U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF I-, INC.

DATE: OCT. 20, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which sells mobile phones, tablets, photographic equipment, and accessories, seeks to continue the Beneficiary's temporary employment as its president and general manager under the L-1A nonimmigrant classification for intracompany transferees.[1] *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, as required, that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner submits additional evidence and asserts that the Director mischaracterized the nature of the Beneficiary's primary duties and over-emphasized the company's staffing levels in reaching her decision. The Petitioner maintains that it submitted sufficient evidence to show that the Beneficiary will be employed in an executive capacity, and maintains that his duties could also be classified as primarily managerial.

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.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period January 25, 2016, until January 24, 2017. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation one year within the date of approval of the petition to support an executive or managerial position.

A petitioner seeking to extend an L-1A petition that involved a new office must submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status; evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii).

"Managerial capacity" means as 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.

"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.

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) takes 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.

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

In the denial decision, the Director concluded that the Beneficiary's job description included various non-managerial and non-executive tasks and did not identify how much time he would spend on them. The Director also reviewed the Petitioner's claimed staffing levels and organizational charts and determined that it did not establish that it had grown to the point where it could support a managerial or executive position. Finally, the Director noted that there were unexplained inconsistencies between the Petitioner's initial organizational chart (which depicted the Beneficiary as both president and purchase manager) and the organizational chart submitted in response to a request for evidence (RFE), which listed the Beneficiary solely as president.

On appeal, the Petitioner submits a position description for the Beneficiary, evidence related to its opening of a branch office in Florida, and an expert opinion letter in support of its claim that the Beneficiary will be employed in an executive capacity. The Petitioner also claims, in the alternative, that the Beneficiary would be employed in a managerial capacity based on his discretionary

authority over the company as a whole, his ability to hire and fire staff, and his supervision of subordinate supervisory personnel.

When examining the managerial or executive capacity of a given 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). Beyond the required description of the job duties, USCIS examines 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 and its staffing levels.

A. Duties

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 at 1533.

The Petitioner states that it is engaged in the "wholesale, retail, and online sales of smartphones, tablets, cameras, photographic equipment, and mobile phone accessories." However, based on the terms of the Petitioner's lease, it does not have a retail location and is only authorized to warehouse and distribute these products from its premises.

In a supporting letter, the Petitioner listed the Beneficiary's duties as president and general manager as:

- Develop and cultivate relationships with the customers, both present and future.
- Oversee day-to-day projects and/or events to ensure that the quality of [the Petitioner's] services meets clients' business objectives and provides value.
- Accountable for the financial stability of [the Petitioner], including the development of annual budgets as well as the management and oversight of revenue and expenses . . . .
- Manage stock of merchandise levels, organize special promotions, displays and events in order to maintain clear and consistent communications between the customers and [the Petitioner].
- Maintain professional and technical knowledge by attending educational workshops; reviewing professional publications; establishing personal networks; benchmarking state-of-the art practices; participating in professional societies and

> attending international business meetings to keep up with products and new technologies.

The Petitioner stated that the position is primarily executive in nature, as the Beneficiary "possesses autonomous control over, and the exercise of wide latitude in discretionary decision-making, in deciding the most advantageous courses of action for the most successful management and direction of [the Petitioner's] developmental activities. The Petitioner submitted an organizational chart which depicted the Beneficiary in the distinct positions of both president and purchase manager, but did not provide a position description for the purchase manager position or indicate how the Beneficiary would divide his time between these different roles.

In response to an RFE, the Petitioner provided a statement from the Beneficiary, who provided an overview of his duties which was similar to that provided at the time of filing. He stated that he: directs and coordinates financial activities and monitors revenues and profits; attends meetings relevant to consumer electronics to keep up with industry developments and attract potential new business; determines staffing needs and hires and supervises personnel; reviews sales and activity reports; makes ultimate decisions regarding purchases of stock items; calculates weekly budgets based on accounts payable and receivable; directs and approves services, product strategies, and price policies; and visits vendors and customers. The Petitioner also submitted an updated organizational chart in response to the RFE. This chart did not include the purchase manager position previously attributed to the Beneficiary.

We agree with the Director's determination that the submitted descriptions did not establish that the Beneficiary would perform primarily managerial or executive-level duties under the extended petition.

