U.S. Citizenship and Immigration Services

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

MATTER OF J-E- INC.

DATE: MAY 30, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a 10-employee sporting goods wholesaler, seeks to temporarily employ the Beneficiary as its deputy general manager under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the California Service Center denied the petition, concluding that the record did not establish that the Beneficiary will be employed in the United States in a managerial or executive capacity.

On appeal, the Petitioner asserts that the Director erred in her determination and that the Beneficiary qualifies as a manager.[1]

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.

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 or managerial capacity, or in

[1] As the Petitioner does not assert and the record does not demonstrate that the Beneficiary will perform duties in an executive capacity, we restrict our analysis to whether the Beneficiary will be employed in a managerial capacity.

a position requiring specialized knowledge, including a detailed description of the services to be performed. 8 C.F.R. § 214.2(l)(3)(ii).

## II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Petitioner asserts that it submitted sufficient evidence to show that it had a sufficient organizational structure to relieve the Beneficiary of performing primarily non-qualifying duties so that the proffered position qualifies as a managerial one.

Section 101(a)(44)(A) of the Act 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.*

### A. Duties

When examining the managerial or executive capacity of the Beneficiary, 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).

Based on the definitions of managerial and 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). 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.

In a letter appointing the Beneficiary to the position of Deputy General Manager for the Petitioner, the foreign entity's president stated that the Beneficiary "will assist the CEO of [the Petitioner], [] in setting up and leading a manager team, oversee the daily operation and management of the company, and lead [the Petitioner] into an independent, profitable subsidiary company." The proposed position is described as follows:

> Job Summary
>
> - Reporting directly to the CEO of [the Petitioner], the Deputy General Manager is responsible for overseeing the day-to-day operations of the company. Additionally, the Deputy General Manager is in charge of all operation related functions and developing and executing a clearly defined marketing and communication strategy in a manner that supports consistent business growth and enhances brand equity and awareness. The Deputy General Manager will also evaluate performance of company employees, and assist the General Manager in making important personnel decisions such as hiring, firing, training and promotion of mid[-]level managers and cadres.
>
> Detailed Duties & Responsibilities
>
> - Establishing development strategies of [the Petitioner] and participating in decision makings related to important strategic, tactical, and staffing moves (30% of work time):
>
>  a. Acts as second hand of the CEO, helps establish development, marketing, and communications strategies of [the Petitioner], and semi-annual and annual work plans to achieve these strategies (15% of work time);
>  b. Executes and oversees the implementation of company strategies and work plans, and ensures revenues are on the track to meet or exceed company expectations (10% of work time);
>  c. Organizes regular employee meetings, explaining company policies and tactics at such meetings and gather[s] employee feedbacks (5% of work time).
>
> - Taking full charge of all operation related functions (40% of work time):
>
>  a. Develops operation plans and company policies, and oversees their implementation (15% of work time);
>  b. Develops initiatives in the management team that contribute to long-term operational excellence (10% of work time);

c. Oversees daily operation of the Operations Department, including its two functional groups, Marketing and Sales (15% of work time).

- Overseeing daily operation of [the Petitioner] (30% of work time):

a. Hires, trains, fires, reviews the work performance of, and promotes mid[-]level managers and other key personnel of company, builds and improves the HR system of company (15% of work time);
b. Organizes and presides over mid-level cadres meetings, makes quarterly and annual work reports to the board of [the foreign entity] (5% of work time);
c. Works with legal consultants and accountants, and ensures that the [Petitioner] does not break any law, regulations, or local rules (5% of work time);
d. Reviews tax, other government filings, and annual reports of [the Petitioner] to ensure the accuracy of such filings (5% of work time).

The Petitioner repeated this description of duties in its response to the Director's request for evidence.

The Director denied the petition determining that this description was insufficient to demonstrate what the Beneficiary would do on a day-to-day basis.

On appeal, the Petitioner disagrees with the Director's interpretation and asserts that the Director did not apply the preponderance of evidence standard and that the Petitioner submitted sufficient relevant, probative, and credible evidence to meet this standard.

