



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

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

MATTER OF K-G-, INC.

DATE: DEC. 20, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, which operates a restaurant, seeks to permanently employ the Beneficiary as its managing director and president under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

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

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred by misinterpreting the nature of the Beneficiary's role with the petitioning company and its relation to the foreign parent company.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

Section 203(b) of the Act states in pertinent part:

- (1) **Priority Workers.** – Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

....

- (C) *Certain multinational executives and managers.* An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same

Matter of K-G-, Inc.

employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file Form I-140, Immigrant Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. A labor certification is not required for this classification.

The regulation at 8 C.F.R. § 204.5(j)(3) states:

(3) Initial evidence—

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:
 - (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
 - (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
 - (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
 - (D) The prospective United States employer has been doing business for at least one year.

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that: (1) the Beneficiary will be employed in a managerial or executive capacity; and (2) the Beneficiary has been employed abroad in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term “managerial capacity” as “an assignment within an organization in which the employee primarily”:

Matter of K-G-, Inc.

- (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. 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)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as "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.

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. U.S. Employment in a Managerial or Executive Capacity

The regulation at 8 C.F.R. § 204.5(j)(5) requires the Petitioner to submit a statement which indicates that the Beneficiary is to be employed in the United States in a managerial or executive capacity. The statement must clearly describe the duties to be performed by the Beneficiary.

The Petitioner filed Form I-140 on March 24, 2015. The Petitioner stated that the company “is engaged in establishing a chain of contemporary restaurants,” but at the time of filing, it had only one restaurant. There is no evidence that the Petitioner has purchased additional restaurants.

1. Duties

When examining the executive or managerial 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. § 204.5(j)(5).

The Petitioner stated:

[The Beneficiary] will act in an executive capacity, responsible for directing all operations in the United States. As the President in an executive capacity, [the Beneficiary] will oversee a management team responsible for the day-to-day operations of the restaurant chain. He will also oversee all corporate activities such as finance, accounting, marketing, as well as negotiating contracts with suppliers and business partners. . . .

....

[The Beneficiary] is responsible for all employment issues including hiring the company staff. . . . He developed the procedures for operating the restaurant and authorized the general manager to undertake the duties needed for day-to-day operations.

In his own letter, the Beneficiary stated:

[The Beneficiary] will serve as President and will be responsible for the set up and overall management of the restaurant chain in the United States. . . .

As President, one of the first duties will be to hire a General Manager to run the daily operations of the restaurant. [The Beneficiary] will create the job duties of each key employee, including those of the General Manager. . . .

. . . [The Beneficiary] will manage the capital investment to ensure funds are used for appropriate expenses that will achieve the company’s goals. For example, [the Beneficiary] will establish that procedures for purchasing food supplies and negotiating contracts with suppliers. He will also develop the marketing and advertising strategies for the first restaurant and the future restaurants in the chain, such as brand creation, traditional advertising models, social media advertising, and promotions.

The Beneficiary stated that he “spends about 70% of [his] time managing the U.S. organization and about 30% of his time is dedicated to management of [the] parent company organization in Singapore.”

The Director issued a request for evidence (RFE), asking for a more specific job description showing individual tasks and the approximate time devoted to each.

In response, the Petitioner stated that the Beneficiary would serve in an “executive and manager position” that meets each of the defined requirements for an executive capacity as well as a managerial capacity. This is a change from the Petitioner’s initial assertions that the Beneficiary would serve specifically as an executive.

The Petitioner submitted a longer job description, divided into four categories and signed by the Beneficiary. We have omitted several of the items listed under “Planning and Executive Administration” because they refer not to ongoing responsibilities, but to one-time decisions or actions that the Beneficiary has already taken, such as securing funding and purchasing and renaming the restaurant.

1. Planning and Executive Administration (40% of Duties)

- Provide leadership and vision to the organization with the development of long range and annual plans, namely to establish a chain of restaurants in the U.S. . . .
 - Execute and enter into legal agreements, contracts, and represent the company . . . ;
 - Review feasibility for business based on financial reports and make executive decisions;
 - Authorize budgetary allocation and major financial expenditures;
 - Receive reports from management of industry status and seek potential expansion target for additional restaurants for chain operation. . . .

