



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

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

MATTER OF T-C-H-

DATE: AUG. 30, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a hair salon, seeks to temporarily employ the Beneficiary as its area 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 a managerial or executive capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish that 1) the Beneficiary would be employed in a managerial or executive capacity in the United States; 2) the Beneficiary has been employed abroad in a managerial or executive capacity; or 3) it has a qualifying relationship with the Beneficiary's foreign employer.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director made errors of law and fact.

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.

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

As noted above, the Director denied the petition based on a finding that the Petitioner did not establish that: (1) the Beneficiary will be employed in a managerial capacity; or (2) the Beneficiary has been employed abroad in a managerial capacity. The Petitioner does not claim that the Beneficiary will be employed in an executive capacity. Therefore, we 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;
- (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

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supervisor's supervisory duties unless the employees supervised are professional.

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

A. U.S. Employment in a Managerial or Executive Capacity

1. Evidence of Record

On the Form I-129, the Petitioner indicated that it has two current employees in the United States and a projected gross annual income of \$100,000. The Petitioner also indicated on that form that the Beneficiary would be employed as an area manager with the following proposed duties (verbatim):

To employ new staff at the current branch in [REDACTED] Florida, train a branch manager and seek to find new branches.

The Director issued a request for evidence (RFE) instructing the Petitioner, in part, to submit evidence that the Beneficiary will be employed in a managerial or executive position in the United States. The Director suggested that the Petitioner submit a list of the U.S. supervisory/professional employees who will be managed by the Beneficiary, their position descriptions, educational requirements, and copies of their educational credentials.

In response to the RFE, the Petitioner submitted a statement including the following proposed job duties (verbatim):

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1. To integrate into the current working environment and make sure all the employed staff are up to our current standards.
2. To train staff, where necessary and make sure the branch supervisor is up to the position.
3. Arrange meeting with product suppliers and get the best possible price for products and evaluate our place in the market.
4. Make sure all staff are licensed and trained in the chemicals to comply with Florida law.
5. To order stock and keep an inventory and manage stock levels.
6. Develop a safe and positive work environment for staff.
7. To hire and fire staff members and issue disciplinary action where appropriate, and make sure all procedures are followed.
8. To make sure all Florida Work guidelines and minimum wage policies are followed.
9. Analyze capital budget and expenses to find opportunities for cost-effectiveness and profitability.
10. Perform market research to study consumer behaviour, latest trends and competitor activity.
11. Oversee the full upgrade of the salon to bring it in line with the high quality feel of our other branches.
12. To seek out new business premises and expand the business into other areas, including hiring and training staff for those new branches.

The Petitioner also submitted an undated organizational chart depicting the Beneficiary as "Area Manager" with a subordinate "Branch Supervisor," three "Senior Stylists," and three "Junior Stylists." The chart also includes a "proposed [REDACTED] Florida USA Branch" with a similar organizational structure but with two "Senior Stylists" and two "Junior Stylists."

The Director denied the petition, concluding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity in the United States. In denying the petition, the Director found that the Petitioner did not submit a list of the U.S. supervisory/professional employees who will be managed by the beneficiary, their position descriptions, educational requirements, and copies of their educational credentials. Thus, the Director concluded that the Petitioner had not submitted sufficient evidence that the Beneficiary would be supervising professional employees. The Director also noted that the Petitioner indicated that it had two employees and therefore, the size and scope of the business activity does not support a managerial or executive level position.

On appeal, the Petitioner states that it plans to employ five employees and that the Director's statement that the Beneficiary would perform the day-to-day tasks of the business was incorrect. The Petitioner also states (verbatim):

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Since this process has taken some time I have taken on more US Citizens as employees so I have included and up to date list of US employees and their professional qualification and where I have had access to their Florida state license I have included a copy of this also.

The Petitioner also submits a list of "current US employees," including [REDACTED] as branch supervisor and five additional staff members, along with copies of their cosmetology licenses.