We find that the Beneficiary's duties as described are general and do not include sufficient information describing the Beneficiary's day-to-day duties. For example, acting as an assistant to the chief executive officer to help establish strategies and work plans does not convey an understanding of what tasks will be assigned to the Beneficiary for her execution. Additionally, the Petitioner has not submitted a description of the duties of its chief executive officer or explained how the Beneficiary's duties are different from the duties of this position. Thus, we cannot ascertain whether the Beneficiary's duties will overlap with the chief executive officer or are an additional support to the Petitioner's operations.

Similarly, stating that the Beneficiary will develop operation plans, company policies, and initiatives that contribute to operational excellence, does not address how the Beneficiary will accomplish these broadly-stated business objectives. Moreover, overseeing the daily operation of the Petitioner appears to overlap with the operation manager's duty of assisting the chief executive officer in "overseeing the day-to-day operation of the company." Overall the job description for the Beneficiary's position does not include sufficient detail or explanation of her proposed activities in the course of her 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).

The fact that the Beneficiary will generally manage or assist in the management of the operations of a business 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. While the Beneficiary may exercise some discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, the position descriptions in this matter are insufficient to establish that her actual duties would be primarily managerial or executive in nature.

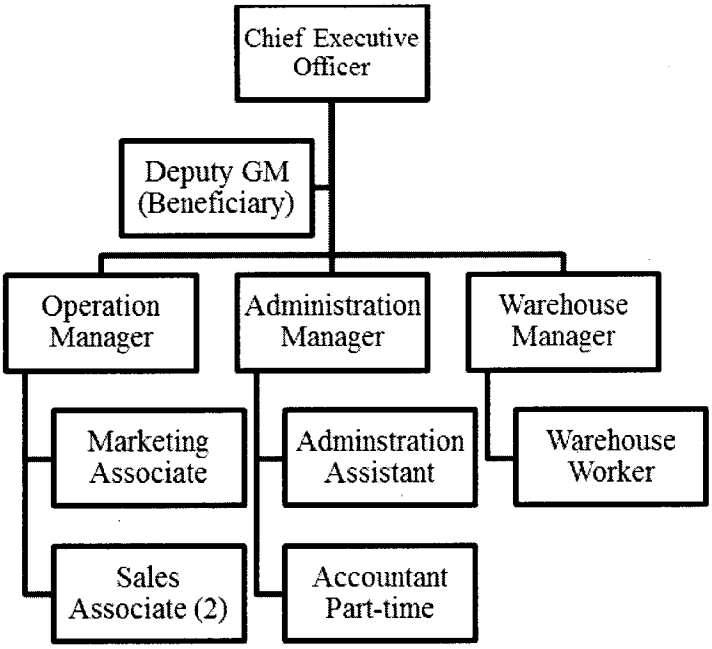
B. Staffing

Beyond the required description of the job duties, we review 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.

On appeal, the Petitioner asserts that the Beneficiary qualifies as a manager and re-states a portion of initially described duties, specifically the duties included within the heading of overseeing the daily operation of the Petitioner. The Petitioner also contends that the Beneficiary will manage the overall operation of the company as well as all operation related functions, and will supervise the work of three departmental managers, with the authority to hire, fire, or recommend personnel actions, as well as exercise discretion over the day-to-day operations of the functions for which she will have authority.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 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. 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." Section 101(a)(44)(A)(iv) of the Act. 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*).

The record includes the Petitioner's organizational chart, reproduced below with only job titles, which shows the Beneficiary's position over three departments, the operations, administrative, and warehouse department and identifies a manager in each of the three departments.




