



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

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

MATTER OF F-C- INC.

DATE: AUG. 22, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a one-employee company selling leather repair kits, seeks to employ the Beneficiary as its president and chief executive officer (CEO) 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 a managerial or executive capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Beneficiary would not be employed in a managerial or executive capacity in the United States.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred in misstating facts of record and erroneously applying the law.

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

#### I. LEGAL FRAMEWORK

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, 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 AN EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that Beneficiary would be employed in a managerial or executive capacity. However, the 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.

Finally, 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 October 16, 2015. On the Form I-129, the Petitioner indicated that it has one current employee in the United States and a gross annual income of

\$710,000. In its letter of support, the Petitioner stated that it distributes a “unique range of cleaning, repair and restoration products” for leather, fabric, and wood goods. The Petitioner described the Beneficiary’s duties in the United States as follows:

He will operate within our U.S. headquarters focusing on the expansion of our U.S. business strategies, managing and hiring professional level staff, increasing productivity, enabling sales targets achievement through the management of all staff, and overseeing our marketing and finance functions. He will have responsibility for all U.S. operations revenue of \$710,000 and implementing our Business Plan. He will report to our U.K.-based owner . . . .

The Petitioner explained that the Beneficiary’s subordinate staff will include one U.S.-based employee and five U.K.-based subordinates, and that after the Beneficiary receives his visa, the organization intends to add more U.S. based staff. According to the Petitioner, the U.K.-based staff includes the following positions: a general manager, a marketing manager, a marketing assistant, an office manager, and a warehouse manager. The Petitioner also noted that they outsource certain services including shipping, packaging, bookkeeping, accounting, payroll, and digital advertising.

The Petitioner further submitted a copy of a business plan. The plan includes an organizational chart of the Petitioner showing the general manager in the United Kingdom reporting directly to the Beneficiary. According to the chart, a marketing manager, office manager, and warehouse manager all report to the general manager and all are located in the United Kingdom. Also in the United Kingdom, a marketing assistant reports to the marketing manager. The only U.S. employee, the order packer/color matcher, reports to the warehouse manager in the United Kingdom.

According to the Petitioner’s business plan, the Petitioner’s business will include product retail as well as a handbag clinic repair service. The target market for the retail products includes the following: public, trade, stores, and wholesale. The target market for the handbag clinics are owners of designer purses and or the designer brands themselves.

The Petitioner also submitted its 2014 IRS Form 1120, U.S. Corporation Income Tax Return, indicating that it paid \$50,803 in salaries and wages and \$80,000 in officer compensation during 2014. The return also showed that the Petitioner had \$741,515 in gross sales.

The Director issued a request for evidence (RFE) on October 30, 2015, instructing the Petitioner to submit evidence establishing that the Beneficiary will be employed in a qualifying managerial or executive capacity. The Director noted that the Petitioner employs only one employee in the United States.

In response to the RFE, the Petitioner submitted a letter from the President of the foreign entity providing a more detailed position description of the Beneficiary’s position and explaining how the U.S. organization can support an executive level position. The letter stated that as the president/CEO, the Beneficiary will be responsible for the following duties:

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- (30%) focusing on the expansion of our U.S. business strategies and implementing our business plan with full control over all U.S. Operations Revenue of \$710,000, specifically:
  - utilizing strategic knowledge of U.S. market, deep understanding of [the foreign entity and the Petitioner's] products, and developed business acumen to create a long-term vision for [the Petitioner];
  - designing and implementing a business plan to reach this vision and altering that business plan when necessary;
  - developing strategies to increase our U.S. market-share in sales of our products to the general public;
  - overseeing the expansion of our current U.S. advertising efforts from solely online advertising to print-based advertising;
  - overseeing the transition from a U.K.-based marketing firm to a U.S.-based marketing firm in order to more effectively target our advertising to U.S. customers;
  - overseeing the expansion of our customer base into the trade, wholesale, and store retail supply markets;
  - overseeing the setup and implementation of our U.S. [REDACTED] Department including strategic choice of store location, hiring and training of staff, and marketing and advertising to introduce the [REDACTED] concept to a U.S. audience;
- (20%) increasing productivity and enabling sales targets achievement through the management of all staff including:
  - working with the General Manager to set high level goals and targets which the General Manager will communicate to the heads of each functionality- General Management, Marketing, and Warehouse Operations
  - overseeing the General Manager in supporting each head in meeting these strategic goals and targets and holding each responsible for outcomes in their department;
  - overseeing the General Manager's implementation of further training for current and future U.S. Staff by the U.K. training department run by [REDACTED]
- (20%) overseeing our marketing and finance functions including:
  - overseeing the efforts of the U.K.-based Marketing Department (and eventually the U.S.-based Marketing Assistant in conjunction with the U.K.-based Marketing Department) to being print-based advertising in the U.S.;
  - overseeing the efforts of the U.K.-based General Manager (and eventually the U.S.-based General Manager) in managing the finance functions of the company, and;