2. HR management (25% of Duties)

- Recruitment of all management personnel, determine pay level, allocate personnel expenditure budgets, determine shift managers for each division. . . .
- Decide on policy relating to promotion, training programs, vacations, recruitment and termination of employees;
- Policy development including shift management and periodic reporting requirements of business units;
- Employee relations;
- Receive daily and periodic reports on restaurant operation from General Manager . . . and Manager . . . on operation of the restaurant and based on recommendation, approve human resource allocation and budgetary allocations;
- Receive weekly reports from Chief Chef . . . on menu offerings and chefs on customer review of menu items, popular items, weekly chef specials and how they reflect on revenue;

- Receive and approve purchases of supplies/inventory and dealing with vendors for various matters for restaurant operation;
- 3. Project management (20% of Duties)**
- Review and authorize advertisements and promotions for the restaurant;
 - Receive regular periodic reports on . . . revenue, operation, and projections for management decisions in expanding the business;
 - Develop guidance, policy, and issue directives to provide structural basis of the business that will be incorporated into business operation and duplicated in future restaurant chain openings.
- 4. Financial management (15% of Duties)**
- Make executive decisions regarding investments and financial strategies;
 - Oversee preparation and approve annual budgets, regular variance statements and annual audits;
 - Coordinate with parent company's . . . administration division and financial division in allocating financial resources for efficient operation and expansion of the U.S. business.

The Director denied the petition, concluding that the Petitioner had not established that the Beneficiary would serve in a managerial or executive capacity. The Director found that the job description consists of broad responsibilities rather than specific, identifiable tasks. The Director acknowledged the Petitioner's assertion that the Beneficiary is the highest-ranking authority in the company, but concluded that the Petitioner had not shown that the Beneficiary's duties would be primarily managerial or executive. The Director also stated: "As the petitioner states the beneficiary will serve as both multinational manager and executive, the petitioner must show that the beneficiary meets the requirements for both."

On appeal, the Petitioner states that the Beneficiary need only qualify as a manager or as an executive, but not both. The Petitioner effectively abandons the initial claim that the Beneficiary will be an executive, and focuses on the assertion that the Beneficiary will primarily be a function manager. The Petitioner states that the Beneficiary will not primarily serve as a personnel manager, and therefore the "entire line of inquiry is irrelevant to the matter at hand." Therefore, we need not explore that issue here.

The Petitioner states:

Beneficiary is a "functional manager" who is charged with the executive (as opposed to the legal, accounting, sales, etc.) function of expansion into the North American market. A mischaracterization of his role would be that Beneficiary is managing a restaurant . . . because a *general manager* would generally manage each restaurant.

A petitioner must establish eligibility at the time it files the petition, continuing through the adjudication of the petition. See 8 C.F.R. § 103.2(b)(1). When the Petitioner filed Form I-140, it owned one restaurant. The Petitioner maintains that one of the Beneficiary's major duties is to expand the business, but the record contains no evidence that the Beneficiary has taken any such

steps since he began working in the United States in 2013. Instead, he has concentrated his efforts on the single restaurant, for instance by changing its name and personnel structure.

Furthermore, the job descriptions furnished by the Petitioner, and signed by the Beneficiary, do not indicate that the Beneficiary has devoted, or will devote, the majority of his time to expansion-related activities. Most of the activities specific to expansion were within the category of "Planning and Executive Administration," occupying 40% of his time, and that category was not limited to expansion. It also involved activities specific to the first (and so far only) restaurant, such as securing specific amounts of capital and purchasing the site.

The definitions of executive and managerial capacity have 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 (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, Inc. v. INS*, 940 F.2d 1533.

Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *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). 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 actual duties themselves will reveal the true nature of the employment. *Id.* Here, the Director found that the Beneficiary's job description lacked critical detail. The Petitioner has not addressed this finding on appeal, concentrating instead on staffing issues. The Petitioner quotes parts of the job description, but doing so does not address or overcome the Director's findings. Phrases such as "employee relations" and "provide leadership and vision" provide no useful specific information about how the Beneficiary goes about those tasks.

