



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

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

MATTER OF N-C-M-P- CORP.

DATE: AUG. 30, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a provider of professional makeup services, seeks to continue the Beneficiary's temporary employment as its president under the L-1A nonimmigrant classification for intracompany transferees. 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 of the California Service Center denied the petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner disputes the denial, asserting that the Director overlooked evidence in the record and did not properly apply the law to the presented facts.

Upon *de novo* review, we find that the Petitioner has not overcome the basis for denial. Therefore, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized knowledge," 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 or executive capacity. *Id.*

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Petitioner claims that the Beneficiary will continue to be employed in the United States in an executive capacity. As the Petitioner does not claim that the Beneficiary will be employed in a managerial capacity, we will only address the Petitioner's claim that the Beneficiary will be employed in an executive capacity.

Matter of N-C-M-P- Corp.

“Executive capacity” means an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

Based on the statutory definition of executive capacity, the Petitioner must first 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). The Petitioner must also prove that the Beneficiary will be *primarily* engaged in 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 description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in an executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine the company’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 business, and any other factors that will contribute to understanding the Beneficiary’s actual duties and role in a business.

Accordingly, we will discuss evidence regarding the Beneficiary’s job duties along with evidence of the nature of the Petitioner’s business and its staffing levels.

A. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in an executive capacity, we 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.

The Petitioner operates a salon that offers professional makeup, eyelash, eyebrow, and waxing services. It claimed five employees, including the Beneficiary, at the time this petition was filed in August 2017. The Petitioner provided an organizational chart reflecting its staffing in its “3rd year” of operation which the Petitioner identified as its “current” organizational chart. The chart shows the Beneficiary as operating in three separate capacities as president, as manager of the Petitioner’s salon; and as manager of media and advertising, which is identified as a “temporary” role. These positions are depicted at three different levels within the Petitioner’s hierarchy. In his capacity as president, the Beneficiary is depicted at the top-most level of the hierarchy overseeing a comptroller, the building landlord, the media and advertising manager position, a graphic designer, a web management company, two attorneys, and various product suppliers. In his capacity as manager, the chart depicts the Beneficiary as overseeing a beauty salon staff that includes a cashier, a facial specialist, an eyelash extension specialist, a makeup artist, and a contractor that provides makeup artist services. Finally, in his third, “temporary” role as media and advertising manager, the chart

shows that the Beneficiary has no subordinates and was likely expected to perform, rather than manage, the duties related to this area of the business.

The Petitioner did not clarify how the Beneficiary would manage or direct the companies that supply its products or own the building where the Petitioner's business is housed. Similarly, although the Petitioner may use the services of attorneys from time to time as the business need arises, it has not established that the two attorneys that are identified in the organizational chart can be deemed as part of the staff through whom the Beneficiary manages or directs the operation. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The evidence must substantiate that the duties of a beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees are not probative and will not establish that an organization is sufficiently complex to support an executive position.

The Petitioner also provided its payroll summary for January through June 2017 as well as multiple quarterly federal tax returns. ; The quarterly tax return for the 2017 second quarter, which immediately preceded the filing of this petition, indicated that the Petitioner had four employees. The Petitioner's payroll summary lists only three employees, including the Beneficiary. However, the other two employees were not named in the Petitioner's organizational chart.

In a request for evidence (RFE) the Petitioner was instructed to provide an organizational chart identifying the Beneficiary and the employees in his team or division. The Petitioner was asked to provide employee names, job titles, and job descriptions along with their respective educational levels and evidence of salaries or wages paid, such as the Petitioner's payroll summary, or IRS Forms W-2, and 1099-MISC.

In response, the Petitioner provided an updated organizational chart which is labeled [REDACTED]. The updated chart includes a change in position titles for [REDACTED] whom the original organizational chart identified as the comptroller, but who is now identified as "comptroller/accountant" in the updated organizational chart. As the Petitioner did not acknowledge the altered job title, it is unclear whether the change was intended to indicate a change in [REDACTED] job duties. The updated chart also indicates that the Petitioner hired a social media manager – [REDACTED] – and a beauty salon manager – [REDACTED] (who was also performing as a makeup specialist); the Petitioner did not explain why these two employees were included in its original payroll summary for January through June 2017, but were not listed in the original organizational chart. The Petitioner must resolve this incongruity in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, although the Petitioner's updated staffing information indicates that the Beneficiary was relieved from having to assume any position other than president within the petitioning organization, it appears that the changes had not taken place as of the date this petition was filed. As discussed above, the Beneficiary originally assumed three separate roles within the petitioning organization – president, media and advertising manager, and manager of the beauty salon. We note, however, that

the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). Again, it is unclear why [REDACTED] and [REDACTED] were not identified in the Petitioner's original organizational chart if they were working for the Petitioner at the time of filing, as the original payroll summary indicates.

