U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-U-USA INC.

DATE: DEC. 4, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which is engaged in the wholesale and retail sale of fabrics and garments, seeks to continue the Beneficiary's temporary employment as its general director 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 it would employ the Beneficiary in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner contends that the Director mischaracterized the Beneficiary's role as that of a first-line supervisor, and maintains that he will continue to be employed in a managerial and executive capacity.

Upon *de novo* review, 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. DEFINITIONS

"Managerial capacity" means an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization; 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; has authority over personnel actions or functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

The term "executive capacity" is defined as 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.

The Petitioner must first establish that the Beneficiary will perform certain high-level responsibilities consistent with these statutory definitions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). 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, e.g., Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

III. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

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

When examining the managerial capacity of a given beneficiary, we will look to the petitioner's description of the job duties. *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 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.

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

B. Duties

In a letter submitted at the time of filing in December 2017, the Petitioner stated that the Beneficiary will continue to perform the following duties as general director:

- Develop overall marketing and sales strategic framework and build brand positioning and marketing strategies (10% of time);
- Overall analysis of the sourcing competition in the U.S. market; plan global sourcing strategy, inconsideration of the U.S. market strategy (5% of time);

- Direct responsibilities for seasonal factory allocations and factory and capacity [*sic*] based on U.S. market conditions (5% of time);
- Establish U.S. market sales revenue goals and seasonal sales revenue goals (5% of time);
- Direct and make final decision on trade show strategies in the U.S. market (5% of time);
- Negotiate and make final decisions on all contracts (20% of time);
- Develop strategies to secure new client accounts and policy to build lasting relationships with U.S. vendors from the offshore company and factory (15% of time);
- Supervise all major functions of the organization (5% of time);
- Structure and develop U.S. market customer services and client account management methods and policies to ensure meeting the sales revenue goals and U.S. market expansion goals (15% of time);
- Guide business personnel and expand or contract premises (5% of time);
- Direct the integration of existing brands and customers of the foreign entity to the U.S. market with U.S. new brands and customers (10% of time).

This broad description of the Beneficiary's duties did not convey what he would be doing on a day-to-day basis as the Petitioner's general director. The Petitioner did not identify the tasks he will perform with sufficient specificity, nor did it provide any concrete examples of strategies and goals the Beneficiary would develop and implement in support of its claim that he would spend his time primarily focused on higher-level strategy, planning and decision-making responsibilities. For example, without additional information, we cannot determine what is entailed by "supervis[ing] all major functions" or "direct[ing] the integration" of brands and customers, nor can we determine that the Beneficiary's responsibility for negotiating "all contracts" is a managerial or executive-level task without details regarding the nature of the contracts requiring the Beneficiary's direct involvement.

Reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. The Petitioner did not provide 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).

In a request for evidence, the Director requested a more detailed description of the Beneficiary's position and advised that the Petitioner should identify the Beneficiary's typical managerial or executive duties with specificity and provide the percentage of time to be spent on each task.

In response to the RFE, the Petitioner submitted a substantially different and even broader overview of the Beneficiary's duties, as follows:

1. Manage and supervise [four company employees]. [The Beneficiary] is responsible to evaluate performance . . . for key employees of [the Petitioner] and he has broad discretionary authority to hire and fire managerial and other personnel (15%);

2. The Beneficiary will develop organizational policies to coordinate functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives (5%);
3. Confers with our parent company's officials to plan business objectives, to develop an overall strategic framework for wholesale supplier diversification; developed a plan for profit margin increase through eliminating intermediaries and seeking contracts directly with manufacturers of garments and fabrics (10%);
4. Review activity reports and financial statements to determine progress and status in attaining objectives and revised objectives and plans in accordance with current market conditions (10%);
5. Direct and coordinate formulations of financial programs to provide funding for new or continuing operations to maximize on return on investments, and to increase productivity (10%);
6. Plan and develop labor and public relations policies designed to improve our company's image and relations with our customers (10%);
7. Regularly attend meetings with CEOs of various companies located in the United States and throughout the world as well as spends a great deal of time fostering these relationships . . . (40%)[.]

This description was not responsive to the Director's request to provide a more detailed description of the Beneficiary's specific tasks. Rather than elaborating on the responsibilities described in the initial description, the Petitioner included additional broad duties and removed many of the initial duties without providing an explanation, and without clarifying how both sets of duties could require 100% of the Beneficiary's time. As such, the Petitioner has not met its burden to clearly describe the Beneficiary's actual duties within the context of its business. The descriptions consistently describe the Beneficiary as the company's senior employee but do not provide a sufficiently clear picture of the nature of his typical daily routine.