Many of the Petitioner's specific claimed duties concern reviewing reports and other work product from unspecified subordinates. For example, the Petitioner asserts that the Beneficiary oversees the preparation of the budget and approves the purchase of inventory, but the Petitioner has not shown who actually prepares the budget or purchases the inventory. The job description contains several references to reports, but the only specific employee identified as preparing them is the chief chef.

The Petitioner states that the Beneficiary reviews and authorizes promotional campaigns, but has not identified any employee responsible for those campaigns. The Petitioner has submitted a list of outside companies that, the Petitioner claims, provide some services to the Petitioner, including four companies listed under "Marketing" and two under "Advertisements," but the record does not contain any documentary evidence to support that claim even though the Director asked for such evidence in the RFE.

A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing

Matter of K-G-, Inc.

Matter of Treasure Craft of Cal., 14 I&N Dec. 190 (Reg'l Comm'r 1972)); *see also Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

The fact that the Beneficiary manages or directs 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” of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B). While the Beneficiary may exercise discretion over the Petitioner’s day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, the position description alone is insufficient to establish that his actual duties, as of the date of filing, would be primarily managerial or executive in nature.

For the reasons discussed above, the Petitioner has not shown that the Beneficiary’s intended duties are managerial or executive in nature.

2. Staffing

Beyond the required description of the job duties, USCIS reviews 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.

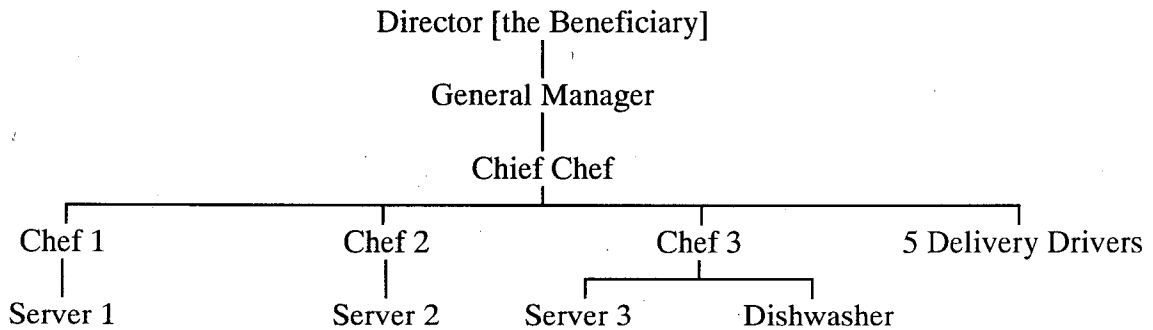
The statutory definition of “managerial capacity” allows for both “personnel managers” and “function managers.” *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. 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; 8 C.F.R. § 204.5(j)(4)(i). 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. § 204.5(j)(2).

The term “function manager” applies generally when a beneficiary’s managerial role arises not from supervising or controlling the work of a subordinate staff but instead from responsibility for managing an “essential function” within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The statute and regulations do not define the term “essential function.” If a petitioner claims that a beneficiary will manage an essential function, that petitioner must clearly describe the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary’s daily duties

dedicated to managing the essential function. See 8 C.F.R. § 204.5(j)(5). In addition, a petitioner's description of a beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform the duties related to the function.

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, 8 U.S.C. § 1101(a)(44)(B). 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.*

On its Form I-140, the Petitioner claimed to have 24 U.S. employees at the time of filing, but the Petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, shows that the Petitioner had 15 employees on its payroll as of March 12, 2015. The lower number is consistent with an employee list and the Petitioner's organizational chart:



In the RFE, the Director requested job descriptions for the Beneficiary's subordinates and documentation of contract labor used.