The Petitioner also provided an updated payroll summary for January through October 2017 naming four employees and a 1099 summary for January through December 2017 naming five employees.¹ Both summaries list the employees and their respective earnings in 2017. Although the Petitioner provided its 2017 third quarterly tax return claiming four employees around the time the petition was filed, the record does not identify those employees or their respective positions.

In addition, the Petitioner provided an employee list that names each employee and includes his or her salary, job title, and job description. The list indicates that the Petitioner's comptroller/account is an independent contractor. It also lists names, salaries, and job descriptions for a manager/makeup artist, a makeup facial specialist, a cashier, and a social media manager. The additional information indicates that the Petitioner underwent some staffing changes between the time the instant petition was filed and the time it issued the RFE response. However, the Petitioner did not explain or clarify the considerable differences between the submitted organizational charts. As such, it is unclear precisely whom the Petitioner employed at the time it filed the instant petition. We further note that the Petitioner's and the foreign entity's respective organizational charts indicate that both entities share [REDACTED] as their graphic designer and use the services of [REDACTED] as their web manager. However, the Petitioner did not provide evidence to show that it paid either [REDACTED] or [REDACTED] for services at or around the time of filing:

In the denial decision, the Director incorrectly determined that the changes reflected in the Petitioner's updated organizational were indicative of inconsistencies when compared to the original organizational chart. As the Petitioner argues on appeal and as indicated by the titles on the two respective charts, the more recent organizational chart merely reflected the organizational changes that had taken place since the time of filing. However, the Director properly noted that eligibility must be based on the facts and circumstances that exist at the time of filing and any changes that may have taken place since then would not be relevant to the issue of the Petitioner's eligibility *at the time of filing*. The Director found that the Petitioner does not have a subordinate level of managers for the Beneficiary to direct and concluded that the Petitioner's organizational structure is not sufficient to elevate the Beneficiary to a position that is above that of a first-line supervisor of non-professional employees.

On appeal, the Petitioner asserts that it has a staff of employees and contracted workers who "handle the beauty service workload," thereby freeing the Beneficiary to focus on "important executive duties consistent with his role as President of the corporation." We note, however, that the

¹ All four employees, who were included in the payroll summary also received 1099 payments, while one individual was paid solely as a contractor.

organizational chart that the Petitioner originally provided does not indicate that the Beneficiary was free to solely focus on his intended role as president of the company, given that the Beneficiary was depicted in two other roles – that of media and advertising manager and that of manager of the beauty salon – at the time this petition was filed. Although the Petitioner may have intended to transition the Beneficiary to a full-time role as its president, it does not appear to have had that ability at the time of filing, as is apparent by the fact that the Beneficiary had to manage the beauty business and assume the role of “temporary” media and advertising manager.

The Petitioner also correctly observes that we must take into account the reasonable needs of the organization and that a company’s size alone may not be the only factor in determining whether the Beneficiary is or would be employed in a managerial or executive capacity. See section 101(a)(44)(C) of the Act. However, it is appropriate 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. *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). The size of a company may be especially relevant when there are noted discrepancies in the record, such as those discussed earlier. See *Systronics*, 153 F. Supp. 2d at 15. We also note that the Petitioner’s reasonable needs serve only as one factor in evaluating the Beneficiary’s proposed position and they will not supersede the requirement that the Beneficiary must be “primarily” employed in an executive capacity. See section 101(a)(44)(B) of the Act.

Further, although the Petitioner cites to several of our non-precedent decisions to support its arguments about reviewing a company’s reasonable needs, its arguments are not persuasive because the Petitioner has not shown that the facts of this petition are analogous to those in the unpublished decisions, where we determined that the respective petitioners provided ample evidence of their use of contracted labor and demonstrated adequate organizational complexity to warrant and support the employment of a manager or executive. Here, as discussed in sufficient detail, the Petitioner has provided insufficient evidence to show that it had the necessary staffing to support the Beneficiary in a primarily executive position. Further, while 8 C.F.R. § 103.3(c) provides that we are bound by our precedent decisions, unpublished decisions are not similarly binding.

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. 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 they 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. 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, as the Director correctly pointed out, the Petitioner did not have a subordinate level of managerial employees through whom the Beneficiary could have directed the management of the organization at the time of filing. In fact, based on the original organizational chart the Beneficiary himself occupied the Petitioner's two managerial positions at the time of filing. Although the Beneficiary may have assumed the top-most position as the Petitioner's president, the record indicates that the Beneficiary did not have a managerial staff to support his executive position, given that he himself comprised the managerial tier within the organization at the time of filing.

