U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF [redacted] DATE: APR. 24, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a wine importer, seeks to temporarily employ the Beneficiary as its chief operating officer (COO) and one of its regional sales managers 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 of the California Service Center denied the petition, concluding that the Petitioner did not establish, as required, that it will employ the Beneficiary in the United States in a managerial or executive capacity.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred by disregarding the Beneficiary's detailed job description and substantial evidence of eligibility.

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. 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. Section 101(a)(15)(L) of the Act.

By regulation, an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, must include evidence that the Petitioner will employ the Beneficiary in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed. *See* 8 C.F.R. § 214.2(l)(3)(ii).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. On appeal, the Petitioner states that it submitted enough evidence and information to establish eligibility. We disagree, as explained below.

Throughout the proceeding, the Petitioner has stated that it seeks to employ the Beneficiary in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in an executive capacity.[1]

An "executive capacity" is "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.

Section 101(a)(44)(B) of the Act.

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. Duties

When examining the executive capacity of the Beneficiary's intended position, we will look first to the Petitioner's description of the job duties. 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. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The definition of executive capacity has 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

[1] On appeal, the Petitioner observes that, "[a]t all times," it has called the Beneficiary's intended position "an executive position," but that the Director, nevertheless, also determined that the position does not qualify as managerial. The Petitioner does not contest that determination.

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 Petitioner referred to the Beneficiary's intended position by two different titles, specifically COO and regional sales manager. Each title appears more than once, indicating that neither appeared through error or oversight. A proposed organizational chart (to be discussed below) identified the Beneficiary as the Petitioner's COO, and also as one of three U.S. regional sales managers. The Petitioner stated: "As a Chief Operating Officer . . ., [the Beneficiary] will be managing the regional customers/accounts (distributors) in the territories he will represent."

The Petitioner listed the Beneficiary's intended responsibilities, with the approximate percentage of time to be devoted to each. The four-page description, too long to quote here in full, includes these seven areas of responsibility:

> Establish and carry out departmental or organizational goals, policies, and procedures – 10%
> Analyze financial statements, sales reports, and other performance indicators. Identify places to cut costs and to improve performance, policies, and programs – 15%
> Management and Operations – 25%
> Human Resource Management – 15%
> Consult with CEO [chief executive officer], staff, and board members about general operations – 20%
> Negotiate or approve contracts and agreements – 15%

Here are some key details quoted from various parts of the full description:

- [The Beneficiary] will be focusing on establishing and developing relationships with retail chains [in the Western United States] . . . while directing sales managers and promoters
- He will be carrying out the Company's operational planning together with the CEO/President. Among his duties, he is responsible for directing the warehouse in the West Coast, hiring Promoters, launch a new line [of] wines, and hire a key account manager for the off-trade and on-trade.
- [The Beneficiary] will be working with and supervising the US Office Manager at the [redacted] office which provides logistic support to the company. [redacted] is the office manager who reports to the Executives.
- Oversees national and international organization and company structure
- Manages human resources of organization for national and international markets
- Has . . . discretion over the day-to-day operations of the activity or function [the Beneficiary] manages.

- Supervise and control the work of other regional managers of the organization and provides necessary support.
- Collaborates with other Regional Sales Managers for cognition of best sales practices that support the [Petitioner's] business model
- [The Beneficiary] will be directing sales managers, promoter and logistic employees and working with the US legal and CPA consultants.

The Petitioner stated that its "Board delegates responsibility for management and day-to-day operations to the COO and he has the authority to carry out these responsibilities. . . . [The Beneficiary] will report directly to the CEO and Board of Directors."

The Petitioner also indicated that the Beneficiary "is scheduled to work at the [redacted] CA Office," but then stated that the Beneficiary would work at the following locations:

- [redacted] Office: 6 weeks per year
- [redacted] Office: 12 weeks per year
- Italy: 6 weeks per year
- Off-site: 24 weeks per year [visiting customers]

The Petitioner also described the "type of customers/accounts" with which the Beneficiary will work, stating that he will manage more than 20 local distributors in 13 U.S. states and has the "basic function to make sure that the distributors purchase the products and to ensure repeat sales to the distributor." The Beneficiary would also work with retailers (the distributors' clients) by "overseeing the placement of point-of purchase displays; running sales promotions . . .; providing product education to the retailers, and running events at on- and off-premise retailers."