The Petitioner's response to the RFE included an employee list showing 16 employees:

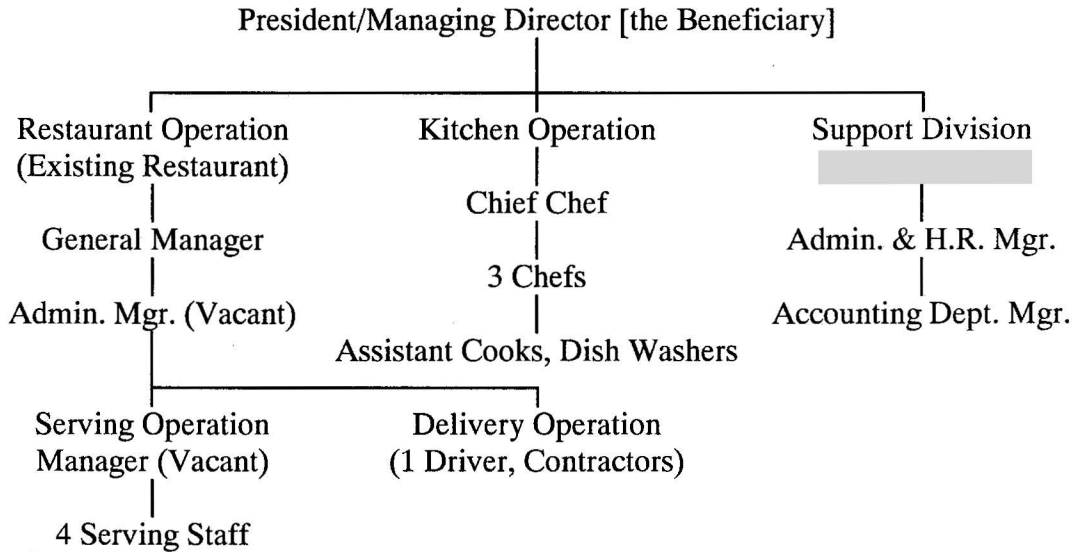
Title	Hours per week
Manager 1	40
Manager 2 [the Beneficiary]	40
Kitchen Manager	60
Chefs 1-3	40
Chef 4	25
Chef 5	15

(b)(6)

Matter of K-G-, Inc.

3 Drivers	40
4 Servers	40
Dishwasher	40

The Petitioner also submitted a different organizational chart, reproduced in part below. We have omitted a section relating to "Additional Restaurants," because it is entirely prospective and does not include any existing personnel:



The list is not entirely consistent with the organizational chart, and the Petitioner did not submit job descriptions or documentation of contract labor. An unsubstantiated list of third-party service providers cannot suffice in this regard.

The Petitioner's IRS Form 941 returns show significant fluctuations both in the number of employees and in the total wages paid per quarter:

Quarter	Employees	Total wages paid
3, 2013	21	\$39,279.44
4, 2013	14	60,840.14
1, 2014	22	84,159.76
2, 2014	23	80,237.38
3, 2014	13	73,919.36
4, 2014	38	67,136.72
1, 2015	15	90,495.40
2, 2015	15	95,902.25
3, 2015	14	119,056.81
4, 2015	13	138,875.53

The quarterly tax returns indicate that, near the petition's filing date, the Petitioner reduced the size of the staff while also increasing total wages paid. This is consistent with the consolidation of several part-time positions into a smaller number of full-time positions. But the figures on the most recent quarterly returns do not support the Petitioner's claim to have 16 employees at the time of the RFE response. Instead, they show a decline in staffing after the filing date. The Petitioner did not account for the discrepancy between the quarterly returns and the most recent organizational chart.

In the denial notice, the Director found that the Petitioner had not submitted job descriptions for the Beneficiary's subordinates to show how they would relieve the Beneficiary from primarily performing operational or administrative functions. The Director also found that the Petitioner had not submitted requested information regarding contractors and employee duties. The Director also found that the Petitioner had not established that the Beneficiary's subordinates qualify as professionals.

