



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

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

MATTER OF T-Z-, INC.

DATE: MAR. 14, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a wholesale distributor, seeks to extend the Beneficiary's temporary employment as a president under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in an executive or managerial capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish that the Beneficiary would be employed in a qualifying managerial or executive capacity.¹

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the proposed employment is in a qualifying managerial or executive capacity.

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

I. THE LAW

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.

¹ Although not a ground for denial, the Director raised a question regarding the qualifying relationship between the Petitioner and the foreign employer in his decision. The Petitioner responded to this issue on appeal and we consider the matter resolved for this case.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

II. EMPLOYMENT IN A QUALIFYING MANAGERIAL OR EXECUTIVE CAPACITY IN THE UNITED STATES

The sole issue to be addressed is whether the Petitioner established that the Beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition.

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.

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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. Facts

The Petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on February 4, 2015. The record shows that the Beneficiary was previously granted one year in L-1A status in order open the Petitioner's new office. The Petitioner operates a wholesale distribution firm with four employees and claimed gross sales in the amount of \$1,794.885 for 2014. In a January 19, 2015, letter submitted in support of the petition, the Petitioner described their business as working with both manufacturers and wholesale distributors of nutritional and sports supplements, and receiving revenue from both wholesale and web-based sales. The Petitioner also stated that the Beneficiary will be employed in the position of President and would continue to "assume a leadership role in expanding out international business strategy" as well as developing "overall objectives for the company." As President, the Petitioner stated that the Beneficiary would be performing the following duties:

1. Manage and supervise [REDACTED] the Managing Director of [the Petitioner] and will plan, develop and establish policies and objectives of the company in the United States.
2. Confer with our parent company's officials to plan business objectives, to develop an overall strategy framework for wholesale supplier diversification; to develop a plan for profit margin increase through eliminating intermediaries and seeking contracts directly with manufacturers of sports nutrition supplements;
3. Develop organizational policies to coordinate functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives;
4. Review activity reports and financial statements to determine progress and status in attaining objectives and will revise objectives and plans in accordance with current market conditions
5. Direct and coordinate formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity;
6. Plan and develop labor and public relations policies designed to improve Company's image and relations with our customers;
7. Negotiate and make final decisions on all new contracts;
8. Manage the development and maintenance of relationships with new and existing wholesale sellers and manufacturers as well as consistent/regular visits with the key accounts to build the best possible assortments of brands based on the evolving product offering;

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9. Evaluate performance of [REDACTED] the Managing Director and key employee of [the Petitioner] and will have broad discretionary authority to hire and fire managerial and other personnel.

The Petitioner submitted additional evidence in support of the petition, including IRS Form 1120, U.S. Corporate Income Tax Return for 2014; payroll summaries; brochures and website printouts; bank statements; and a lease agreement.

In a request for evidence (RFE), the Director requested, among other items, evidence to show that the Petitioner can support an executive or managerial position. Specifically, the Director requested the following, among others: (1) a statement explaining the Beneficiary's duties for the previous year and his proposed duties on extension; and (2) a statement describing the new operation's staffing.

In response, the Petitioner provided a restatement of the Beneficiary's proposed duties but did not include a breakdown of time spent of each duty. The Petitioner also included a narrative description of the Beneficiary's tasks for the prior year.

The Petitioner states in a March 26, 2015, letter that the Beneficiary is responsible for supervising the work of the Managing Director, along with two other people and a consultant. The Petitioner did not provide names, titles, or position descriptions for the other employees. The Petitioner ALSO submitted IRS Form 941 for 2014: Employer's Quarterly Federal Tax Return showing zero employees for the first three quarters, but reporting wages paid.

The Director denied the petition, concluding that the Petitioner had not established that the Beneficiary would be employed in a qualifying managerial or executive capacity. In denying the petition, the Director noted that it is not clear what employees the Beneficiary supervises, if any and that his position description is vague. The Director noted that the Petitioner's Form 941 for 2014: Employer's Quarterly Federal Tax Return showed zero employees.

