



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

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

MATTER OF C- INC

DATE: OCT. 19, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a weather instrument exporter, seeks to extend the Beneficiary's temporary employment as its general 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 record does not establish that the Beneficiary will be employed in a managerial capacity under the extended petition.

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

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 CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary would be employed in a managerial capacity under the extended petition. 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.

Further, "[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." *Id.*

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 February 19, 2015. On the Form I-129, the Petitioner indicated that it has four current employees in the United States and a gross annual income of \$635,938. In a letter submitted in support of the initial petition, the Petitioner stated that it is a wholesale distribution company providing weather instruments to Latin American markets as well as the eastern part of the United States.

The Petitioner stated that, as general manager, the Beneficiary will continue to carry out the managerial function of "executing business contacts." Specifically, the Petitioner stated he will perform the following duties:

[The Beneficiary] will continue to direct and coordinate the activities of [the Petitioner] in coordination with [the foreign parent company's] global operations. He will continue to be responsible for formulating and administering company policies as well as developing long range goals of the company in accordance with [the parent company's] objectives. He will do this for 20% of his time. He will review analysis of activities, costs and operations and will forecast data to determine the progress achieved by the company towards stated goals and objectives. In his sole discretion, he will control all of the financial aspects of the corporation, including receiving and disbursing funds, and acquiring debt. He will do this for 25% of his time.

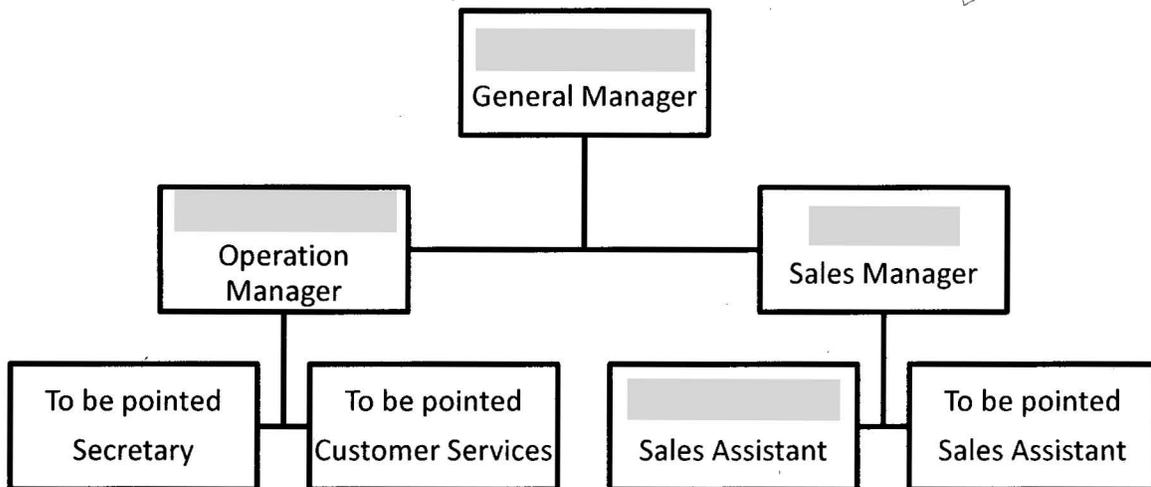
The [Beneficiary] will make decisions as to the areas in which to concentrate marketing efforts and as to which methods to utilize to expand client base on the research and analysis of market trends and economic conditions. More specifically, the [Beneficiary] will supervise the operations related with the purchasing, import, export, marketing and staff activities of [the Petitioner]. The [Beneficiary] will oversee the service operations of [the Petitioner] and will assume responsibility for quality, cost and deliveries.

The [Beneficiary] will [sic] meet with top executives of providers in the U.S. territory in order to enhance the company's market share in the U.S. The [Beneficiary] will be in charge of obtaining new distribution or representations agreements with U.S. manufacturers. He will oversee negotiations of substantial contracts and will conduct legal negotiations on investments in the United States. He will do this for 5% of his time.

*Matter of C- Inc*

[The Beneficiary] will establish work plans and oversee staffing for each project phase. He will arrange for assignment of personnel, and will confer with project staff to outline work plans and to assign duties, responsibilities and scope of authority. He will direct and coordinate activities of personnel to ensure project progress on schedule and within prescribed budget. He will do this for 15% of his time.

The Petitioner provided an organizational chart as follows:



The Petitioner also provided a position description of the operation manager position and the sales manager position. The Petitioner provided evidence of staffing levels including copies of 2014 IRS Form W-2 Wage and Tax Statement as well as copies of recent paystubs for the Beneficiary and its three other employees.