We have already discussed some issues relating to staffing, such as the lack of information to show that specific employees relieve the Beneficiary from performing specific non-managerial functions. The Director requested job descriptions for the Beneficiary's U.S. subordinates, but the Petitioner did not include that information in its response to the RFE. This omission is, by itself, grounds for denial of the petition under 8 C.F.R. § 103.2(b)(14). To assert that the Beneficiary reviews reports and budgets, without showing where the reports and budgets originate, presents at best an incomplete picture of the Beneficiary's role in the company.

On appeal, as noted above, the Petitioner asserts that the Director erred by considering the Beneficiary's position in the context of a personnel manager instead of a function manager. The Petitioner states that the Beneficiary "*primarily . . . manages the essential function of market development involving expansion of a chain of restaurants in the Americas, a role which reasonably requires him to rely on services from the foreign staff whose duties directly support[] the U.S. subsidiary.*"

To support the above point, the Petitioner cites *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), in which we stated:

Finally, when staffing levels are considered in determining whether an individual will act as a manager, we must also take into account relevant evidence in the record concerning the reasonable needs of the organization as a whole, including any related entities within the "qualifying organization," giving consideration to the organization's overall purpose and stage of development. See section 101(a)(44)(C) of the Act. Given that Congress created this visa classification to "eliminate problems . . . faced by American companies having offices abroad in transferring key personnel freely within the organization," it is reasonable for a petitioner to assert that the organizational needs include those of its related foreign components. See generally H.R. Rep. No. 91-851, § 1(b), at 5 (1970), as reprinted in 1970 U.S.C.C.A.N. 2750, 2754. To support this type of claim, the petitioner bears the burden of submitting probative evidence to establish the reasonable staffing needs of

(b)(6)

Matter of K-G-, Inc.

the organization and how those needs are material to whether the beneficiary will act as a manager. An adjudicating officer in turn must assess all relevant evidence in the record concerning the beneficiary's position within the wider "qualifying organization" in determining whether the petitioner has satisfied that burden.

Id. at 5 (footnote omitted). The Petitioner states, on appeal:

Staff members within the parent company's office in Malaysia exclusively support Beneficiary's work in the United States. The record shows, for example, Beneficiary "coordinate[s] the parent company's administration division and financial division regarding the expansions." [Petitioner Support Letter, dated March 1, 2016, submitted with the RFE response filing, p.2]. . . .

The Petitioner misquotes the earlier letter. The passage in question reads: "Coordinate with parent company's [redacted] administration division and financial division in allocating financial resources for efficient operation and expansion of the U.S. business." This does not indicate that [redacted] plays an active role in the operation of the petitioning U.S. employer, or that its employees perform administrative or financial tasks on the Petitioner's behalf, let alone that they "exclusively support Beneficiary's work in the United States" as the Petitioner contends. It shows only that the Petitioner relies on infusions of foreign capital from the parent company. For instance, [redacted] provided the funds for the Petitioner to purchase its restaurant.

The beneficiary in *Z-A-* was responsible for overseeing the foreign parent company's expansion into the United States, to "manage the implementation of all policies and strategies and establish goals pertaining to the import, sales, and marketing of the parent company's specialized products into the market." *Id.* at 5-6. In the case now before us, the Petitioner does not import, sell, or market the parent company's products in the United States. The record does not show that the Petitioner and its foreign parent company engage in similar or complementary business endeavors, such that they comprise, in effect, a single organization. The Petitioner has not shown that the parent company's staff performs any of the day-to-day functions involved in operating the Petitioner's restaurant. Discussion of the company's possible role in facilitating the Petitioner's expansion is entirely hypothetical, because there is no evidence that the Petitioner had begun that expansion at the time it filed the petition. The Petitioner has not submitted evidence to establish any relevant connection between the Beneficiary's continuing work on behalf of the foreign company and his role with the petitioning U.S. employer.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States.

B. Foreign Employment in a Managerial or Executive Capacity

If the Beneficiary is already in the United States working for the foreign employer or its subsidiary or affiliate, then the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) requires the Petitioner to submit a statement from an authorized official of the petitioning United States employer which demonstrates

(b)(6)

Matter of K-G-, Inc.

that, in the three years preceding entry as a nonimmigrant, the Beneficiary was employed by the entity abroad for at least one year in a managerial or executive capacity.

