needed (5%)
- Identify and effect the acquisition, establishment and development of additional businesses to add to the Portfolio Companies, including, evaluating industry profitability trends, identifying targets, negotiating acquisition deals and contracts, including leases, franchise agreements, and purchase agreements (20%)
- Interview and hire managers to operate additions to the Portfolio Companies in collaboration with the Board of Directors and the Parent Company (10%)
- Work with General Managers and the Parent Company to develop and monitor budgets for each [P]ortfolio Company, including reviewing income statements and cashflow reports to determine past performance (15%)

³ This entity is sometimes identified as [REDACTED] and sometimes [REDACTED]. The organizing documents identify the name of the limited liability company as [REDACTED]

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- Work with General Managers of Portfolio Companies in assessing staffing needs and making hiring and firing decisions, including determining how many staff members are required, what skills are required, and the nature and duration of training which is required for each position (5%)
- Conduct performance reviews of General and subsidiary managers of the Portfolio Companies on such factors as [s] knowledge of the business, leadership skills, initiative, quality of objective results, among others (5%)
- Prepare progress/performance reports of the Portfolio Companies for the Board of Directors and the [f]oreign parent company, including financial, staffing, customer and market and industry details (2%)
- Represent the US Subsidiary before all external constituencies, including government agencies, the media and others, acting as an advocate for issues relevant to the Petitioner or the Portfolio Companies and their products and services (3%).

The Petitioner also submitted IRS Forms 941, for the third quarter of 2015, showing [REDACTED] employed four individuals in the quarter. The Petitioner also submitted an offer of employment on the letterhead of [REDACTED] to an individual for the position of general manager of [REDACTED] which is dated and accepted September 15, 2015, and to an individual for the position of general manager of [REDACTED] dated and accepted September 21, 2015. The record also included an employee profit sharing agreement entered into between [REDACTED] and [REDACTED] employee.⁴

The Director denied the petition determining that the record did not establish that the Petitioner had sufficient staff to relieve the Beneficiary from performing day-to-day non-qualifying duties and that the Beneficiary will be employed in an executive capacity. The Director concluded that the Beneficiary does not qualify for classification under section 101(a)(15)(L) of the Act.

On appeal, the Petitioner asserts that as its business is a holding company limited to the ownership of stock and the supervision of management of subsidiary entities, there are no day-to-day operations for the Beneficiary to perform. Rather, it is the subsidiary companies that manufacture products or provide services. The Petitioner notes that the Director acknowledged the staff and operations of its portfolio of companies and asserts that the Director erred when not viewing its parent company and the subsidiary operating companies as integral parts of its organization.

⁴ This individual is identified as the general manager of [REDACTED] on the previously submitted organizational chart.

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B. Analysis

Upon review of the petition and the evidence of record, we conclude that the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States.

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(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 a managerial or in an 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.

The Petitioner has submitted a broad overview of the Beneficiary's duties. Upon review of the descriptions submitted, the Petitioner does not include detail regarding the actual tasks the Beneficiary is expected to perform. For example, the Petitioner asserts that the Beneficiary will spend 15 percent of his time working with the foreign entity and its subsidiary companies on vision, goals, values and mission, as well as on developing and implementing policies and procedures, and evaluating and modifying policies and procedures. This description does not convey an understanding of the Beneficiary's day-to-day duties but rather recites his vague job responsibilities and broadly-cast business objectives.

Of more significance, the Petitioner claims that the Beneficiary will spend 25 percent of his time overseeing the general managers of the portfolio companies, assisting them when needed to achieve smooth operations and he will spend 15 percent of his time developing and monitoring budgets for each subsidiary company and reviewing income statements and reports. However, upon review of the totality of the record, only one individual identified as a general manager was employed when the petition was filed on July 27, 2015.⁵ Thus, it is reasonable to believe that the Beneficiary would be performing all supervisory, administrative, and budgetary tasks associated with [REDACTED] and [REDACTED] when the petition was filed. 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. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a

⁵ Although the organizational chart within the Petitioner's business plan identifies an individual in a general manager position for [REDACTED] the record does not include any documentary evidence demonstrating the individual was actually employed when the petition was filed. Additionally, the Petitioner does not identify when this restaurant opened under its management. Further, the record includes an employment offer and acceptance for this position dated September 15, 2015, subsequent to the date this petition was filed.

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).

Additionally, this 40 percent of the Beneficiary's time is not well detailed. The Petitioner does not disclose who will be responsible for performing the operational and administrative tasks, including the bookkeeping, customer service, and marketing of these companies. We cannot ascertain if these generally described duties are primarily managerial or executive duties or whether they comprise the necessary and routine tasks of owning and operating a business. 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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Further, the Petitioner states that the Beneficiary will spend an additional 20 percent of his time identifying, researching, and negotiating for new businesses. While this activity may incorporate some discretionary decision-making and require only general supervision from the Board of Directors, we are unable to ascertain from this general description that these tasks fall within the parameters of the statutory definition of managerial or executive capacity. The Beneficiary would be the sole employee of the petitioning holding company and would not have an assistant or other staff to which he could delegate non-qualifying duties associated with the company's research and expansion activities. Accordingly, we are unable to conclude that this duty and its incumbent responsibilities are managerial or executive in nature.