In light of the above, the Petitioner has not established that it had the organizational complexity to support the Beneficiary in an executive capacity at the time of filing.

B. Duties

In support of the petition, the Petitioner provided two substantially similar job descriptions for the Beneficiary's proposed position. It stated that the Beneficiary's job duties would include monitoring the following: financial performance, weekly sales and cash flow from daily sales, bank accounts, "the flow of customers," and the effects of advertising campaigns on social media. The Petitioner also stated that the Beneficiary would use his discretionary authority to do the following: work with an accountant to review financial statements and establish policies that will result in increased profits; review and supervise tax payments; review and approve payroll and payments to suppliers; establish monthly sales targets and establish and approve advertising strategies and designs; "[e]stablish the necessary regulations" to ensure good performance by employees and contractors; hire employees and contractors; "[m]ake necessary the contributions of investment for the consolidation of the company"; and, in concert with the "Legal Representative," establish policies and disciplinary measures to be applied to all employees and contractors. The Petitioner did not clarify the types of policies that would affect its profit margins or state who would gather the data the Beneficiary would use to determine monthly sales targets and the effects of various advertising campaigns. Likewise, the Petitioner did not discuss the types of "necessary regulations" that would affect employee performance, nor did it clarify what was meant by "the consolidation of the company" within the scope of a business that offers salon services.

In addition, the Petitioner indicated that the Beneficiary would carry out multiple non-executive tasks, including contacting suppliers and making product purchases, processing supplier invoices, actively taking steps to ensure the Petitioner's compliance with licensing requirements, and providing "ongoing training" and supervising non-professional employees and contractors, including a cashier and various beauty specialists, i.e., makeup artists, facial and eyelash extensions specialists, and hair stylists.

Other relevant supporting evidence includes the Beneficiary's professional profile and photocopy of his business card. The profile includes the Beneficiary's name and contact information and states, in part, that the Beneficiary trains "professionals to service the field of make-up, waxing and plucking eyebrows." The profile also states that the Beneficiary trains and develops "techniques for

managing clients” and is an expert team leader and makeup artist. The Beneficiary’s business card also includes his and the Petitioner’s contact information and indicates that the Petitioner offers various beauty services in the United States and Venezuela; it identifies the Beneficiary as “Make Up Specialist,” thereby indicating, as did the professional profile, that the Beneficiary actually provides some of the beauty services that the Petitioner offers.

In the RFE, the Director instructed the Petitioner to provide a job duty breakdown with a percentage of time allocated to the typical executive duties the Beneficiary would perform. The Director asked that the Petitioner address each of the four-prongs that comprise the criteria for executive capacity.

In response, the Petitioner provided a job duty breakdown using the prongs of the definition of executive capacity to categorize the job duties. The Petitioner stated that the first prong – establishing the organization’s goals and policies – would consume 30% of the Beneficiary’s time and would involve the following duties: providing strategic leadership in developing and implementing “concepts, plans, operating policies, and management direction”; establishing long- and short-term goals and growth strategies; preparing and overseeing the annual budget, “scheduling expenditures,” and ensuring adherence to financial objectives; negotiating “the scope, deliverables and costs of [the Petitioner]’s contracts with clients,” identifying client needs, and creating an effective sales and service strategy; and staying up-to-date on factors that affect the beauty industry in southern Florida where the Petitioner does business. The Petitioner did not identify specific concepts, plans, or operating policies, nor did it clarify its reference to “the scope,” “deliverables,” or client contracts within the context of a business that provides beauty services. The Petitioner also did not state who will gather information to enable the Beneficiary to stay informed of factors that affect the beauty industry. Further, based on the Petitioner’s staffing composition at the time of filing, the organization was primarily comprised of make-up artists with expertise in various fields in the beauty industry. Therefore, the record lacks evidence to show that the Beneficiary had a managerial tier of employees to whom he could delegate the execution of the financial objectives he establishes.

The Petitioner stated that the second prong of executive capacity – directing the management of the organization – would consume 42% of the Beneficiary’s time and would involve the following duties: overseeing the work of contracted service providers, including accountants, attorneys, graphic designers, and web management companies; directing investment activities; monitoring the Petitioner’s financial performance and cash flow, reviewing financial statements, and establishing sales targets and “cost policies”; monitoring and supervising employee performances and overseeing ongoing staff training; establishing advertising strategies and “market behavior” by monitoring “the flow of customers”; evaluating supply needs, negotiating with suppliers, and making equipment and supply purchases; and overseeing the company’s “financial operations” by monitoring bank accounts and approving payroll and supply expenditures. The Petitioner did not, however, explain the types of investments it plans to make or establish that making investments is an ongoing activity within the context of its business. The Petitioner also did not establish that overseeing non-professional employees and service providers, monitoring “the flow of customers,” negotiating with suppliers, and purchasing supplies and equipment are qualifying executive-level tasks.