1. Duties

The Petitioner identified the Beneficiary's foreign employer as [REDACTED] and described the Beneficiary's duties abroad as follows:

[The Beneficiary] developed the company's strategic plans for operating the two companies it manages, [REDACTED] and [REDACTED]. Because these two companies sell their products globally, [the Beneficiary] was responsible for creating international logistics processes and procedures to manage the companies' shipments while complying with all international customs regulations.

[The Beneficiary] was also responsible for managing the companies' financial performance. He set the company's financial goals and established the policies to achieve them. He then supervised his management team to ensure these goals were being achieved. . . .

As an executive manager for [REDACTED] [the Beneficiary] was responsible for the direct management and supervision of five managers. He established their job duties, assessed their performance, and received regular reports from them about the company's operations. Because . . . the nature of [REDACTED] business was to manage two large companies, [the Beneficiary] was ultimately responsible for all of the managers and employees of [REDACTED] and [REDACTED]. Both companies had management teams on site, however, [the Beneficiary] was the executive manager who oversaw each company.

[REDACTED] does not own [REDACTED] or [REDACTED]. Rather, individual employees of [REDACTED] own or co-own those two companies. Any management services that [REDACTED] provides to those companies would therefore appear to be on a contract basis. (The record does not contain copies of those contracts, but [REDACTED] bank statements show deposits originating from the two companies.) Because neither [REDACTED] nor [REDACTED] are affiliates or subsidiaries of [REDACTED] the business activities and staffing of those companies are not relevant to this proceeding. Their employees are not the Beneficiary's *de facto* subordinates.

A job description on [REDACTED] letterhead showed the following duties for the Beneficiary, each of which occupies "not more than 20% of his time" (note: errors in the original text have not been corrected):

As Chief Executive his responsibilities is to expand the company's business portfolio / new business investment and explore future business trend and steer the company to new height.

(b)(6)

Matter of K-G-, Inc.

As Chief Executive his responsibilities is to make sure the company is run in an efficient / profitable and law abiding company.

As Chief Executive, his responsibilities are to balance his responsibilities to the company and the shareholder.

As Chief Executive, he is also in charge of the Purchasing Department. . . .

Major decision / accomplishment made by the Chief Executive.

- a) Export Malaysian / Indonesian Palm oil to Uzbekistan / Ukraine / Russia market. Control an estimated 80% of Palm Oil requirement in Uzbekistan market.
- b) Export and design Malaysian made OEM car audio (CD/USB player) to [REDACTED] Supply 90% of car audio requirement to [REDACTED]
- c) To export palm oil by tanker to Russia. (Now under discussion)
- d) Make decision on buying of commodities at the right price.
- e) Make decision to sell commodities at the right price and timing for profit.
- f) Appoint custom broker / shipping agent to handle the export of Palm oil.
- g) Explore and planning to attract new customer for the Palm Oil commodities.
- h) Planning and design of new car audio for [REDACTED]

The description quoted above consists largely of vague, general responsibilities rather than specific, identifiable tasks.

The record contains no evidence that [REDACTED] exports palm oil or car audio equipment. It appears, instead, that [REDACTED] exports palm oil, while [REDACTED] sells car audio equipment. Any transactions that the Beneficiary negotiated on behalf of those companies would be separate from his work as general director of [REDACTED] and [REDACTED] are not affiliated with the petitioning U.S. company, and therefore any management work that the Beneficiary performed for those companies would not qualify him as a multinational manager or executive.

In the RFE, the Director asked for more details about the Beneficiary's claimed duties at [REDACTED]. In response, [REDACTED] a director of [REDACTED] listed several duties with the approximate percentage of time devoted to each:

Executive Decisions (40%)

- Make executive decisions of business operation and make major decisions including approving new business operation . . . ; approve organization structure; approve business structure; approve and authorize budgetary expenditures; oversee and approve major subsidiary expenditures and affiliate business

(b)(6)

Matter of K-G-, Inc.

direction for [the Petitioner], [redacted] (Singapore), [redacted] (Singapore) and the parent company ([redacted] Malaysia). . . .