Both descriptions note the Beneficiary's responsibility for negotiating and approving all contracts and his role in developing and maintaining relationships with wholesalers, manufacturers, and existing customer accounts. While we acknowledge the Petitioner's claim that it is typical in the industry for a senior official to sign major contracts and attend some initial meetings with new business associates, it is unclear that the Beneficiary's ongoing regular visits with customers are an activity that would fall under the definition of managerial or executive capacity. Further, although not included in the duty description breakdown provided in the response to the RFE, the Petitioner added that the Beneficiary is responsible for "strategic sourcing" which requires him to assess the supply market, conduct costs analysis, identify potential competitors, and perform other market and financial analyses. While such duties may be critical to the company's performance, the Petitioner did not explain how such duties are managerial or executive in nature.

The fact that the Beneficiary will manage or direct a business as its senior employee and owner does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive or managerial in

nature. Sections 101(A)(44)(A) and (B) of the Act. The Petitioner has not provided a consistent or detailed description of the Beneficiary's actual duties sufficient to support its claim that he would engage primarily in managerial or executive tasks. Therefore, even though 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, the record contains insufficient information regarding the nature of his actual duties and his allocation of time to qualifying tasks.

C. Staffing and Organizational Structure

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or 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 claimed to have seven employees at the time of filing in December 2017, but did not provide an organizational chart, an employee list, or recent evidence of wages paid to its staff. It provided copies of its 2016 IRS Forms W-2, Wage and Tax Statement, for the Beneficiary and three other employees, as well as an IRS Form W-4 for a recently hired employee.

In response to the RFE, the Petitioner provided an organizational chart showing that the Beneficiary supervises: a wholesale manager, an internet sales manager, an accounting/finance employee, and a warehouse manager. The chart also depicts three sales representatives reporting to the wholesale manager.

The Petitioner provided evidence of wages paid to the Beneficiary's immediate subordinates in 2017, but did not provide evidence of any payments made to the sales representatives, who are claimed to receive commission only. The Petitioner stated that it was included copies of IRS Forms 1099 with its RFE response, but these documents were not submitted. Although the Director specifically noted this evidentiary deficiency in the denial decision, the Petitioner has not submitted additional evidence of their employment on appeal. Accordingly, we will not include these sales staff in our analysis of the Petitioner's organizational structure.[1]

The Petitioner documented the following payments to its payroll employees:

Position	Stated Salary	Actual Wages December 2017	Actual Annual Wage
Wholesale Manager	$2500/mo.	$0	$15,000 for 10 months
Internet Sales Manager	$2500/mo.	$1523	$2656 for 2 months
Accounting/Finance	$2000/mo.	$1656	$12,690 for 11 months
Warehouse Manager	$2000/mo.	$2465	$21,486 for 12 months

[1] At the time of filing, the Petitioner submitted copies of IRS Forms W-9, Request for Taxpayer Identification Number and Certification, completed by two of the three sales employees in December 2016. These documents alone are insufficient to establish that these employees were providing services to the Petitioner as sales representatives in December 2017 when the petition was filed, as they do not provide evidence that the sales employees received compensation.

Although the Petitioner stated that it employed the wholesale manager at the time of filing, in response to the RFE, and on appeal, the record shows that the Petitioner did not pay this employee in November or December 2017. The Petitioner did not provide any explanation for this discrepancy and has submitted insufficient evidence that it continued to employ this worker at the time of filing. Further, the evidence shows that three of the four employees were earning salaries commensurate with part-time employment in 2017.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional."[2] *Id.* If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

Although three of the Beneficiary's four subordinates have managerial job titles, and the Petitioner claims on appeal that all four employees are managers,[3] the Petitioner has not shown that the Beneficiary's subordinates are performing managerial or supervisory duties. As noted, the record does not contain evidence of the wholesale manager's continuing employment, nor evidence of the Petitioner's employment of the commissioned sales representatives. The Petitioner's brief descriptions of duties for the remaining employees do not include supervisory or managerial tasks, and the Petitioner has not shown that the Beneficiary supervises subordinate managers or supervisors.

Although the Director requested the information, the Petitioner did not provide the level of education required to perform the duties of the subordinate positions. For this reason, the Petitioner has not established that the Beneficiary's subordinates possess baccalaureate degrees and that their positions require such degrees, such that we can consider these employees to be professionals. Therefore, the Petitioner has not shown that the Beneficiary qualifies as a personnel manager based on his supervisory duties.