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- overseeing our U.S. business relationships with the following partner companies to whom we outsource our shipping, packaging, bookkeeping, accounting, tax, and payroll functions until our U.S. operations expand sufficiently to bring these professional functions in-house:
  - Shipping Partner- [REDACTED]
  - Packaging Partner- [REDACTED]
  - Bookkeeper- [REDACTED]
  - Accountant/Tax Advisors- [REDACTED]
  - Payroll Processing- [REDACTED]
  - Landlord- [REDACTED]; and
  - Digital Advertising Agency- [REDACTED]
- **(30%) managing and hiring professional level staff, including:**
  - supervising the recruitment, hiring, and training of a General Manager who will take over responsibility for management of the day-to-day operations of [the Petitioner] from [REDACTED] our U.K. General Manager;
  - supervising the recruitment, hiring, and training of a Marketing Assistant who is intimately familiar with the U.S. market. The Marketing Assistant will report to [REDACTED] the U.K.-based Marketing Manager, and will coordinate with the U.S. marketing firm;
  - supervising the recruitment, hiring, and training of a Trade Sales representative who will lead the expansion of our customer base into the trade, wholesale, and store retail supply markets and will report to the General Manager;
  - supervising the recruitment, hiring, and training of two Customer Service Advisors who will handle sales and customer service calls and emails and will report to the U.K.-based Officer Manager; and
  - supervising the recruitment, hiring, and training of a Warehouse Packer, who will assist [REDACTED] in packing and shipping orders and performing color matches in anticipation of increased sales from our trade, wholesale, and store retail supply market and print advertising initiatives and will report to our U.K.-based Warehouse Manager, [REDACTED]

The Petitioner stated that the organization has a multi-tiered structure which is able to support an executive position. The Petitioner gave a brief overview of the work flow between the U.S. and the U.K. employees and detailed the day-to-day duties of the one U.S. employee. In a separate document, the Petitioner provided job duties, salary information and education levels for the U.K. staff working with the Petitioner.

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 denying the petition, the Director noted due to the nature and size of the office, the Beneficiary would most likely be engaged in the day-to-day duties of the organization. Furthermore, the Director noted that the evidence indicates that the

U.S. employee, a non-professional and non-managerial position, will be directly supervised by the Beneficiary. Finally, the Director stated that the five hour time difference between the U.S. and U.K. offices make it unlikely that the U.S. office is able to rely heavily on the U.K. staff.

On appeal, the Petitioner submits a brief, stating that the Beneficiary will be employed in an executive capacity and disputing the Director's findings. The Petitioner asserts that the Beneficiary will perform all duties associated with running the organization and submits a brief reiterating how the U.K. based staff will relieve the Beneficiary of non-qualifying duties until the U.S. based staff is hired to replace them. The Petitioner restated that the order packer/color matcher would not be directly supervised by the Beneficiary. The Petitioner asserts that the Director disregarded evidence of record relating to the use of the U.K. employees, and further notes that the five hour time difference between the two offices does not affect the U.S. business' reliance on the U.K. staff. The Petitioner primarily focuses on the Director's statements regarding the lack of subordinate employees and does not address the Beneficiary's actual job duties any further.

#### B. Analysis

Upon review, and for the reasons stated herein, the Petitioner has not established that the Beneficiary will be employed in an executive capacity.

As an initial matter, we agree with the Petitioner's assertions that the role of order packer/color matcher is most likely directly supervised by the U.K. staff. We also agree that the five hour time difference does not necessarily prohibit a reliance on the use of the foreign entity's staff to support the U.S. operations. We find, however, that the evidence of record does not otherwise support a finding that the Beneficiary will serve in a primarily executive capacity.

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.* While the definition of "executive capacity" does not require a petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is a petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization.

The definition of executive capacity has two parts. First, a petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definition. Second, a 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 owns or 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”).

When examining the executive capacity of the beneficiary, we will look first to a petitioner’s description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). A 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 capacity. *Id.*

In the instant matter, the Petitioner characterized the Beneficiary’s role as president and provided a list of duties. The Petitioner’s description of the Beneficiary’s duties included clusters of job duties with percentages of time devoted to each cluster, as listed above. Within each general duty, the Petitioner provided a list of sub-duties. However, the sub-duties provided were vague and did not give a further understanding of what the Beneficiary would do on a day-to-day basis. Duties such as “utilizing strategic knowledge of U.S. market...to create a long-term vision”; “developing strategies to increase our U.S. market share”; “working with the General Manager to set high level goals and targets”; and “overseeing our business relationships” do not state with any specificity what the Beneficiary will do on a daily basis as president/CEO of the U.S. entity. 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. Here, the Petitioner has not provided 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. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990).