2. 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 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 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 this case, the Petitioner has described the Beneficiary's job duties in very vague terms without specifically indicating how they rise to the level of managerial duties. For example, the Beneficiary's job description states that he will "hire and fire staff members," "train staff," and "make sure all staff are licensed and trained." On appeal, the Petitioner submits a list of current employees, however, the Petitioner does not describe their positions or provide evidence of their educational credentials or employment records. Because the management and training of staff members is integral to the Beneficiary's job description, without further evidence, we find that the job description alone is insufficient to establish what he would do on a day-to-day basis within the Petitioner's current staffing structure.

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.

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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 petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act; 8 C.F.R. §§ 214.2(l)(1)(ii)(B)(2)-(3).

Although the beneficiary is not required to supervise personnel, if the petitioner claims that the beneficiary’s duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See section 101(a)(44)(A)(ii) of the Act. Here, the Petitioner has not established that its employees possess baccalaureate degrees or that their positions require such degrees, such that we can consider the employees to be professionals. Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors.

Furthermore, the Petitioner states that it operates its hair salon with a proposed four-tiered management structure that includes an owner, area manager, branch supervisor, and stylists. The evidence must substantiate that the duties of the Beneficiary and his or her subordinates correspond to their placement in an organization’s structural hierarchy. In this case, while the Petitioner claims it can support two levels of “managers,” the totality of the record does not support a conclusion that the Beneficiary’s subordinates would be supervisors, managers, or professionals. Instead, the record indicates that the Beneficiary’s subordinates, including those with managerial job titles, more likely than not perform the actual day-to-day tasks of operating the hair salon. In the list submitted on appeal, the five employees noted appear to be stylists and the Petitioner has not described the duties of the branch supervisor, [REDACTED] or provided evidence of his employment. Thus, the Petitioner has not shown that the Beneficiary’s subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

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 dedicated 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 has not described the function to be managed or submitted evidence explaining how his daily duties reflect his management of that function. Further, the evidence as a whole does not support a conclusion that the Petitioner has sufficient staff to relieve the Beneficiary from significant involvement in the day-to-day operations of the business.

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 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.*, 469 F.3d 1313; *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 fails to believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15. In this case, as described above, the Petitioner has not established that it has hired employees for the Beneficiary to supervise or that its proposed organizational structure is sufficiently complex so as to require the Beneficiary to primarily supervise professional or managerial level employees.

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

B. Foreign Employment in a Managerial or Executive Capacity

1. Evidence of Record

On the L Classification Supplement to Form I-129, the Petitioner described the Beneficiary's duties abroad¹ for the three years preceding the filing of the petition as follows:

The Beneficiary manages the staff management at the branches and trains new staff to manage those branches and the staff beneath them, overseas stock orders, and payroll.

The Petitioner identified the Beneficiary's duties abroad as follows (verbatim):

1. To manage the staff at the branches and make sure they run smoothly.
2. To appoint a branch supervisor to oversee the stylists and make sure juniors are being supervised.
3. To attend meetings with product representatives and decide which product lines we stock.
4. To order stock and keep an inventory and manage stock levels.

¹ The name of the foreign entity is the same as the Petitioner's name.

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5. To make sure all staff are trained in the C.O.S.H.H. guidelines for handling chemicals.
6. To hire and fire staff members and issue and disciplinary action and make sure all procedures are followed and staff are properly trained.
7. Develop a safe and positive work environment for staff.
8. Keep track of staff time schedules and make sure they arrive for work as they should.
9. Analyze capital budget and expenses to find opportunities for cost effectiveness and profitability.
10. Perform market research to study consumer behavior, latest trends and competitor activity.
11. To seek out new business premises and expand the business into other areas, including employing and training new staff to our current UK high standard.

The Petitioner indicates that the Beneficiary has been employed by the entity abroad since May 4, 2013, and submitted the Beneficiary's payroll receipts for three pay periods (April 30, 2014, October 31, 2014, and April 30, 2015).

In the RFE, the Director instructed the Petitioner to submit evidence that the Beneficiary's position abroad was in a managerial or executive capacity. The Director indicated that the Petitioner should submit copies of the Beneficiary's training, pay, or other personnel records along with documentary evidence that shows how the Beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. The Director further requested evidence of the foreign entity's organizational structure and staffing levels.