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 he "directs" 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.*

The Beneficiary's overall authority over the company and discretion to select, hire, and supervise employees and contractors is noted, but the position description does not convey sufficient information about what the Beneficiary would be doing on a day-to-day basis as of the date of filing. Further, we agree with the Director that several of the duties potentially involved non-qualifying tasks. For example, the Petitioner states that the Beneficiary would "develop and cultivate

relationships with customers" and "manage stock of merchandise levels" but has not distinguished these responsibilities from involvement in routine sales and purchasing activities. The Petitioner provided extensive evidence of its activities during the previous year, including invoices, purchase orders, and e-mails with customers related to its sales transactions. Many of these documents identify the Beneficiary as the person involved in the individual sales and purchases, including those which post-date the Petitioner's hiring of sales staff.

Further, we cannot overlook the Petitioner's inclusion of a "purchase manager" role filled by the Beneficiary on its initial organizational chart. The Petitioner reported over $1 million in purchases in 2015 and has not indicated that its other personnel are engaged in purchasing activities. On appeal, the Petitioner explains that "this 'Purchase Manager' distinction was simply integrated into the President position in its later version," noting that amendments to the organizational structure were "intended to provide greater clarification of staff duties given USCIS' perception of [the Beneficiary] as being bogged down by low-leveled, day-to-day tasks."

The Petitioner goes on to state that "to the extent that [the Beneficiary's] initial title of 'Purchase Manager' was perceived as indicating that [the Beneficiary] takes stock of inventory and consumer demand and orders electronic parts himself, the label was later omitted." However, the Director's RFE did not mention the purchase manager title that was initially assigned to the Beneficiary or suggest that the Director perceived the Beneficiary as performing inventory and stock ordering duties. For this reason, it is unclear why the Petitioner would change its organizational chart for clarification purposes. As noted, the extensive documentation submitted with the petition tends to support a finding that the Beneficiary was and would be responsible for the company's purchasing activities regardless of whether he holds a second "purchase manager" job title.

In addition, some of the duties attributed to the Beneficiary were too vague to provide insight into the nature of his day-to-day tasks, and some are inconsistent with the nature of the Petitioner's business. For example, the Petitioner stated that the Beneficiary would "oversee the day-to-day project and/or events to ensure that its services meet clients' business objectives." The Petitioner buys and sells cell phones and cameras with most of its sales and purchase transactions handled online. It is unclear what "projects and/or events" the Beneficiary would oversee or what "services" the company provides to clients. The Beneficiary is also charged with "organizing special promotions, displays and events" but, the Petitioner has no retail store at which to display its products or hold promotional events.

In sum, the job descriptions provided prior to the denial of the petition included a mix of qualifying duties, some non-qualifying duties, and some duties that were too vaguely described to be classified as managerial or executive. The job description did not support a finding that the Beneficiary would be employed in an executive capacity in which he would be *primarily* focused on the broad goals and policies of the organization, rather than being significantly involved in its day-to-day operations.

On appeal, the Petitioner provides a "re-organized" description of the Beneficiary's job duties in which it assigns a percentage of time to various areas of responsibility. Briefly, the Petitioner indicates that the Beneficiary would allocate his time as follows:

- 25% on "financial planning, monitoring and stabilizing activities of the sort"
- 25% on "tracking analytics and adapting the company's sales strategy with these patterns in mind"
- 15% on "company-based travel and other strategies tailored to acquiring and maintaining a steady supply of vendors and customers"
- 10% on "taking notice of industry trends and setting [the Petitioner] up to be 'ahead of the game'"
- 15% on "determining personnel, coordinating their activities, and assuring their efficiency"
- 5% on "reviewing and keeping stock of staff sales reports and company bank statements, and adjusting weekly purchase budgets accordingly"
- 2.5% on "quality control"
- 2.5% on "marketing and public relations"

The Petitioner maintains that this description establishes that low-level tasks amount to only 10% of the Beneficiary time while he spends 90% of his time "directing the management of the organization, establishing company policies and goals, and using executive privilege for overall decision making."