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[2] To determine whether a 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 U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, 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."

[3] In the brief submitted in support of the appeal, counsel states that the wholesale manager also supervises the "manager of the retail store." This is the first reference to such an employee and the record does not contain any statement or other evidence from the Petitioner that mentions a store manager position. Assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence.

On appeal, the Petitioner claims that the Beneficiary "is responsible for seeking new opportunities for expansion and development" for the Petitioner and its foreign affiliate and manages this essential function of the organization. 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. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that "(1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations." *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

The Petitioner states that the Beneficiary seeks new opportunities for expansion and development by attending fashion fairs and expos to see the latest trends in the industry, by meeting with other CEOs in the garment industry to create partnerships, by meeting with buyers from established retailers and retail store chains who are making their first purchase orders, and by interfacing with the foreign affiliate to ensure seamless logistics, sharing of sales strategies, and consistent company strategies and policies. However, the Petitioner's claim that the Beneficiary is relieved from performing the day-to-day sales and business development activities of the company, as well as other non-managerial duties, is predicated on its claim that it employs seven subordinate staff members, when only three subordinates were documented in the record as of the date of filing and two of them did not work full-time. In addition, the submitted position descriptions do not establish that these "expansion and development" activities are the Beneficiary's primary duties or, as discussed above, that the Beneficiary's actual duties on the whole are primarily managerial in nature. Accordingly, the Petitioner has not submitted sufficient evidence to support the Petitioner's claim that the Beneficiary qualifies as a function manager.

Initially, the Petitioner claimed that the Beneficiary would be employed in an executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. 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.

Here, while the Beneficiary has the appropriate level of authority, the Petitioner has not supported its claim that he delegates non-executive duties to subordinate managers or other employees so that he can focus on the broad goals and policies of the organization. Nor has it established that he is

sufficiently relieved from involvement in the day-to-day operations of the U.S. enterprise to perform primarily executive-level duties.

As noted, when considering a petitioner's staffing levels, we must take into account the reasonable needs of the organization and a company's size alone may not be the only factor in determining whether a 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 we note discrepancies in the record. *See Systronics*, 153 F. Supp. 2d at 15.

The Petitioner imports and sells garments and fabrics and states that it engages in wholesales, Internet sales, and retail sales from its store.[4] It has documented its employment of an Internet sales manager who performs online sales and marketing duties, an accounting employee responsible for overseeing daily finances, and one warehouse employee who handles logistics and inventory. It has not submitted evidence of its ongoing employment of its wholesale manager or commissioned sales representatives, and prior to an unsupported statement from counsel on appeal, has not claimed to have any employees other than the wholesale manager working in the retail store. Further, it has not shown that its employees have been receiving their claimed full-time wages.

While the Petitioner's latest tax return shows substantial business activities, the record does not support its claim that the staff in place at the time of filing were able to perform most of the day-to-day administration and operational tasks required to operate a business with three separate sources of sales revenue. It is unclear who, if anyone, was available to work in the Petitioner's retail store at the time of filing, as the Petitioner has documented its employment of only one part-time Internet sales employee. Absent corroborating evidence of how the non-managerial duties of the organization are performed by the lower-level staff, the Petitioner has not established that it can sufficiently relieve the Beneficiary from involvement in the tasks necessary for its daily operations.

We acknowledge the Petitioner's claim that the Beneficiary travels abroad frequently and divides his time between the Petitioner and its foreign affiliate (and the implication that he could not be involved in the Petitioner's routine operational tasks). However, the record reflects that he spent most of 2016 and 2017 in the United States despite taking seven brief trips abroad in both years.

In sum, the Petitioner has not demonstrated that the Beneficiary would primarily supervise a subordinate staff of professional, managerial, or supervisory personnel, or an essential function of the company. *See* section 101(a)(44)(A)(ii) of the Act. Furthermore, the Petitioner has not established that it continued to employ sufficient staff who would the Beneficiary from performing non-qualifying duties. Regardless of the Beneficiary's position title, the record is not persuasive that

[4] The Petitioner initially claimed that the wholesale manager is responsible for the retail store. As noted, counsel states on appeal that there is a store manager, but that claim is uncorroborated.

he will primarily focus on the broad policies and goals of the company or perform primarily executive or managerial duties.

IV. CONCLUSION

The appeal will be dismissed because the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity under the extended petition.

ORDER: The appeal is dismissed.

Cite as *Matter of G-U-USA Inc.*, ID# 1784539 (AAO Dec. 4, 2018)