Executive Oversight and Business Unit Management (20%)

- Allocate parent company's business units in relation to subsidiary and affiliate companies where [redacted] Acts as the controlling entity. . . .

Formulate Strategy and Policy (10%)

- Provide executive guidance in board of directors meeting and ratify proposals for strategic vision for the company to grow into new business industry (restaurant chains), new international geographic regions (Singapore, Malaysia, U.S., Ukraine, etc.), expand into categories for import and export and capture geographic market (i.e. palm oil market, export Malaysian and Indonesian palm oil to Eastern European countries such as Uzbekistan, Ukraine, and Russia).

Executive Policy and Guidance (10%)

- Receive periodic reports from management and business units of current status on business and financial operations and issue policy, guideline, management directives on resource allocation and business focus.
- Set operational goals appropriate for each department's activities.

Management (20%)

- Manage purchasing department by establishing protocols and policy in maintaining key inventory levels, logistics, and make final decisions on procurement contracts after reviewing relevant reports from management and business units.

The Director denied the petition, stating that the Beneficiary's job description showed a high level of authority but did not show what, exactly, the Beneficiary did on a daily basis with the foreign company. The Director found that the Petitioner had not established that the Beneficiary's tasks with [redacted] were primarily those of a manager or executive.

On appeal, the Petitioner repeats the assertion that the Beneficiary made major business decisions for [redacted] and [redacted]. As explained above, those companies have no qualifying relationship with the Petitioner; the decisions described affected his management of the unrelated companies, not [redacted]. The Beneficiary also made decisions relating to the petitioning U.S. entity, such as deciding to purchase the restaurant and allocate the needed funds, but the Petitioner has not shown that these decisions, many of them one-time events, occupied the majority of the Beneficiary's time. The Petitioner has not provided sufficient information about the Beneficiary's duties as they relate to [redacted].

(b)(6)

Matter of K-G-, Inc.

2. Staffing

The Petitioner initially submitted two organizational charts for [REDACTED]. Both charts showed the Beneficiary as managing director, and named the same four departments, but they identified different managers for many of those departments:

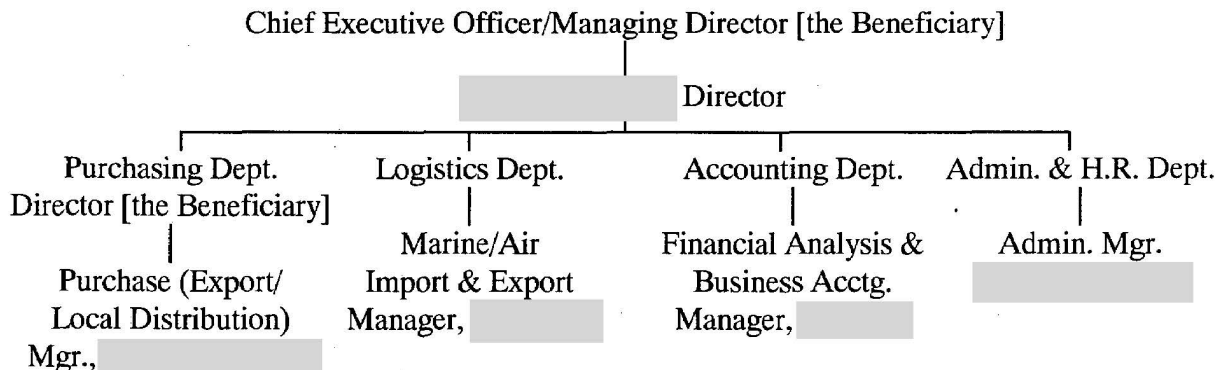
Department	Manager, chart 1	Manager, chart 2
Administrative	[REDACTED]	[REDACTED]
Accounting	[REDACTED]	[REDACTED]
Purchasing	The Beneficiary	[REDACTED]
Logistics	[REDACTED]	[REDACTED]

The organizational charts referred to all of the above positions as either managerial or executive. The Petitioner submitted descriptions showing the responsibilities of each department, but did not show how many subordinates, if any, worked in each department. From February 1, 2013, to March 31, 2014, the company paid a total of RM102,643 in "Salaries, bonuses and allowances," an average of RM7332.64 per month. The Beneficiary's pay statements show that he received RM7000 per month in 2013, more than 95% of the company's total salary expenses at the time. Therefore, it does not appear that [REDACTED] had a significant number of employees on payroll.

