



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

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

MATTER OF H-USA INC.

DATE: JULY 21, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a manufacturer and distributor of sanitary goods and cleaning supplies seeks to temporarily employ the Beneficiary as its marketing 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 evidence of record did not establish that the Beneficiary would be employed in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by denying the petition based on lack of sufficient organizational structure and asserts that it has plans to hire additional employees.

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

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary will be employed 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":

- (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 7, 2015. On the Form I-129, the Petitioner indicated that it has 10 current employees in the United States and a gross annual income of \$3.7 million.

In a letter dated June 30, 2015, the Petitioner stated that the Beneficiary would be responsible for supporting U.S. sales and expanding upon the opportunities that are present in the U.S. market. The Petitioner explained that the Beneficiary would be responsible for leading its marketing operations in the U.S. "including a marketing team that will develop and execute new concepts, business models, channels and partners to position the business as an industry innovator and leader."

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

- Identify marketing opportunities by identifying consumer requirements; defining market, competitor's share, and competitor's strengths and weaknesses; forecasting projected business; establishing targeted market share.
- Analyze market trends and recommend changes to marketing and business development strategies based on analysis and feedback.
- Gather and analyze customer/consumer insight.
- Engage closely other organizations within the community, such as sales, R&D, production and so on. Collaborate with sales and sourcing to develop strategic

partnership activities and implement the execution framework and strategic plan on identified opportunities.

- Develop and lead a marketing team that will develop and execute new concepts, business models, channels and partners to position business as innovator and leader.
- Support a sales team to achieve customer satisfaction.
- Develop and assume responsibility for a budget for data analysis, monitoring and design of packaging, logo, product, printed/non-printed banner, flyers and so on.
- Meet with clients and senior management in furtherance of these duties.

The Petitioner also submitted an organizational chart dated June 26, 2015 which shows the Beneficiary in the role of marketing manager with no subordinates. The chart indicates that the Beneficiary will report to the vice president of marketing.

The Director issued a request for evidence (RFE) on August 7, 2015, instructing the Petitioner to submit a detailed job description that outlines the specific duties that the Beneficiary will perform and the percentage of time spent she will spend on each individual duty, along with an explanation of the entity's organizational structure and staffing levels.

In response to the RFE, the Petitioner submitted a letter dated August 12, 2015, which included a more detailed description of the Beneficiary's proposed duties. The Petitioner stated that the Beneficiary would be responsible for:

[P]roviding strategic advice to the vice president of marketing, as well as providing and executing the national marketing plan. As the lead for marketing operations, this position is responsible for creating and implementing key commercial and marketing operations in preparation for the commercialization and product launch. This will include the development of key processes as well as creation of a commercial infrastructure (e.g. IT systems, organizational structure, etc.) as needed with appropriate integration with marketing, sales and manufacturing operations.

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

#### 60% Strategic Marketing Management

- Identify marketing opportunities by identifying consumer requirements; defining market, competitor's share, and competitor's strengths and weaknesses; forecasting projected business; establishing targeted market share.
  - Analyze markets, proposing and implementing strategies for different market segments (based on in-depth market research and intelligence), and coordinating new product and product enhancement introductions.
- Analyze market trends and recommend changes to marketing and business development strategies.

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- Meet with clients and senior management in furtherance of these duties based on analysis and feedback.
- Serve as lead in developing in collaboration with commercial leaders an integrated launch plan for initial product launches including key project streams across marketing, sales, access, regulatory, and manufacturing.
- Lead, develop and implement an optimized promotional review committee process including development and implementation of an SOF and recommended software system and ongoing oversight of process.
- Develop key marketing processes and metric to evaluate (and continuously improve) operational excellence.
- Manage all projects within budget and timeline needs.
- Conduct all responsibilities in accordance with company policies, with a strong adherence to our values including compliance.
- Regularly update a corporate strategic marketing plan based on market segmentation principles and market analysis.
- Direct the research to identify potential new products for both current and new markets. Process will include analyzing product application requirements, estimating potential profits, and identifying barriers to entry.

20% Marketing Staff Management and Communications

- Develop and lead a marketing team that will develop and execute new concepts, business models, channels and partners to position business as innovator and leader.
- Lead and manage Marketing Assistant & Market Research Analyst
- Build and maintain collaborative relationships within the company to optimize commercial effectiveness.
- Serve as a key member representing market operations activities such as leading, scheduling, and managing meetings across commercial functions.
- Support a sales team to achieve customer satisfaction.
- Manage vendor responsible for warehousing all approved promotional materials for use by sales force.
- Oversee team responsible for promotional materials management.

20% Product Marketing Management

- Improve product marketability and profitability by researching, identifying, and capitalizing on market opportunities; improving product packaging; coordinating new product development.
- Solicit and assimilate engineer and end user needs on new products and current product modifications.
- Establish integrated targets in sales, production planning, distribution systems and engineering design.

