



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

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

MATTER OF 747G- LLC

DATE: OCT. 21, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a human resources consulting firm, seeks to extend the Beneficiary's temporary employment as its managing director 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 under the extended petition.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the evidence of record establishes that the Beneficiary would perform primarily executive duties. The Petitioner contends that the Director placed undue emphasis on the Petitioner's staffing levels and overlooked its use of contractors.

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 (I)(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 (I)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (I)(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 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 under the extended petition.

A. Law

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.*

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.

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 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.*

In a letter submitted at the time of filing, the Petitioner described the Beneficiary's position as a "high-level executive position" involving top-level decision-making authority and responsibility for the overall direction of the company, and provided the following duties:

- Establish the Company's plans and goals in the US;
- Execute the company's business strategies;
- Promote the Company's image and reputation;
- Greatly increase awareness of the Company among the corporate business community;
- Establish a sales and growth plan, and implement that plan to achieve revenue targets;
- Recruit the necessary staff; and
- Lead an effective operating model for [the Petitioner].

In a request for evidence (RFE), the Director advised the Petitioner that this description was insufficient to establish the Beneficiary's eligibility and requested, among other items, a more detailed statement of what the Beneficiary would actually be doing on a daily basis.

In response, the Petitioner emphasized that the position is "clearly executive" and provided the following breakdown of the Beneficiary's duties:

- Establishing the company's presence in the U.S. by founding partnerships with clients . . . (20%) . . . ;
- Promoting the company's image and reputation by active participation in exhibitions and local chapters events . . . (15%) . . . ;
- Greatly increase awareness of the company by building strategic alliances with the corporation business community . . . (5%) . . . ;
- Establishing a sales and growth plan and executing that plan to achieve revenue targets (10%);
- Recruiting the necessary staff and setting in motion an effective operating model for [the Petitioner] (10%);
  - Selecting, developing, coaching and evaluating personnel . . . ;

- Managing people who lead projects supporting the company-client relationships and ensuring customer satisfaction;
- Hiring, terminating and training staff;
- Building and maintaining an effective management team;
- Overseeing the company's financial functions including financial plans and policies, accounting practices and procedures, and the organization's relationship with the financial community . . . (10%) . . . ;
- Oversees the execution and completion of customer projects, including . . . monitoring project completion from initiation through delivery to meet revenue and cost projections . . . (10%) . . . ;
- Analyzing budget reports, planning, and coordination of activities between clients and company personnel . . . (5%); . . . ;
- Sustaining, growing and adding new programs and service . . . (5%) . . . ;
- Meeting potential clients by growing, maintaining and identifying potential clients and decision makers within the client organization . . . (5%);
- Maintaining a dialogue between shareholders and the board via financial reporting; and assuming full accountability for the board for all company operations. (5%).

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.

Here, the Petitioner has consistently stated that the Beneficiary's role will be in an executive capacity and will include high-level responsibilities and authority to direct the organization; however, it has not provided sufficient detail to establish that the actual duties the Beneficiary will perform on a day-to-day basis will be primarily executive in nature. The Petitioner's initial description of his duties largely paraphrased the statutory definition of executive capacity and did not provide any insight into the nature of the Beneficiary's daily tasks. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. See *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

While the Petitioner submitted a lengthier description in response to the RFE, it did not further explain the duties provided at the time of filing. Rather, the Petitioner stated that the seven duties in the initial description would require only 60% of his time and then added six additional responsibilities which would make up the remainder of his time. The Petitioner did not explain why these new duties were not included at the time of filing. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. §

103.2(b)(8). The information provided by the Petitioner in its response to the Director's RFE did not clarify or provide more specificity to the original duties of the position, but rather added new duties to the job description.

Further, to the extent that the Petitioner described the Beneficiary's duties, those duties indicate that he will be directly responsible for the company's marketing, promotion and business development activities. Specifically, the Beneficiary is responsible for securing clients, promoting the company at exhibitions and workshops, executing a "sales and growth plan," building alliances within the business community, and identifying and meeting potential clients. These duties constitute 55 percent of the Beneficiary's time and have not been explained in sufficient detail to be characterized as clearly managerial or executive in nature, particularly in light of the lack of evidence that the Beneficiary has subordinate personnel to assist him with these business development functions, which will be discussed below. In response to the RFE, the Petitioner identified some specific clients, exhibitions, and business organizations as the Beneficiary's contacts, but did not elaborate on his actual duties.

The Petitioner asserts that the Beneficiary will allocate an additional 15% of his time to overseeing financial functions including directing the controller, accounting, treasury, and tax functions. While we do not doubt the Beneficiary's overall responsibility for the company's profits and losses, the Petitioner has not provided evidence of who is actually performing the various financial activities the Beneficiary is claimed to oversee. Also, the Petitioner allocates 10% of the Beneficiary's time to overseeing customer projects from initiation through delivery, but does not explain what tasks he performs or explained how projects are carried out, other than noting that projects are handled "via collaboration with industry experts and clients." Again, the Petitioner identified specific projects, but did not explain who among the Petitioner's employees or contractors would actually provide services to clients, information that would support its claim that the Beneficiary spends only a small time on client project activities.

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 Petitioner has not provided sufficient detail or explanation of the Beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Overall, the position descriptions submitted are inconsistent, vague, and include potentially non-qualifying duties, making these descriptions alone insufficient to support the Petitioner's claim that the Beneficiary performs primarily executive duties.