The Petitioner submitted descriptions showing that each department performs operational tasks that are not managerial or executive, such as filing correspondence, processing orders, tracking inventory, preparing invoices, and recording financial transactions. Because the Petitioner did not document any subordinate staff in any department, the Petitioner's initial submission did not show that anyone other than the department heads performed these non-managerial and non-executive tasks.

In the RFE, the Director asked for job descriptions for the Beneficiary's subordinate managers and supervisors, stating that what the Petitioner had previously submitted was insufficient.

The Petitioner's response included a third version of [REDACTED] organizational chart:



(b)(6)

Matter of K-G-, Inc.

The chart showed both the Beneficiary and [REDACTED] filling two positions each. Like the previous charts, the latest version did not show any subordinate staff below the managers to perform the company's non-managerial operational and administrative tasks.

In the denial notice, the Director stated that, although the various organizational charts show several managers subordinate to the Petitioner, the Petitioner did not show that the managers had any subordinates below them. The Director also found that the Petitioner did not show that those managers qualify as professionals; first-line supervision of non-professional employees does not qualify as managerial or executive. See 8 C.F.R. § 204.5(j)(4)(i). The Director also found that the Petitioner did not show that [REDACTED] had sufficient staff to relieve the Beneficiary from primarily performing non-qualifying tasks.

On appeal, the Petitioner submits a list of six employees at [REDACTED]

- The Beneficiary, title not specified
- [REDACTED] purchasing manager
- [REDACTED] administration and logistics
- [REDACTED] accounting
- [REDACTED] "accounting executive assisting [REDACTED] in accounting"
- [REDACTED] owner of [REDACTED] title at [REDACTED] not specified

The Petitioner still has not shown that [REDACTED] has, or had, more than six employees. The new list provides a job description for only one of those employees, [REDACTED]

Director and owner of [REDACTED] of Singapore and Management control of financial [sic] in [REDACTED] as signatory approval for all payment.

Provide consultancy services to GLC (government link companies) through the [REDACTED] to the Malaysia Northern Corridor / Aquaculture and Agriculture for investor. Involved in the [REDACTED] implementation for the [REDACTED] in the Agriculture sector. Provide investor linkage to the state government.

The Petitioner has not submitted any information or evidence to show how the second quoted paragraph relates to [REDACTED]. There is no other information in the record indicating that [REDACTED] is involved in aquaculture, agriculture, or government consulting. The reference to "the [REDACTED] is unclear; [REDACTED] is not a law firm. Any activities that [REDACTED] undertakes as a director of [REDACTED] are beyond the scope of this petition, and do not establish a managerial capacity at [REDACTED]."

Federal courts have generally agreed that, in reviewing the relevance of the number of employees a Petitioner has, USCIS "may properly consider an organization's small size as one factor in assessing

(b)(6)

Matter of K-G-, Inc.

whether its operations are substantial enough to support a manager.”¹ Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company’s small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a “shell company” that does not conduct business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The Petitioner has not established that the Beneficiary’s subordinates at [REDACTED] were managers, supervisors, or professionals. The Petitioner has not established the nature of their duties, or even the exact nature of [REDACTED] business; most of the latter discussion concerns management of other companies that [REDACTED] as a company, does not own or control. The Beneficiary may have held a high-ranking title at that company, but the Petitioner has not shown that the Beneficiary primarily performed managerial or executive duties for that company (as opposed to non-qualifying duties for [REDACTED] or managerial duties for outside companies).

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary was employed in a managerial or executive capacity abroad.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of K-G-, Inc.*, ID# 118452 (AAO Dec. 20, 2016)

¹ *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d at 42; *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003).