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- Gather and analyze customer/consumer insight.
- Engage closely other organizations within the community, such as sales, R&D, production and so on. Collaborate with sales and sourcing to develop strategic partnership activities and implement the execution framework and strategic plan on identified opportunities.
- Develop and assume responsibility for a budget for data analysis, monitoring and design of packaging, logo, product, printed/non-printed banner, flyers and so on.
- Be familiar with current marketing research options and techniques to assist company in predicting customer needs.
- Provide new product development teams with product specification, cost, pricing, sales forecasts and development time frames. Communicate status both internally and externally as required.

The Petitioner further explained that the Beneficiary will “directly manage and supervise one marketing assistant & market research analyst, a professional position within the organization” and “have the ultimate responsibility for directing, supervising and managing the duties of the marketing assistant & market research analyst.” The Petitioner also stated that the Beneficiary will have the authority to hire, fire, and promote employees as well as authorize leave. With respect to training, the Petitioner states that the Beneficiary will “provide direction and training to the marketing assistant & market research analyst regarding [the Petitioner’s] brand and philosophy which is critical to the success of the new office.”

The Petitioner also submitted a second organizational chart dated August 11, 2015. This chart indicates that the Beneficiary will supervise one subordinate, the marketing assistant & market research analyst [REDACTED] who “is expected to start in September.” The Petitioner also submitted a signed employment offer from the Petitioner to [REDACTED] dated August 14, 2015.

The Director denied the petition on August 31, 2015, 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 explained that the Beneficiary’s duties would be mostly non-qualifying tasks related to the company’s day to day operations, and that the Petitioner lacked sufficient organizational structure at the time of filing to relieve the Beneficiary from performing these non-qualifying tasks. The Director also noted that although the Petitioner intends to hire an employee who will work for the Beneficiary, at the time of filing, the Beneficiary’s duties and responsibilities do not include the supervision of other supervisory, professional, or managerial employees.

On appeal, the Petitioner explains that “[The Petitioner] recently hired a Manufacturing Engineer, a QC/QA manager, and will soon be filling the roles of Marketing Assistant & Market Research Analyst (a role that will report directly to the role of marketing manager) and HR Manager.” The Petitioner further explains that, as marketing manager, the Beneficiary’s primary job duties will be to “provide strategic advice to the Vice President of Marketing as well as provide and execute the national marketing plan . . . .” The Petitioner also states that the Beneficiary will be “responsible for

the implementation and optimization of programs and processes requiring strong leadership and management capability, and will work with internal teams, consultants and vendors . . . .”

The Petitioner states that the Beneficiary “qualifies as a manager on the basis that the Beneficiary will supervise and control the work of a professional” and the “Beneficiary will act in a managerial capacity by supervising the professional position of Marketing Assistant & Market Research Analyst within the marketing department.” The Petitioner states that the Director erred in concluding that the Beneficiary will not include the supervision of other supervisory, professional, or managerial employees. The Petitioner indicates that it has provided a signed job offer letter for this subordinate position but that “the candidate who has been hired for this position has not yet commenced employment, but is expected to by the end of this year.”

Finally, the Petitioner asserts that the Director erred in concluding that the Beneficiary would be engaged in producing services, products and other administrative duties, but rather, that “the marketing manager will be managing and overseeing the marketing department for [the Petitioner’s] products and services. The Petitioner states that, “other research, analyses and related marketing and sales responsibilities will be performed by the Marketing Assistant & Market Research Analyst.”

#### 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 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 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.

The Petitioner’s initial position description was brief, but suggested that the Beneficiary would perform non-managerial sales, marketing, and market research functions, while also developing and leading a marketing team and supporting a sales team. The Petitioner submitted a lengthier description of the Beneficiary’s duties in response to the RFE which likewise suggested that the Beneficiary will spend a significant portion of his time engaged in non-qualifying operational tasks.

Specifically, the Petitioner states that 60% of the Beneficiary's time will be spent on strategic marketing tasks such as identifying marketing opportunities, analyzing marketing trends, meeting with clients, developing product launch plans and marketing processes and directing marketing research to identify potential new products and trends. While these job duties are categorized as "strategic marketing management," when examined closely, they are actually day-to-day tasks associated with marketing a product. Furthermore, these duties do not provide insight into the specific managerial or executive tasks that the Beneficiary would perform or who, if anyone, would assist him with these functions and the Petitioner does not provide sufficient explanation to establish that these tasks qualify as managerial or executive.

The Petitioner also states that the Beneficiary will spend 20% of his time on product marketing management. This includes "researching, identifying, and capitalizing on market opportunities," "establish integrated targets in sales," "gather and analyze customer/consumer insight," "develop and assume responsibility for a budget for data analysis, monitoring and design of packaging, logo, product, printed/non-printed banner, flyers," and, "providing new product development teams with product specification, cost, pricing, sales forecasts and development time frames." The organizational chart does not contain a product development team or staff or any other marketing personnel other than the Beneficiary and her supervisor, the vice president of marketing. Therefore, the duties described must be solely performed by the Beneficiary without the assistance of subordinate personnel. While this category of job duties is referred to as "product marketing management," the detailed explanation of these responsibilities indicates that the Beneficiary would spend much of his time performing market research, sales, and product development support functions that are not managerial in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam). While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify a beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act.