The Director issued a request for evidence (RFE) on July 31, 2015, instructing the Petitioner, in part, to submit evidence that the Beneficiary will be employed in a managerial or executive capacity in the United States.

In response to the RFE, the Petitioner submitted a two page sample daily schedule for the Beneficiary in his role as general manager. The Petitioner also provided a position description for the Beneficiary as follows:

- Meeting with Managers, to discuss matter pending from the prior week that required [the Beneficiary's] attention to revolve them.
- Discuss details of distribution and sales, and solve only complicated issues.

- Review business reports, elaborating business planning, establishing relations with providers and customers; answering questions of personnel in order to orient them in this field.
- Formulate strategies and policies of how to receive new clients and retain both, old and new via good services, promotion and appealing prices; she also transmit therefore her extensive executive experience in this field.
- Supervise the marketing and distribution manager for the developing and planning new strategies to export products to Colombia, depending on the necessities of clients and partners, always looking for quality and prices.
- Prepare and present to business partners abroad all payments made to employees, utility services, professional services, etc. for their review
- Manage policy deployment in the areas of distribution techniques, quality, cost reduction, completing on-time delivery safety, employee relations and performance measures.
- Provide all required support/control work for the logistic department of our main offices in Colombia and the alliance office for the export of all the orders of said offices; she prepares all the exports information to ours [*sic*] offices in Colombia.
- Develop ways for increasing inventory curves and reduce levels on hand for Petitioner in order to organize the chain distribution properly.
- Conducts a weekly meeting with all personnel in an effort to satisfy customers' specifications, to discuss communication between them and/or advise as to solutions of problems presented.
- Prepare, create and adequate [*sic*] international business transactions for clients in Colombia and later to other countries including but not limited to licensing agreement, franchising, international agreements.
- Procure the development and growth of business alliances.
- Conduct meetings with his immediate personnel to prepare marketing strategies, and to develop advertising plans to promote the company's products.
- Supervises the sales and operations department to assure a consistent flow of information and attainment of sales goals not just for the export but also into the United States.

In addition to the description of the Beneficiary's duties and daily activity log, the Petitioner submitted work examples of his work in the form of internal memoranda to subordinate staff.

The Petitioner provided the same organizational chart submitted with the initial petition. The Petitioner submitted its State of Florida Department of Revenue Form UCT-6 Quarterly Employment Tax filing for the quarter ending March 31, 2015, the quarter of filing. The returns show that the Petitioner employed the four employees named on the organizational chart. In a separate document, the Petitioner provided the names, position title, degree, date of employment, and annual salary for each employee. The Petitioner stated that the document included "summaries of duties" for each employee; however, no job duties were included. The Petitioner did include resumes and copies of degrees with uncertified English translations for each employee.

The Director denied the petition on February 22, 2015, concluding that the Petitioner did not establish that the Beneficiary would be employed in a managerial capacity under the extended petition. In denying the petition, the Director found that the Petitioner did not provide a clear and detailed job description. In addition, the Director found that the organization does not appear to be of sufficient operational capacity to support the Beneficiary in a primarily managerial role.

On appeal, the Petitioner submits a brief and a copy of its 2015 IRS Form 1120, U.S. Corporation Income Tax Return.

## 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 capacity under the extended petition.

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 stated in broad terms and lacked sufficient detail to establish what the Beneficiary would be doing on a day-to-day basis. For example, the Petitioner stated that the Beneficiary will "be responsible for formulating and administering company policies," "control all financial aspects of the corporation," "make decisions as to the areas in which to concentrate marketing efforts," "review analysis of activities, costs and operations," "establish work plans and oversee staffing," and "direct and coordinate activities of personnel." Many of these duties simply paraphrase the statutory definition of executive capacity and the Petitioner offered no additional insight into what specific tasks these responsibilities would entail within the scope of a weather instrument sales and distribution business with four employees. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *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). 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. The actual duties themselves will reveal the true nature of the employment. *Id.*

In response to the RFE, the Petitioner provided a new list of duties, but did not provide the percentage of time to be spent on each. Whether the Beneficiary is a managerial or executive employee turns on whether the Petitioner has sustained its burden of proving that his duties are “primarily” managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the Petitioner did not document what proportion of the Beneficiary’s duties would be managerial functions and what proportion would be 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 would spend on them. This failure of documentation is important because several of the Beneficiary’s daily tasks provided in response to the RFE, such as “prepare and present to business partners,” “develop ways for increasing inventory curves,” “prepare, create and adequate [*sic*] international business transactions,” “prepares all the exports information to our offices in Colombia,” and “procure the development of growth of business alliances,” do not fall directly under traditional managerial duties as defined in the statute. For this reason, we cannot determine whether the Beneficiary would be primarily performing managerial duties. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). In addition, the description stated that the Beneficiary supervises a marketing and distribution manager. This subordinate position, however, does not appear in any of the Petitioner’s other submitted documentation or organizational charts.