A separate job description referred to the Beneficiary as an "independent contractor" with the following responsibilities as regional sales manager:

- In charge of reaching the targets and goals set for his department.
- Establishes, maintained and expanded his customer base
- Services the needs of company's existing customers
- Explores various routes to market
- Sets sales targets for individual importers
- Monitors importer's performances and motivating them
- Compiles and analyzed sales figures
- Manages and dealt directly with all wine importers
- Conducts customer feedback and market research
- Reports to Chief Executive Officer. . . .
- Follows up to date with products and competitors

The travel schedule indicates that the Beneficiary would spend half his time traveling to meet with customers. This information suggests that the Beneficiary will perform substantial duties in his sales

role, which would limit the amount of time he would have available to perform any claimed managerial duties associated with the COO position. Also, the Petitioner does not employ any subordinate sales staff (although there are contracts with two local marketing companies).

The Director issued a request for evidence (RFE), asking for more information about the Beneficiary's intended duties and responsibilities. In response, the Petitioner repeated the previous job description, with some added passages emphasizing the Beneficiary's discretionary authority. The Petitioner stated that, as COO, the Beneficiary will:

- Oversee sales team by territory
- Develop and maintain good relationships with current and future distributors
- Introduce new products the CEO negotiated to the network of US distributors
- [Be] [r]esponsible for quality control and proper service of each account.
- [Be] [r]esponsible for overseeing contracts nationwide

A new set of job descriptions showed the Beneficiary's duties as a regional sales manager as before, but included a new passage stating: "this job description is for services prior to visa application. Upon visa approval, his job position . . . is COO." Nevertheless, the Petitioner submitted two more organizational charts which, like before, showed the Beneficiary both as the COO and as a regional sales manager.

The Director found that the Petitioner did not provide enough information about the Beneficiary's day-to-day tasks to show that his position is primarily managerial or executive. On appeal, the Petitioner states: "The Director did not consider the lengthy and detailed analysis, percentage of the job duties, and travel itinerary" and other evidence that established that the Beneficiary will work in an executive capacity.

The described duties address the first element of the definition of an executive capacity, in that the Petitioner claims the Beneficiary would direct the management of the organization or a major component or function thereof. But the Petitioner has not shown that the Beneficiary will establish goals and policies, exercise wide latitude in discretionary decision-making, or receive only general supervision or direction from higher-level executives and the board of directors. Section 101(a)(44)(B) of the Act. Instead, it appears that the Beneficiary would be implementing goals, policies, and decisions formulated by the CEO, as shown by this breakdown that the Petitioner submitted:

CHIEF EXECUTIVE OFFICER	CHIEF OPERATING OFFICER
• Responsible for the company['s] entire operations • Focus on existing recurring clients • Improve relationships with existing clients	• Oversee sales team by territory • Develop and maintain good relationships with current and future distributors. • Introduce new products the CEO

• Introduce new products and services to the company's portfolio • Responsible for annual budget • Visit producers and major clients • Enter into partnership/agreements with new producers and distributors • Develop special projects	negotiated to the network of US distributors. • Responsible for quality control and proper service of each account. • Responsible for overseeing contracts nationwide.

The Petitioner has consistently described the Beneficiary's position as that of an executive, but the Petitioner has not shown that the intended position rises to that level of authority or responsibility. Instead, the record shows some degree of oversight over another regional sales manager and contractors, with the Beneficiary spending the majority of his time away from the Petitioner's offices, primarily on sales trips. We cannot conclude that the Beneficiary would primarily perform executive level duties if he will be spending half of his time performing sales duties alongside the Petitioner's other regional sales staff.

In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner has submitted a lengthy job description for the Beneficiary, and evidence that the company has hired contractors and employees to carry out many of the company's tasks, but the evidence, regardless of its quantity, does not show that the Beneficiary would primarily act in an executive capacity.