Additionally, a number of the duties provided appear to be repetitive or overlapping; specifically, oversight of the transition from a U.K.-based marketing firm to a U.S.-based marketing firm, as well as the transition from solely online advertising to print-based advertising are listed more than once. Without a more specific breakdown of time, the overlapping duties call into question the amount of time the Beneficiary will actually spend on each task. 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)(A) and (B) of the Act. Given the overlap and lack of detail, the Petitioner has not demonstrated that the Beneficiary’s duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. The job duties provided for the Beneficiary’s employment do not demonstrate that the Beneficiary will focus primarily on executive duties rather than on non-qualifying, day-to-day operational duties of the business.

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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 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.

On appeal, the Petitioner contends that the multi-tiered organizational structure, including both U.K.- and U.S.-based employees, establishes that the Beneficiary will be performing in an executive capacity. The Petitioner, however, has not provided sufficient evidence to demonstrate that the foreign employees are available to perform the duties necessary to run the day-to-day operations of the U.S. entity until those positions are hired locally. Specifically, the Petitioner has not shown, among other things: (1) how the U.S. entity will compensate the foreign employer for the use of these employees, if at all; (2) what percentage of the foreign employees' overall time will be spent performing tasks for the U.S. entity and what percentage of time will be spent performing duties for the foreign entity; (3) who will be performing the duties for the foreign entity while the U.K. staff is temporarily performing duties for the U.S. entity; and (4) who is responsible for the evaluation, hiring, and firing of the foreign employees. Without such information, we cannot conclude that the Beneficiary will be supported by the foreign staff.

In the alternative, even if the Petitioner provided sufficient evidence to show that the foreign employees are available to assist in the U.S. operations, the stated staffing structure at the time of filing does not support a finding that the Beneficiary will be relieved of non-qualifying duties. The Petitioner contends that the Director's focus on its lack of employees is unfounded; however, we find that the lack of subordinate employees is highly relevant because if the U.S. company does not have lower-level employees to perform the routine daily tasks of providing a service or producing a product of the business, it must fall on the Beneficiary to perform those tasks. 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 Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Although the Petitioner claims the U.K. staff will support the business operations in the United States, the Petitioner has not met its burden of proof to show that all of the tasks necessary for its continued operations and its business expansion, which includes the establishment of a [REDACTED] can be completed with only one subordinate staff member located in the United States. Even taking into consideration the U.K. staff, it is not clear who will support the Beneficiary in an executive position and relieve him from performing non-qualifying duties associated with his assigned responsibilities. First, 20% of the Beneficiary's time is to be spent "increasing productivity and enabling sales targets achievement." The Petitioner, however, has not sufficiently explained how the sales staff in the U.K. will provide sales services for the Petitioner, and it also has not identified any current sales staff in the United States. The Beneficiary's duties include overseeing

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some marketing functions and increasing productivity to support sales, but it is not clear who is performing the actual sales function. In the Petitioner's business plan, it identified multiple target markets including public, trade, stores, and wholesale. Similarly, the Petitioner stated that the Beneficiary will "oversee the expansion of our customer base into the trade, wholesale, and store retail supply markets." Without any sales staff in the United States, however, the Beneficiary will most likely be performing the non-qualifying duties associated with the sales function himself.

Similarly, 30% of the Beneficiary's time will be devoted to "managing and hiring professional level staff" including the supervision of "recruitment, hiring, and training" of this subordinate U.S.-based staff. The Petitioner, however, has not identified anyone who would be responsible for actually performing the duties associated with this task. While it is reasonable to anticipate that the U.K. staff would be able to assist in such efforts, without U.S. based staff to provide support, it is reasonable to anticipate that the Beneficiary would perform some non-qualifying duties associated with this task as well.

Finally, the Petitioner also stated in the business plan and in the list of the Beneficiary's duties, that the U.S. organization will create a "U.S. [REDACTED] Department." Again, the Petitioner has not identified any subordinate staff in the United States to perform the non-qualifying duties associated with the expansion of the business to create a [REDACTED] which would require staff physically present in the United States. Although the Petitioner asserts that additional staff would be hired in the future, the Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after a petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978).

We 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. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (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 41, 42 (2d Cir. 1990) (per curiam); *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 Petitioner's size, but rather the deficiencies of the job duties submitted, coupled with the lack of evidence of sufficient staff to support the Beneficiary in an executive role, that is dispositive.

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

### III. CONCLUSION

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. § 136; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

Cite as *Matter of F-C- Inc.*, ID# 18053 (AAO Aug. 22, 2016)