We also point out 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 his actual duties are 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 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

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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 a beneficiary to direct and a 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 he or she has an executive title or because he or she “directs” the enterprise as an owner or sole managerial employee. A 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.*

A review of the totality of the record reveals that the Beneficiary does not have a subordinate level of managerial employees to direct. As stated above, the Petitioner does not support its claim that its three subsidiary companies employ general managers. As referenced above, the record does not include evidence that the Petitioner, [REDACTED] or [REDACTED] employed anyone when the petition was filed. The Petitioner submitted an organizational chart identifying seven employees working for [REDACTED]. However, the Petitioner has submitted documentary evidence of only four individuals employed by [REDACTED] when the petition was filed. Regarding the four employees on [REDACTED] IRS Form 941, we note that this document does not identify the names of the employees and thus we are unable to ascertain which positions were filled as of July 2015. Without the company’s operating hours, employee schedules, documentation identifying the positions the employees hold, and evidence of their duties and time spent on those duties, it is reasonable to believe that [REDACTED] general manager also performs sales, administrative duties, and financial negotiations associated with purchasing and selling the company’s inventory. Accordingly, we cannot conclude that [REDACTED] general manager actually performs managerial tasks.

Upon review, the Petitioner has not provided a probative, detailed description of the Beneficiary’s duties demonstrating that he will perform tasks primarily in an executive capacity. The Petitioner has not credibly identified a subordinate level of managerial employees for the Beneficiary to direct or subordinate employees to perform the day-to-day operational tasks of the three subsidiary businesses. The record does not demonstrate that the Beneficiary will primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the holding company and its subsidiaries’ enterprises.

Although the Petitioner does not assert that the Beneficiary will primarily perform in a managerial capacity, we will address this issue. The statutory definition of “managerial capacity” allows for both “personnel managers” and “function managers.” *See* sections 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. The statute plainly states that a “first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor’s supervisory duties unless the employees supervised are professional.” Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(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. *See* 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

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Here, the Petitioner's organizational chart shows the Beneficiary as its sole employee with oversight duties of three subsidiary companies. However, the Petitioner has not established that the three subsidiary entities were operational and staffed when the petition was filed. We note for example, that although the record includes the Petitioner's purchase of a Chinese restaurant in May 2015, the record does not include evidence of when the restaurant was opened under its new brand [REDACTED]. The record does not identify when the restaurant became operational or when employees were hired. Similarly, the record does not identify any employees working for [REDACTED] when the petition was filed. Further, although the record includes evidence that [REDACTED] employed four staff in the third quarter of 2015, there is insufficient evidence to establish who was employed or that any of these individuals held supervisory, managerial, or professional positions. Moreover, the record does not include sufficient evidence to establish that the Beneficiary would be relieved from performing non-qualifying operational, administrative, and first-line supervisory duties of non-professional employees. Rather, the record suggests that the Beneficiary would be required to perform the marketing, budgetary, and administrative tasks necessary to maintain the operations of the three subsidiary entities.

Upon review of the totality of the information in the record, the Petitioner has not established that the Beneficiary would be primarily supervising and controlling the work of other supervisory, professional, or managerial employees.

The Petitioner has not established, in the alternative, that the Beneficiary will be employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that a beneficiary will manage an essential function, a petitioner must clearly describe 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 a beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, a petitioner's description of a beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform the duties related to the function.

Here, the Petitioner does not identify a specific function that the Beneficiary will manage. Additionally, the general descriptions of the Beneficiary's duties do not include sufficient information regarding what the Beneficiary will actually do, such that we may conclude that the Beneficiary will manage a specific function. The actual duties themselves will reveal the true nature of the employment. See *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

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 petition for classification as a multinational manager or executive. See section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would

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perform the non-managerial or non-executive operations of the company, or a “shell company” that does not conduct business in a regular and continuous manner. *See e.g. Family Inc. v. USCIS* 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and does not believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15.

Upon close review of the descriptions of duties set out in the record and the lack of substantive information regarding the Beneficiary’s and the claimed subordinates’ actual roles in the business, the record does not include sufficient probative details demonstrating that the Petitioner’s organization is sufficiently developed to support a managerial or executive position as statutorily defined. While it appears that the Petitioner’s subsidiaries were likely to employ additional staff in the future, 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).

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

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.

ORDER: The appeal is dismissed.

Cite as *Matter of T-H-B-, Inc.*, ID# 18037 (AAO Aug. 19, 2016)