B. Staffing

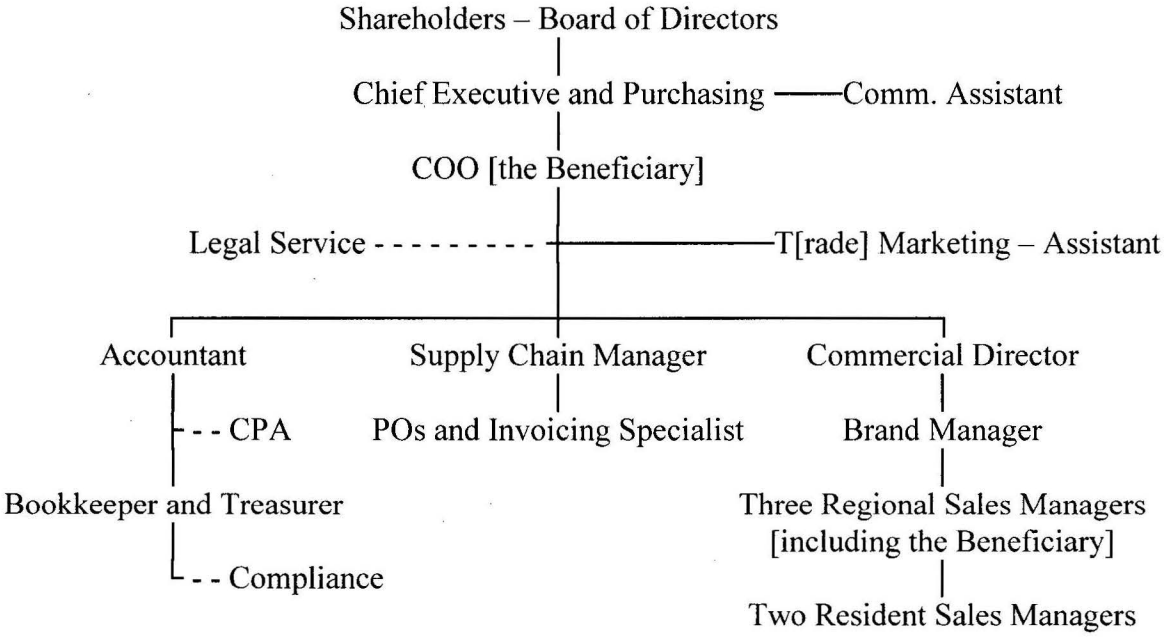
Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed executive capacity of a beneficiary, including the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve 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 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 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.*

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. 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. *See e.g., Family Inc.*, 469 F.3d 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

On its Form I-140, asked how many employees it had "in the U.S.," the Petitioner stated that it had "three full time employees and a total of 14 independent contractors." A list of job descriptions indicated that the three employees are the CEO and two regional sales managers (one of whom the Petitioner also called the national sales manager). The list also indicates that most of these workers are abroad, not "in the U.S." as claimed on the petition.

The Petitioner's proposed organizational chart showed the listed individuals, along with contracted support firms (designated by dashed lines):



The proposed chart is largely identical to the current chart, except that the current chart lacks a COO position, and lists the Beneficiary only once, as one of the regional sales managers. The similarity between the charts indicates that the Petitioner has previously functioned with the same organizational structure without a COO.

Other information in the record indicates that the organizational chart does not simply depict the Petitioner's organizational structure. Rather, most of the people named on the chart actually work (as employees or contractors) for the two foreign companies that jointly own the petitioning entity.

Seven of the names on the above organizational chart also appear on the chart for The Winy Way Group, which owns half of the petitioning company. (The Beneficiary is a shareholder, director, and COO of

The chart identified the "Bookkeeper and Treasurer" as ' [*sic*]." Elsewhere, the Petitioner called "the office manager who reports to the executives" and "a logistic and operations officer." These inconsistencies raise questions about actual responsibilities with the company. job description calls him an "[i]ndependent contractor" who "[r]eports to Chief Executive Officer" and handles the following functions:

- Compliance
- Order Processing
- Bookkeeping
- Taxes
- Reporting

The job description also states that would:

- Maintain corporate operations at headquarters office in
- Serves as the central communications hub of the company, managing relationships with customers, suppliers, sales reps and management.
- Maintain database of customers, pricing, business contracts, supplier products specs and other details.

The RFE response includes a letter from stating that he is "in charge of logistics, bookkeeping, compliance and payments for" the Petitioner. He did not claim the other duties that the Petitioner has attributed to him, although he signed a contract in 2014 calling himself the Petitioner's "Operations Manager."

The Petitioner has variously indicated that reports directly to the Beneficiary, the bookkeeper, and the CEO. The Petitioner has not provided consistent information about role within the company or his place within its hierarchy.