As noted, the Petitioner has de-emphasized the Beneficiary's involvement in sales and purchasing activities, but its supporting evidence presents a different picture and reflects the Beneficiary's involvement in routine purchase and sales transactions. Therefore, while the Beneficiary may be in charge of the company's finances, personnel, and sales strategies, we cannot determine that any of the submitted descriptions fully convey the Beneficiary's actual day-to-day duties. In addition, the Petitioner has not explained how the Beneficiary's responsibilities for studying industry trends and acquiring vendors and customers qualify as executive or managerial tasks.

Even though the Beneficiary holds the senior position within the company, the fact that the Beneficiary will manage or direct 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. 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 broad position description the Petitioner submitted is insufficient to establish that his actual duties would be primarily executive in nature.

B. Staffing

The Petitioner stated on the Form I-129, filed in January 2017, that it had four "independent contractors" at the time of filing. Its organizational chart submitted at the time of filing identified a subordinate sales manager a sales executive (, an accountant (a bookkeeper (, an electronics technician (and a purchase manager (the Beneficiary).

The organizational chart submitted in response to the RFE identified the Beneficiary as president and did not include the purchase manager position. This chart showed that the Beneficiary supervised (now identified as "Director of Sales and Marketing"), a newly hired "electronics technician and logistic" employee , and the previously identified sales executive, accountant, and bookkeeper. The Petitioner noted at this time that had left the company in December 2016, before the petition was filed.

The Petitioner submitted copies of IRS Forms 1099, Miscellaneous Income and Forms W-2, Wage and Tax Statement, issued in 2016, 2017 payroll records, and its California quarterly wage reports for the fourth quarter of 2016 and the first quarter of 2017. Based on this evidence, the Petitioner has established that it employed the Beneficiary, and at the time the petition was filed.[2] These two subordinate employees are full-time, hourly workers earning $11.00 and $10.50, respectively.

In his statement in response to the RFE, the Beneficiary indicated that as sales manager, "supervises and handles day to day activities, such as sales, meetings with companies to increase sales and he manages the stores which provide our items to the buyers." He further noted that reports to him each morning and "[b]ased on his report, I start purchasing the regular inventory items or new orders." The Petitioner provided resume and a copy of his bachelor's degree in sociology. The resume lists his job title as "lead account manager" and states that he manages "all major accounts/clients," resolves escalated client issues, leads a four-member team in account management and business development, collaborates across multiple departments to promote client satisfaction, and maintains sales and account information in support of "cross-departmental business intelligence." He states that he "successfully added 150 accounts." The job description in the resume appears to be inconsistent with the scope of the Petitioner's business, as there is no indication that the company has a four-person sales team, multiple departments, or 150 customer accounts. Further, the Beneficiary's statement appears to confirm that he himself makes the Petitioner's purchases, as indicated by much of the supporting documentation.

The Beneficiary stated that the sales executive, is responsible for "handling sales, point to point, and he deals with the customers," reporting to both the Beneficiary and to The Petitioner provided evidence that he has a bachelor's degree in business administration.

The Petitioner claims on appeal that the Beneficiary's position, although characterized as primarily executive in nature, also satisfies the statutory definition of "managerial capacity," which 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

[2] The Petitioner paid the bookkeeper $1,633 in 2016 and issued him a Form 1099, but it did not provide evidence of any payments to him in 2017, nor does the record include evidence of payments to the Petitioner's accountant, who completed an IRS Form W-9, Request for Taxpayer Identification Number and Certification, in March 2017. The Petitioner states that the new electronics technician, commenced employment in January 2017. However, the payroll record shows that the Petitioner paid him for the first time on March 6, 2017, for work performed during February 2017 (107 hours). He was paid as a full-time hourly employee thereafter.

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."[3] 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 Petitioner claims that the Beneficiary's position is in a managerial capacity based, in part, on his supervision of subordinate supervisors. However, it is not clear that the sales manager or "Director of Sales and Marketing" actually supervises the sales executive based on the Beneficiary's description of his job duties. Further, the Beneficiary states that the sales executive directly reports to him as well as to the sales manager. While both organizational charts show a contracted accountant supervising a contracted bookkeeper, the record does not contain sufficient evidence that the Petitioner actually retained these contractors at the time of filing, nor is there a description of the scope of the services they provide to the company. For these reasons, the record does not establish that the Beneficiary is a personnel manager who primarily supervises a subordinate staff of supervisory employees.