The Petitioner also states that the Beneficiary will spend 20% of his time developing and leading a marketing team, supporting a sales team, and leading and managing the marketing assistant & market research analyst. The Petitioner further states that the Beneficiary will "oversee team responsible for promotional materials management." These claimed responsibilities appear incongruous with the stated organization and staffing structure at the time of filing. For example, the record does not contain evidence of a marketing team beyond the Beneficiary and her supervisor. The descriptions also indicate that the Beneficiary is tasked with "supporting a sales team," and "oversee team responsible for promotional materials management"; however, the only position noted on the organizational chart responsible for sales or promotional materials is the vice president of sales. The Petitioner also states that the Beneficiary will lead and manage the marketing assistant & market research analyst; however, as noted by the Petitioner on appeal, this individual will not be employed by the Petitioner until "the end of the year." Again, the Petitioner does not have the organizational structure or employ the personnel described in the Beneficiary's job description.

While the Petitioner may expect to hire personnel at some time 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).

Moreover, while the Petitioner assigned a percentage of time spent on three broad categories of duties, these categories appear to include both qualifying and non-qualifying tasks and responsibilities and the Petitioner has not further defined how much time the Beneficiary will spend on each task. As such, we are unable to determine whether the claimed managerial duties constitute the Beneficiary's primary duties, or whether the Beneficiary will primarily perform non-managerial administrative or operational duties associated with the day-to-day operation of the business. Because the Petitioner has only provided percentages of time spent on broad categories of job duties we cannot discern what portion of the Beneficiary's duties are managerial or executive in nature, and what portion is actually non-qualifying. Absent a clear and credible breakdown of the time spent by the beneficiary performing her/his duties, we cannot determine what proportion of those duties would be managerial or executive, nor can we deduce whether the beneficiary is primarily performing the duties of a 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 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.

The Petitioner asserts on appeal that the Beneficiary's position is in a managerial capacity. 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, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. 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.

In this case, the Petitioner has not demonstrated that the Beneficiary will be employed as a personnel manager. The Petitioner has described, throughout the record, how the Beneficiary will manage a professional subordinate, the marketing assistant & market research analyst. However, on appeal, the Petitioner states that the individual who will assume this role is not expected to commence employment until the end of 2015. While this evidence does support the Petitioner's claims that it intends to grow the organization, the Beneficiary's managerial role is predicated on the Petitioner's organizational structure being sufficient staffed. Until the requisite personnel is in place, the Beneficiary will be performing all of the day to day marketing tasks of the business and cannot be

considered to be primarily managing marketing. Further, many of the Beneficiary's stated job duties involve managing and overseeing departments and personnel that have not yet been hired. Again, 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 lack of evidence of sufficient staff in place at the time of filing to assist the Beneficiary with her market research and sales duties, we cannot conclude that the Petitioner has staff to relieve her from performing the non-qualifying operational and day-to-day sales, marketing and market research duties. We cannot find that the Beneficiary would supervise a subordinate staff of managerial, supervisory or professional employees as of the date of filing, and as such she does not qualify as a personnel manager.

The Petitioner has also not established that the Beneficiary will be employed 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 the Petitioner claims that the Beneficiary will be managing an essential function, the 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 the Beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the Petitioner's description of the Beneficiary's daily duties must demonstrate that the Beneficiary will manage the function rather than perform the duties related to the function.

The Petitioner states on appeal that it is "marketing is clearly a department, function or component of the organization . . . marketing is a critical part of [the Petitioner's] overall revenue and therefore an essential function of the organization." The Petitioner goes on to state that "the Beneficiary qualifies as a manager . . . since this position is in charge of managing the Petitioner's marketing department."

The record does not support the Petitioner's statements that the Beneficiary is in charge of managing the Petitioner's marketing department since the Beneficiary reports directly to the vice president of marketing. While the Beneficiary may have some discretion over marketing activities, this fact does not establish that he qualifies as a function manager. Whether the Beneficiary is a "function" manager turns in part on whether the Petitioner has sustained its burden of proving that his duties are "primarily" managerial. Again, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Here, for the reasons discussed above, the Petitioner has not established that the Beneficiary's actual duties would be primarily within a managerial capacity. Most of the duties included in the Beneficiary's job description are related to the actual marketing, market research and product development functions of the organization rather than managerial duties, and the Petitioner has not established that it has

employees or contractors to relieve the Beneficiary from direct involvement in sales, marketing and market research activities.

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.

Here, although the Petitioner claims to have marketing, sales and product development teams that perform the marketing tasks of the organization, by Petitioner's own statements, these individuals have not yet been hired or commenced employment. While the Petitioner states that the Beneficiary would be responsible for growing the marketing function of the company and hiring staff, it does not qualify as a new office and must establish that she would perform primarily managerial or executive duties at the time the petition was filed.

For the foregoing reasons, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity, and the appeal will be dismissed.

### 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 H-USA, Inc.* ID# 17568 (AAO July 21, 2016)