Next, the Petitioner addressed the third prong – exercising wide latitude in discretionary decision-making – which would consume the remaining 28% of the Beneficiary’s time. The Petitioner stated that this prong would involve the following activities: directing and supervising “human resources activities” through approval of performance reviews, “selection of managerial staff,” and hiring and firing employees; establishing guidelines for and directing the implementation of “corporate level strategies” by providing sales incentives and client support strategies and negotiating with “suppliers and intermediaries”; participating in the recruitment and retention of employees; making decisions on a daily basis about personnel, purchasing, customer support, IT issues, and sales; acting as the Petitioner’s legal representative; and directing “all executive matters of new business” through a board of directors.

As previously discussed, the Petitioner did not establish that it had a managerial staff at the time this petition was filed. Further, although we acknowledge that using discretionary authority in hiring and firing employees is characteristic of an executive employee, the act of carrying out human resources duties, such as recruiting and training non-professional employees and reviewing their respective performances, are not indicative of someone who is primarily employed in an executive capacity. The Petitioner also did not define any “client support strategies” or state who, aside from the Beneficiary, was available to carry out those strategies at the time of filing. Absent evidence that the Petitioner had employees to address its customer support issues, it is likely that the Beneficiary would be carrying out this non-executive function in addition to the various others noted above.

Lastly, the Petitioner addressed the fourth prong of the definition by stating that the Beneficiary receives limited supervision from the board of directors and is “solely responsible” for making executive decisions that affect daily operations as well as the company’s “overall direction and growth.”

On appeal, the Petitioner states that the Beneficiary’s job duties “are clearly executive in nature.” We disagree with this contention. Not only does the record lack evidence to show that the Petitioner had the organizational complexity to support the Beneficiary in an executive position, but the job duty breakdown it offered is also deficient, from its lack of clarity in some instances to lack of supporting evidence in others. Moreover, as discussed throughout our analysis of the job description, the Petitioner included various non-executive job duties as part of the proposed position. While the Beneficiary is not required to allocate 100% of his time to executive-level tasks, the Petitioner must establish that the non-executive job duties would only be incidental to, as opposed to the main focus of, the proposed position. 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, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *Matter of Church Scientology Int’l*, 19 I&N Dec. 593, 604 (Comm’r 1988).

The fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity within the

meaning of section 101(a)(44)(B) of the Act. By statute, eligibility for this classification requires that the duties of a position be “primarily” executive in nature. Sections 101(A)(44)(B) of the Act. While the Beneficiary may exercise discretion over the Petitioner’s day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, these elements alone are not sufficient to establish that his job duties would be primarily executive in nature. 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). In the present matter, neither the job description itself nor the Petitioner’s organizational composition support the Petitioner’s claim on appeal that the Beneficiary’s primary concern is to carry out executive duties in his capacity as the company’s president.

III. PRIOR APPROVALS

Finally, we acknowledge that USCIS previously approved two nonimmigrant petitions filed on behalf of the Beneficiary. In matters relating to an extension of nonimmigrant visa petition validity involving the same petitioner, beneficiary, and underlying facts, we will generally give some deference to a prior determination of eligibility. However, the mere fact that a visa petition was approved, by mistake or oversight, does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *See, e.g., Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); *Matter of Church Scientology Int’l*, 19 I&N Dec. 593, 597 (Comm’r. 1988). Each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. In making a determination of statutory eligibility, the Director is limited to the information contained in that individual record of proceeding. 8 C.F.R. § 103.2(b)(16)(ii).

In the present matter, the Director reviewed the record of proceedings and concluded that the Petitioner was ineligible for an extension of the nonimmigrant visa petition’s validity based on the lack of evidence demonstrating the Petitioner’s eligibility. In both the RFE and the final denial, the Director articulated the objective statutory and regulatory requirements and applied them to the case at hand. If the previous petition was approved based on the same minimal evidence of the Beneficiary’s eligibility, the approval would constitute error on the part of the Director.

IV. CONCLUSION

For the reasons discussed above, we find that the Petitioner has not established that the Beneficiary will be employed in the United States in an executive capacity under an extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of N-C-M-P- Corp.*, ID# 1575816 (AAO Aug. 30, 2018)