The record includes the Petitioner's State of California quarterly employer's wage report for the third quarter of 2016, the quarter in which the petition was filed. The third quarter wage report shows that the Petitioner employed 10 persons in the last month of the quarter. The individuals identified on the wage report correspond to the names depicted on the organizational chart except that the Beneficiary is not listed on the wage report.[2]

The record also includes job descriptions for each of the Beneficiary's subordinate employees. The operations manager position is described as having significant non-supervisory duties, including assisting the chief executive officer and performing market research duties. Similarly, the individual in the administrative manager position spends a limited amount of time (25%) supervising and managing the administrative assistant and part-time accountant and the warehouse manager position spends only 25 percent of his time supervising and managing the one warehouse worker. The duties as described for all three of the Beneficiary's subordinate employees portray these individuals performing the operational tasks of their department along with the other employees in their departments. The job descriptions do not represent that these individuals primarily perform the duties of a manager or a supervisor.

The job descriptions also lack sufficient information to conclude that the subordinate positions, as described, are professional positions. To determine whether the Beneficiary manages or supervises

[2] It appears that the individual identified on the organizational chart in the position of warehouse worker is no longer employed by the Petitioner and has been replaced by someone who was not named by the Petitioner on the organizational chart. That individual is, however, included on the wage report.

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 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." The descriptions of duties for the individuals subordinate to the Beneficiary do not describe duties that require a bachelor's degree; thus the Beneficiary's subordinates do not hold professional positions.

The totality of the record does not support a conclusion that the Beneficiary's subordinates are supervisors, managers, or professionals. Instead, the Beneficiary's subordinates perform the actual day-to-day tasks of marketing, selling, and distributing sporting equipment. The Petitioner has not provided evidence of an organizational structure sufficient to elevate the Beneficiary to a supervisory position higher than a first-line supervisor of non-professional employees. Therefore, the Beneficiary's position does not qualify as a primarily personnel manager under the statutory definitions. *See* section 101(a)(44)(A)(iv) of the Act.

We have also considered whether the proffered position qualifies 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 furnish a written job offer that clearly describes the duties to be performed in managing the essential function, or more specifically, identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary's daily duties attributed 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 duties related to the function. See *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016).

On appeal, the Petitioner contends that the Beneficiary's position has all the necessary elements of a managerial position, and asserts that the Beneficiary will manage operational functions, in particular. The Petitioner, however, does not clearly state the operational functions to which it refers. It is not possible to ascertain from the description of the Beneficiary's position whether the Petitioner is claiming that the Beneficiary will primarily manage the sales and marketing function or will primarily manage all three operational departments. The lack of clarity regarding the Beneficiary's involvement in managing an essential function and the time she will be expected to devote to such a function or functions precludes a determination that the Beneficiary will primarily manage an essential function.

Additionally, the description of the Beneficiary's proposed job duties includes non-qualifying tasks such as reviewing filings and reports, supervising non-supervisory, non-managerial, and

non-professional employees, as well as performing the indefinite task of assisting the chief executive officer in implementing strategies, organizing meetings, and ensuring revenues are on track. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify a beneficiary as long as those tasks are not the majority of a beneficiary's duties, a petitioner still has the burden of establishing that a beneficiary will "primarily" perform managerial or executive duties. *See* section 101(a)(44) of the Act. Here, we agree with the Director's determination that the evidence is insufficient to establish that the Beneficiary will be employed as a function manager.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, we must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. We have long interpreted the statute to prohibit discrimination against small or medium-size businesses. However, we have also consistently interpreted the Act to require petitioners to establish that the beneficiary's position "primarily" consists of managerial and executive duties, and that it has sufficient personnel to relieve a beneficiary from performing operational and administrative tasks. Here, the Petitioner has not sufficiently described the Beneficiary's position, distinguished the Beneficiary's proposed duties from those of the Chief Executive Officer, and explained how the duties of the position differ from other positions in the organization.

The Petitioner has not submitted evidence or argument on appeal sufficient to overcome the Director's determination. The record documents that the Petitioner is doing business, but it does not include probative evidence that it is sufficiently complex to support the addition of another position that includes primarily managerial duties.

## III. CONCLUSION

The Petitioner has not established that it will employ the Beneficiary in a managerial capacity.

**ORDER:** The appeal is dismissed.

Cite as *Matter of J-E- Inc.*, ID# 363536 (AAO May 30, 2017)