Further, the Petitioner has not established that the two-person support staff in place at the time of filing was sufficient to relieve the Beneficiary from significant involvement in the day-to-day operations of the company. The Petitioner 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 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. *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 USCIS notes discrepancies in the record. *See Systronics*, 153 F. Supp. 2d at 15.

While the Petitioner established that it employs sales people, it originally identified the Beneficiary as its purchase manager and has not established that any other employees are involved in the

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[3] In evaluating 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."

Therefore, we must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity. While both of the Petitioner's sales employees have bachelor's degrees, the Petitioner does not claim that the positions require a degree and did not object to the Director's finding that the Beneficiary's subordinates are not professionals.

company's substantial purchasing activities. Further, the Petitioner indicates that the Beneficiary spends 25% of his time overseeing the company's financial and banking activities, but has not established that it actually paid for the services of the claimed bookkeeping/accounts payable and receivable employee at the time of filing. Finally, the Petitioner appears to have hired a technician and logistics employee (also referred to as a "distribution manager") in February 2017, after the petition was filed, but it is unclear who was responsible for handling shipping, packing, inventory and technical support issues at the end of the Petitioner's initial year of operations in January 2017. These facts, when considered in light of the evidence in the record reflecting the Beneficiary's involvement in routine sales and purchasing activities, do not support the Petitioner's claim that the Beneficiary would be allocating his time primarily to managerial or executive duties.

On appeal, the Petitioner also submits an expert opinion letter from Principal Consultant with who maintains that the Director's application of the statutory definition of executive capacity "reflects a lack of understanding of an executive position in a small private business organization." emphasizes that some types of executive duties, such as establishing goals and annual budgets, identifying markets and strategies, and expansion-related activities are not reasonably performed on a day-to-day basis. Referencing the statutory definition of "executive capacity" at 101(a)(44)(B) of the Act, he states that the Beneficiary is the only employee of the petitioning company involved in directing the management of the company and the strategic, financial, operational and marketing aspects of the business, is the sole employee authorized to establish its goals and policies, has complete latitude in all discretionary decisions, and receives no supervision, as he is a stockholder and member of the Board of Directors.

goes on to cite to various industry and regulatory definitions of "executive," (including references found in U.S. Department of Labor (DOL), U.S. Securities and Exchange Commission, and Internal Revenue Service documents) and emphasizes that no definition of "executive" implies that an executive cannot spend some time performing non-executive duties. He particularly emphasizes the "executive exemption" under the DOL's Fair Labor Standards Act, noting that the Beneficiary qualifies for the executive exemption based on his salary, his responsibility for managing the petitioning enterprise, his direction of the work of at least two full-time subordinates, and his authority to hire employees.

USCIS may, in its discretion, use as advisory opinion statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. *Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding a foreign national's eligibility. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.* We have already acknowledged the Beneficiary's managerial or executive level authority over the petitioning company and do not doubt that he is the only employee who exercises that level of authority within the company. Further, we agree that there is no requirement that an L-1A employee perform exclusively managerial or executive duties. However, for the reasons already discussed, the record does not establish that the Beneficiary's primary duties would be executive or managerial in nature. The only definition of "executive capacity" applicable to the adjudication of this petition is found at section 101(a)(44)(B) of the Act. The Beneficiary may perform a mix of duties typical of a senior

employee within a small private business organization; however, consistent with the statutory definition, all petitioners, regardless of size, are required to establish that a given beneficiary's position consists of primarily managerial or executive duties and that it will have sufficient personnel to relieve the beneficiary from performing operational and administrative tasks alongside the company's other employees. The reasonable needs of a petitioner will not supersede the requirement that a beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir. 2008).

Finally, we acknowledge that the Petitioner has opened a branch office in Florida as of the date of the appeal, which is supported by evidence that the Beneficiary signed a lease and began hiring additional, Florida-based staff. All of the evidence related to this expansion post-dates the filing of the petition and will not be considered. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. If a business does not have the necessary staffing after one year to sufficiently relieve the beneficiary from performing operational and administrative tasks, the petitioner is ineligible for an extension.

III. CONCLUSION

The appeal must be dismissed as 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 I-, Inc.*, ID# 745887 (AAO Oct. 20, 2017)