While the Petitioner claims three employees in the United States, it has documented payments to only two employees, specifically the CEO and variously identified as a regional sales manager and the Petitioner's national sales manager. job description reads:

- Market level expert. Manage day-to-day performance, distributor information systems and local market data.
- Monitor progress against channel specific objectives and suggest course correction where necessary thru the market team.
- Distributor Management in key states. . . .

- Communication to the distributor resources, tactical programs and overall strategic imperatives.
- Manage all local resources to obtain a disproportionate share of mind to concentrate on growing KPIs Conduct "work-withs" with distributor selling organization to ensure execution against KPIs.
- Orchestrate sell-through activities with distributor resources in market.
- Work with distributor team to leverage, and ensure proper execution of all assigned sales activities. Create and maintain key market relationships thru focused customers and distributor engagement to maximize awareness of all the brands portfolio in the market.
- Provide training of distributor reps and retailers on [the Petitioner's] brands and target consumers; including use of ambassadors and other educational resources.
- Building existing and new distributor relationship to increase sales and build brand recognition
- Work hand in hand with our wineries (25 wineries) to market new vintages, marketing direction & Trends
- Establish visibility in the competitive wine market
- Reports to Chief Executive Officer

The above description appears to refer to elements of infrastructure that the Petitioner has not fully documented, such as a "market team," "ambassadors," and a "distributor information system."[2]

In the denial notice, the Director stated that the Petitioner had not documented the employment of most of the people named on the organizational charts. The Director concluded that the Petitioner had not established sufficient organizational complexity to warrant a managerial or executive position.

On appeal, the Petitioner cites *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), to support the assertion that we "must assess all relevant evidence in the record concerning the beneficiary's position within the wider 'qualifying organization,'" including the foreign companies.

We must also, however, assess the Beneficiary's prior or existing role with the larger organization. The Beneficiary's pre-existing role with [redacted] already gives him authority over that entity's foreign employees, and the Petitioner has not indicated that the Beneficiary would relinquish that role if granted L-1A status. The Beneficiary would not become an executive of the U.S. company by keeping his existing authority over foreign workers while taking on a new title at the U.S. company. The Petitioner has not shown that the petitioning U.S. company employs or pays those foreign workers. Rather, they work for [redacted] to which the Petitioner

[2] The Petitioner has identified a "[redacted] employed not by the Petitioner but by a related holding company in Italy. The Petitioner has not documented this individual's employment or the extent of his activities in the United States.

provides support services as an importer. The Petitioner appears to operate essentially as a sales office for the foreign shareholders, and currently lacks the organizational complexity and layers of management that would warrant an executive-level COO position.

The Petitioner stated that it "has the support of strategic employees and other services provided" by its two European shareholders. The Petitioner has not explained how this support from Europe would extend to relieving the Beneficiary from having to perform extensive, hands-on account management and sales responsibilities in the United States, including direct contact with distributors and their customers which, as discussed, will require extensive travel and consume half of his time.

On appeal, the Petitioner states: "In early 2015, Petitioner acquired [redacted] a US distribution company located in the North East," from [redacted] a corporation in Maine. The appeal includes a photocopy of a "Business Asset Sale Closing Agreement" from January 12, 2015, but it does not identify the assets purchased. The Petitioner contends that this acquisition increased the organization's complexity. The Petitioner's organizational charts and employee lists do not reflect the addition of any personnel or job titles resulting from the acquisition. The Petitioner has identified office and storage facilities at various U.S. locations, but none in Maine.

The Petitioner's evidence does not draw a clear line between the activities of foreign companies such as [redacted] which the Beneficiary already oversees, and those of the petitioning U.S. entity. The Petitioner has stated that the Beneficiary should be considered an executive abroad because of his work with [redacted] and that his work with that same company's employees and contractors should also count toward a finding that he will be an executive in the United States. We do not find this assertion to be persuasive. The Beneficiary's authority over a foreign company with overseas employees does not become a U.S. executive position when the Beneficiary exercises that authority from an office in the United States.

III. CONCLUSION

The Petitioner has not established that it intends to employ the Beneficiary in an executive capacity in the United States.

ORDER: The appeal is dismissed.

Cite as *Matter of* [redacted] ID# 305129 (AAO Apr. 24, 2017)