On appeal, the Petitioner provides a brief and additional evidence. The Petitioner does not state that the Director's decision is based on error of fact or law. As evidence and included in the brief, the Petitioner provides the following: a letter from the Petitioner's accountant explaining the discrepancies in the tax returns; position descriptions for the Beneficiary's subordinates; and clarification of the Beneficiary's duties.

B. Analysis

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

When examining the executive or managerial 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 definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary

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performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary manages a business or a component of 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”).

The position description submitted by the Petitioner in the initial description and in response to the RFE is insufficient to establish that the Beneficiary in this matter will be primarily performing qualifying duties. First, the Petitioner provided a number of duties that are only generally or vaguely described. Duties such as “developed organizational policies,” “[c]onferred with our parent company’s officials to plan business objective,” “reviewed activity reports and financial statements,” and “planned and developed labor and public relations policies,” do not provide a description of what duties the Beneficiary actually performs as President of a wholesale sports nutritional supplement company. Reciting the 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. The petitioner did not provide any detail or explanation of the beneficiary’s activities in the course of her/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).

Furthermore, the duties provided in the narrative description of the Beneficiary’s duties in response to the RFE describe a number of non-qualifying operational tasks performed by the Beneficiary. Duties such as assessing the supply market, identifying potential competitors, attending conferences, negotiating with suppliers, and securing and helping new accounts are the tasks used to produce the product and provide the services of the company, and are not managerial or executive. As the stated duties include vague and clearly non-qualifying duties, and the Petitioner has not indicated how the Beneficiary will divide his time between these and the claimed managerial and executive duties, we cannot determine that the Beneficiary will “primarily” be performing in a qualifying capacity. The petitioner bears the burden of documenting what portion of the beneficiary’s duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of this information, the record in this matter does not demonstrate that the Beneficiary will function primarily as a manager or executive.

Regarding the Petitioner’s staffing, we note that the record contains inconsistent information regarding the number of staff employed that raises questions concerning who, if not the Beneficiary, is performing the everyday tasks required to run a business. It has been noted in the record that the Petitioner claims to employ two subordinate employees and one consultant. The Petitioner, however, submitted IRS Form 941 for 2014: Employer’s Quarterly Federal Tax Return showing zero employees for the first three quarters, but reporting wages paid. On appeal, the Petitioner provides a letter form [REDACTED] CPA, stating the following:

Apparently, we failed to include the amount of employees for specific dates requested. This information is required to determine if the employer exceeds 250 employees required for electronic transmission of W-2's. In this case they do not.

A review of the instructions for IRS Form 941 shows that the instructions for Part 1, no. 1 read: "Enter the number of employees on your payroll for the pay period including March 12, June 12, September 12, or December 12, for the quarter indicated at the top of Form 941."² The instructions also contain a "tip" which states that if the number of employees exceeds 250, the employer is required to file its Forms W-2 electronically. Contrary to the statement from the Petitioner's CPA, the instructions do not indicate that the number of employees is only required to be reported if the employer employs more than 250 employees; rather, the employer is always responsible for providing accurate information regarding its staff.

On appeal, the Petitioner submits new copies of IRS Form 941 for 2014: Employer's Quarterly Federal Tax Returns for all four quarters of 2014; however, there is no documentation to show that the corrected tax returns were submitted to or accepted by the IRS. Only the Form 941 for the last quarter of 2014 was signed and was also undated with no printed name or contact information provided. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Moreover, the Petitioner has not provided an IRS Form 941: Employer's Quarterly Federal Tax for the quarter of filing (first quarter 2015) in order to substantiate its claimed number of employees at the time of filing. Without clear evidence that the Petitioner employs a subordinate staff of employees who perform the day-to-day operational tasks necessary to run the business, this brings into question how much of the Beneficiary's time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

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; 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. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2).³

² On the Internet at <https://www.irs.gov/instructions/i941/ch02.html#d0e897> (last accessed March 11, 2016).