Finally, we acknowledge the Petitioner’s submission of a “daily activity log” that is intended provide details of the Beneficiary’s work-day. The log, however, did not add further specificity to the broad duties described in the two submitted position descriptions, nor did it give a sense of which of the two different position descriptions more accurately conveys his actual job duties on a day-to-day basis.

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) 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).

We note that in the initial organizational chart, and in response to the RFE, the Petitioner provided information regarding staff to be hired by the Beneficiary in the future. To the extent that the Petitioner plans to staff the company with additional employees, the record shows that those employees were not hired as of the date of filing the Form I-129. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r. 1971).

On appeal, the Petitioner claims that the Beneficiary relies on the services of 12 employees of its Colombian parent company and external service providers to perform some of the day-to-day duties of the organization.<sup>1</sup> While the Petitioner has provided a foreign organizational chart, the Petitioner has not specified the employees and duties that would be supervised by the Beneficiary in performing tasks for the United States entity. Furthermore, the Petitioner has not detailed the work that would be performed by external service providers or provided contracts or other evidence of its use of external service providers. 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) (quoting *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Regarding subordinate managerial or supervisory employees, the Petitioner's organizational chart shows the Beneficiary supervising one sales manager position, who in turn supervises a sales assistant position as the time of filing. The Petitioner has not, however, shown that the organizational structure supports a first-line supervisor. In fact, the evidence shows that the sales manager position is primarily performing the sales work of the organization with the help of an assistant, rather than supervising a subordinate sales employee in carrying out the day-to-day sales tasks. Specifically, the Petitioner claims that the sales manager position "[c]ontacts customers on a regular basis," "[s]hares details with customers on additional offerings," "[p]articipates in trade shows," "[s]hares ideas and customer needs throughout all phases of product life cycles," and "[e]xpedites the resolution of customer problems/complains." Although the Petitioner claims that the position will "[d]irect the accounting, sales and purchases department, and three employees," the Petitioner has not actually hired the claimed subordinate staff.

To determine 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. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term

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<sup>1</sup> In response to the RFE, however, the Petitioner stated that the Colombian company has "five full time employees, three sales persons and outsources two companies." Therefore, it is not clear from the record who are the 12 employees of the Colombian parent company relied on by the Beneficiary.

*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 Petitioner claims on appeal that the positions supervised by the Beneficiary are professional in nature. First, the Petitioner did not provide duties for the sales assistant position, and we are therefore unable to determine whether this position requires a baccalaureate degree. Next, the duties provided for the sales manager position do not support a finding that this position requires a baccalaureate degree, and the record does not support the Petitioner’s claim that this employee has a bachelor’s degree.

Finally, a review of the position description provided for the operation manager calls into question whether this employee will be performing professional level duties. Even if the employee performs some duties associated with the marketing function of the organization, the Petitioner has not shown that the employee will primarily be performing professional level duties and not the customs and administrative work required for an export business.

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.

The Petitioner states on appeal that the Beneficiary, “primarily manages an essential function of the Company.” Here, the Petitioner did not describe with any specificity what “essential function” would be managed by the Beneficiary or provide a breakdown of the Beneficiary’s job duties to support such a claim. Furthermore, the fact that the Beneficiary would have overall authority as the senior employee of the company does not establish that he would be employed as a function manager. While such authority is consistent with the statutory definition of managerial capacity, 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. 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. As described above, the duties described are vague, and offer little insight into the daily tasks the Beneficiary would perform. 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. For these

reasons, the Petitioner has not established that the Beneficiary will be employed as a function manager.

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, it is not the Petitioner's size, but rather the absence of staff to relieve the Beneficiary from performing non-qualifying duties, along with the noted inconsistencies and deficiencies regarding the position description, that are determining factors. It also remains unclear who performs the duties attributed to the vacant secretary, sales assistant, and customer service positions identified at the time of filing, or who is responsible for the purchasing functions attributed to the "purchasing department" which is referenced in the record but has not been shown to exist within the organization. Overall, given the inconsistencies and omissions, it is difficult to determine how work is actually distributed among the Petitioner's four employees and we cannot conclude that the Beneficiary's three subordinates would relieve him from significant involvement in the non-managerial activities of the company on a day-to-day basis.

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

### 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. § 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 C- Inc*, ID# 12608 (AAO Oct. 16, 2016)