In response to the RFE, the Petitioner submitted an undated organizational chart for the foreign entity. The chart depicts the Beneficiary as area manager, supervising a branch supervisor who then supervises three senior stylists. There are three additional stylists, each reporting to one senior stylist. The RFE response also included two letters, from [REDACTED] and [REDACTED] both indicating that the Beneficiary has been employed with the organization since May 2013.

The Director denied the petition concluding that the Petitioner did not establish that the Beneficiary had been employed in a managerial or executive capacity abroad. In denying the petition, the Director found that the Petitioner did not provide evidence that the Beneficiary supervised other supervisory or professional employees including their position descriptions, educational requirements or copies of their educational credentials. The Director also noted that the Beneficiary performed duties that were not managerial such as ordering stock, tracking inventory, and training staff.

On appeal, the Petitioner asserts that the Beneficiary is not a hair stylist, therefore, he could not have been performing the day-to-day functions of the hair salon. The Petitioner submits a definition of

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“manager” from [REDACTED] and questions why the Director would apply a different definition to the facts of this case.

2. 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 was employed in a managerial capacity abroad.

Whether a beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that her/his duties are “primarily” managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the Petitioner has not documented what proportion of the Beneficiary’s duties for the foreign entity are managerial functions and what proportion are non-managerial. The Petitioner lists the Beneficiary’s duties as including both managerial and administrative or operational tasks, but fails to quantify the time the Beneficiary spends on them. This failure of documentation is important because several of the Beneficiary’s daily tasks such as “attend meetings with product representatives and decide which product lines we stock,” “order stock and keep an inventory and manage stock levels,” and “Perform market research to study consumer behavior, latest trends and competitor activity,” do not fall directly under traditional managerial duties as defined in the statute. For this reason, we cannot determine whether the Beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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 “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 petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act; 8 C.F.R. §§ 214.2(l)(1)(ii)(B)(2)-(3).

Here, the Petitioner has not submitted any evidence that the subordinates claimed on the foreign entity’s organizational chart have a bachelor’s degree, or that one is required by their respective

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positions. While the organizational chart submitted for the foreign entity lists several tiers of employees, the Petitioner has not submitted evidence that these claimed employees were employed during the Beneficiary's period of employment, or submitted their employment records or educational credentials as requested by the Director. Given the paucity of evidence submitted, we cannot conclude that the Beneficiary performed as a personnel manager.²

The Petitioner has not established, in the alternative, that the Beneficiary was 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 managed 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 dedicated 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 has not identified a function that was managed by the Beneficiary or explained what portion of the Beneficiary's duties pertained to that function. Without additional evidence and explanation, we cannot conclude that the Beneficiary performed as a function manager.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary was employed in a managerial capacity for the entity abroad.

III. QUALIFYING RELATIONSHIP

The Director denied the petition based on a finding that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer. The Director acknowledged that the Petitioner submitted a copy of the foreign entity's partnership agreement showing ownership by the Beneficiary and [REDACTED]. However, the Director found that the Petitioner did not submit evidence of the ownership and control of the U.S. entity.

On appeal, the Petitioner submits a copy of a Florida general partnership agreement dated June 24, 2015, indicating that the Beneficiary and [REDACTED] each own 50% of the partnership. The agreement also states that each partner "shall have exclusive control over the business and each partner shall have equal rights in the management and conduct of the partnership business."

² We also note that the Petitioner did not submit sufficient evidence of the Beneficiary's employment beginning in May 2013 and lasting through the time of filing. The only documentation contained in the record consists of three months of payroll records as noted above, along with two letters, from [REDACTED] and [REDACTED] both indicating that the Beneficiary has been employed with the organization since May 2013, but providing no additional details or evidence to support their statements.

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We have reviewed the evidence submitted on appeal and conclude that there is sufficient evidence to establish that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer. Thus, the Director's decision will be withdrawn with respect to this issue.

IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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-C-H-*, ID# 18259 (AAO Aug. 30, 2016)