³ In evaluating whether the beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained

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Although the Beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the Petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. Here, the Petitioner asserts that the Beneficiary directly supervises the “managing director” who in turn supervises the other two employees. As noted, the Petitioner has not provided evidence to establish that it employs the claimed subordinate employees. Moreover, the Petitioner has not shown that any of the claimed subordinate employees serve in professional, managerial or supervisory positions.

The Petitioner states that the two lower level employees, namely the independent contractor and [REDACTED] run the day to day operations. The Petitioner states that [REDACTED] for whom no job title is provided, is responsible for the website and internet sales, while the independent contractor is responsible for packing and shipping and placing orders with manufacturers. The duties assigned to these positions do not establish that they are of a professional nature nor is there any indication that these positions involve managerial or supervisory duties. With regard to the managing director/general manager position, the vague position description provided does not indicate that it is a professional level position requiring a baccalaureate degree.

The Petitioner has also not established that the managing director/general manager is a supervisory or managerial position. The Petitioner provides a vague description for [REDACTED] the general manager, stating that he “is responsible to see that the petitioner meets the financial and sales goals set by the beneficiary.” Additionally, [REDACTED] “sets up meeting so that [the Beneficiary] can engage in negotiations for better pricing.” There is no mention in the record of any subordinate employee on staff to perform the client development work, client management, sales, and marketing plan for the United States operations. Without a more detailed position description including percentage of time spent on each tasks, we are unable to determine whether the subordinate general manager is in fact a supervisory or managerial position, or whether he in fact spends a majority of his time perform the sales and marketing tasks of the company. 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 Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. at 604).

The Petitioner also claims in its letter dated February 2, 2015, that the Beneficiary supervises “senior-level managers, and supervisory in the Russia-based parent company.” However, the Petitioner has not identified which staff it is referring to, nor has it provided evidence to show how these employees located in Russia are engaged in the operations of the U.S. Petitioner, or provided

by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817, 818 (Comm’r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686, 687-8 (D.D. 1966).

documentation to establish that such a reporting structure exists. As such, these Russian based employees will not be considered as part of the U.S. organization for the purposes of this petition. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). In light of the foregoing, the Petitioner has not demonstrated that the Beneficiary is more than a first-line supervisor of non-professional employees.

The Petitioner has also not established, in the alternative, 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, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes 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 manages the function rather than performs the duties related to the function. 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 *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. at 604). Here, the Petitioner did not assert that the Beneficiary will be employed as a function manager. Furthermore, the Petitioner did not describe an essential function to be managed by the Beneficiary or provide a breakdown of the Beneficiary's job duties to support such a claim. As such, the record does not establish that the Beneficiary will be employed as a function manager.

Finally, the Petitioner has not established that the Beneficiary will serve in an executive capacity. 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 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.*

In this case, the organizational structure does not support the claim that an executive-level position exists for the Beneficiary. At the time of filing, the Petitioner stated that the Beneficiary directly managed one to two subordinate employees on staff and one consultant. The Petitioner has not shown how this structure would support a finding that the position is executive in nature.⁴ As noted above, the record also does not demonstrate that the Petitioner has sufficient staff to relieve the Beneficiary from performing non-qualifying duties. Therefore, incorporating our earlier discussion on the discrepancies in the Petitioner's staffing and the deficiencies in the position description, along with the lack of a sufficient organizational structure to elevate the Beneficiary to an executive position, we cannot find that the Beneficiary would be employed in a qualifying executive capacity.

When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. 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; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position.

Based on the foregoing discussion, the Petitioner has not established that it will employ the Beneficiary in a managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

III. CONCLUSION

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely 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-Z-, Inc.*, ID# 15841 (AAO Mar. 14, 2016)

⁴ We note that the Petitioner did not submit an organizational chart at any point in the proceedings. We acknowledge that the Petitioner has provided written descriptions of the employee structure, but without an organizational chart we are restricted from making a full-determination on the Beneficiary's subordinate employee structure.