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 Petitioner, described in the record as a human resources consulting firm, provided evidence that it had hired two employees (a client service manager and client service assistant) during its initial year of operations and had opened a branch office in California. At the time of filing, in March 2015, the Petitioner stated that it expected to hire a sales manager and up to four sales people by 2018, and, within five years, a marketing employee and an engineering employee. In response to the RFE, the Petitioner stated that both subordinate employees had left the company in August 2015. The Petitioner provided evidence that it had hired a business development assistant on November 20, 2015. The Petitioner did not state that it was attempting to fill the client service manager or client service assistant positions that had been vacated, but it did identify four contractors who “provide shorter-term project-based work and trainings” for clients.

The Petitioner’s RFE response also included an undated organizational chart which appears to depict the structure of the company as of January 2016. The chart depicts the Beneficiary supervising three consultants (including two of the claimed contractors), a business partner, a contractor who serves as the “legal department,” an “MD Reporting” employee, and the business development assistant. The chart further shows that the business development assistant supervises an art director located in Egypt and a client service assistant located in UAE.

The Petitioner provided a lengthy list of duties for the business development assistant, indicating that she performs clerical, administrative and office-related duties, as well as researching and cold calling potential clients, creating presentations, developing solutions for clients, and interacting daily with a “Project Director” and “the internal team” regarding projects on a daily basis. In addition, the Petitioner submitted evidence of wages paid to this employee, as well as to its previous employees, and copies of IRS Form 1099-MISC, Miscellaneous Income, issued to three contractors in 2015 in amounts ranging from \$1000 to \$3938.68.

One of these contractors was [REDACTED] CEO of [REDACTED] who provided a letter dated December 16, 2015, explaining that he has accepted an offer to succeed the Beneficiary in the Petitioner’s managing director position in two years, and would be working with the Petitioner on a contracting basis and reporting to the Beneficiary in order to prepare for the assignment.

Upon review of the record, we find insufficient evidence to establish that the Petitioner has grown to the point during its initial year of operations where it could support the Beneficiary in a managerial or executive position. 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 a beneficiary to direct and a 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 an owner or sole managerial employee. A 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.*

Here, while we do not doubt that the Beneficiary has the appropriate level of authority and allocates some of his time to qualifying executive duties, the record does not support a finding that he would be primarily focused on the broad goals and policies of the company or that he would be sufficiently relieved from involvement in the day-to-day operations of the company. As noted, the Petitioner indicated that more than half of the Beneficiary’s time would be allocated to business development, marketing and promotion of the company, and financial matters. While some of these duties would likely involve discretionary decision-making authority consistent with an executive position, the Petitioner has not established that the company’s employees or contractors relieve the Beneficiary from significant involvement in non-executive functions of the company. Accordingly, the Petitioner has not established that he would be employed in an executive capacity.

Although the Petitioner consistently states that the Beneficiary’s position would be in an executive capacity, we have also considered whether the evidence supports a finding that his position would qualify as managerial. 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).

Here, while the Beneficiary directly supervised two employees at the time of filing, the Petitioner allocated only 10 percent of his time to personnel matters. Further, both employees left the company while the petition was pending and there is no evidence that the Petitioner intends to staff these positions again 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). At the time the RFE was issued, and for the three months preceding that date, the Beneficiary was the Petitioner’s sole employee and was clearly not acting as a personnel manager. While we acknowledge that the Petitioner eventually hired a business development assistant, a review of her job duties reflects that this position is not managerial or supervisory in nature and the Petitioner, which on appeal characterizes this position as an “administrative assistant,” has neither claimed nor provided evidence that it is a professional position.<sup>1</sup>

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<sup>1</sup> 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),

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 acknowledges that the Beneficiary has only one subordinate as of the date of the appeal, but it has not articulated a claim that the Beneficiary would primarily manage an essential function, nor does its description of the Beneficiary’s duties reflect that his duties would be allocated primarily to managing an essential function or otherwise primarily performing managerial duties.

On appeal, the Petitioner further refers to unpublished decisions in which we determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee or responsible for supervising a very small staff. The Petitioner has not established evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

We acknowledge 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. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Here, the Petitioner employed between zero and two part- and full-time workers subordinate to the Beneficiary while the petition was pending. The Petitioner states that it relies primarily on contractors rather than traditional employees to perform the company’s functions. While it has submitted some evidence related to its contractors, including evidence of limited payments made to them in 2015, it has also stated that it uses them for short-term projects and has not provided a detailed description of the services each contractor actually provides or evidence that the contractors are substantially involved in the day-to-day operations of the business rather than providing certain

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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.”

services to clients on an as-needed basis. Similarly, the Petitioner identifies two foreign employees on its organizational chart, but, again, did not provide a description of their duties or evidence that they are providing services for the U.S. company. 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)).

The regulations governing new office extensions require USCIS to examine the organizational structure and staffing levels of the petitioner at the end of its initial year of operation. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If a business does not have the necessary staffing after one year to relieve the beneficiary from performing operational and administrative tasks, the Petitioner is ineligible by regulation for an extension. Here, while the record shows that the company has expanded in terms of revenue and number of clients, the Petitioner has not submitted sufficient evidence that the combination of an administrative assistant, several short-term contractors, and the claimed foreign staff would sufficiently relieve the Beneficiary from performing non-executive and non-managerial duties associated with growing and administering the business and overseeing and executing projects in multiple countries. Further, at the time of filing, the Petitioner employed a full-time client service manager and the record that does not indicate that his duties have been assigned to the assistant who was hired later, or to one or more contractors. As such, it is unclear who, if not the Beneficiary, is available to perform the non-qualifying duties previously assigned to this employee.

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

### III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated 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 Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of 747G- LLC*, ID# 76179 (AAO Oct. 21, 2016)