



U.S. Citizenship
and Immigration
Services

Non-Precedent Decision of the
Administrative Appeals Office

MATTER OF Q-P-G- LLC

DATE: MAR. 15, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a cheese manufacturing and distribution business, seeks to permanently employ the Beneficiary as its production manager 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 of the Texas Service Center denied the petition, concluding that the Petitioner did not establish, as required, that: (1) it will employ the Beneficiary in the United States in a managerial capacity; (2) the Beneficiary was employed abroad in a managerial capacity prior to his entry to the United States to work for the Petitioner as a nonimmigrant; and (3) it has a qualifying relationship with the Beneficiary's foreign employer.

On appeal, the Petitioner submits additional evidence and asserts that the Director ignored ample evidence of its qualifying relationship with the foreign employer, as well as evidence that the Beneficiary was employed abroad and would be employed in the United States in a managerial capacity.¹

Upon *de novo* review, we will withdraw the Director's determination that the Petitioner did not establish a qualifying relationship with the Beneficiary's foreign employer.² However, as the Petitioner has not overcome the two remaining grounds for denial, we will dismiss the appeal.

I. LEGAL FRAMEWORK

An immigrant visa is available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate. Section 203(b)(1)(C) of the Act.

¹ The Petitioner does not claim that the Beneficiary was employed abroad, or would be employed in the United States, in an executive capacity, so we will limit our review to his eligibility as a multinational manager.

² The submitted evidence demonstrates that the Beneficiary has sufficient ownership and control of both the Petitioner and the foreign entity to establish an affiliate relationship, as defined at 8 C.F.R. § 204.5(j)(2).

The Form I-140, Immigrant Petition for Alien Worker, must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3).

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

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

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director determined that the Petitioner did not establish that the Beneficiary would be employed in the United States in a managerial capacity. Specifically, the Director found that the Petitioner did not provide a sufficiently detailed description of the Beneficiary’s day-to-day job duties or submit sufficient evidence to establish that the Beneficiary supervises subordinate professionals.

On appeal, the Petitioner contends that the Director ignored “ample evidence” of the Beneficiary’s employment in a managerial capacity, and emphasizes that the Beneficiary’s knowledge and expertise in the cheese manufacturing business are fundamental to the company’s success. The Petitioner provides a revised job description for the Beneficiary and evidence that two of his claimed subordinates have bachelor’s degrees.

The regulation at 8 C.F.R. § 204.5(j)(5) requires the Petitioner to submit a statement which clearly describes the duties to be performed by the Beneficiary. Beyond the required description of the job duties, USCIS reviews the totality of the evidence when examining a beneficiary’s claimed managerial or executive capacity, 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. Accordingly, our analysis of this issue will focus on the Beneficiary’s duties as well as the company’s staffing levels and reporting structure.

A. Duties

The Petitioner must show that the Beneficiary will perform certain high-level responsibilities consistent with the statutory definition of managerial capacity. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). In addition, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial, as opposed to ordinary operational activities alongside the Petitioner's other employees. See *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The Petitioner manufactures and distributes Latin American specialty cheeses and other non-cheese food products, and had approximately \$201,000 in gross sales in 2015. At the time of filing, the Petitioner provided a lengthy narrative description of the Beneficiary's duties, including a breakdown of his typical workweek which provided the number of hours he spends on 14 different duties. Despite the Beneficiary's job title of "production manager," almost all of the tasks included in the hourly breakdown involved the sales and distribution functions of the company. For example, the Petitioner indicated that the Beneficiary will manage these two functions, analyze sales reports and set sales targets, provide pricing guidelines to sales department, review industry trends and sales strategies regularly, create new sales channels, represent the company to wholesalers and distributors, negotiate sales contracts with wholesalers and distributors, attend trade shows, engage in business development, and analyze the workforce needs of the sales and distribution department.

At the same time, the narrative job description mentioned the Beneficiary's responsibility for overseeing the production crew and manufacturing process. Similarly, the organizational chart submitted at the time of filing (which we will discuss further below) showed that the Petitioner employed six employees involved in manufacturing, and no sales or distribution staff. Based on this initial evidence and the duties included in the Petitioner's job description, it appeared that the Beneficiary would spend his time primarily on sales and distribution activities, and that he would be required to perform *all* duties associated with these functions, including routine, non-managerial tasks. The Petitioner's initial descriptions were internally inconsistent and therefore did not credibly establish what proportion of the duties is managerial in nature, and what proportion is non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

In a letter submitted in response to the Director's request for evidence (RFE), the Petitioner, noting that "important changes" had taken place since the filing of the petition, stated that the Beneficiary would be responsible for supervising "every step of the Cheese making process as well as the assignment of responsibilities . . . for the sales and distribution department." The Petitioner included a list of 21 duties and the amount of time the Beneficiary spends on each duty. Many of the duties listed initially were included with different allocations of time. Newly added duties included the following:

- Manages the purchase of raw materials and equipment; (2 hours per week);
- Monitors production, sales and distribution methods and techniques, checking biological, physical and chemical hazards, establishing critical limits, assigning responsibilities and verification procedures (10 hours per week);

- Establishes frequency and levels of Plant Sanitation and equipment maintenance. (1 hour per week);
- Ensures the availability of raw materials to guarantee the reach of weekly and monthly goals for the production and sales departments. (2-3 hours per week);
- Oversees and supervises the work of [the foreign entity] (1-2 hours per week);
- Manages and supervises the work of [REDACTED] in the Production Department (1-2 hours per week);
- Oversees and manages the work of the Business Development Department in the person of [REDACTED] (1-2 hours per week)[.]

The Petitioner did not explain what “important changes” took place since the time of filing or the resulting revisions to the Beneficiary’s claimed job duties, although we note that the company had no claimed “sales and distribution department” at the time of filing. As discussed below, the Petitioner has not corroborated the staffing depicted in either of its submitted organizational charts and paid no wages in 2016. The Petitioner paid six contractors in 2016, half of whom earned less than \$1500.00. Therefore, many of the newly claimed responsibilities for managing subordinate supervisors did not appear to reflect the Beneficiary’s duties as of the date of filing in October 2016, and are inconsistent with the company’s documented organizational structure.

On appeal, the Petitioner submits another new job description which lists 28 duties under the following headings: manage the organization (45%); supervise and control the work of incoming professional employees (5%); hire, fire or recommend those as well as other personnel actions (5%); exercises discretion over the day-to-day operations of the company (25%); promote and represent the company locally and abroad (10%); and oversee the company’s strategic position and future strategies (10%). The entire description is comprised of vague, generic duties such as “manage general activities related to provision of services” and “monitor performance [of] the Company’s staff under her [sic] direct supervision,” with no references to the specific type of business the Petitioner operates. Therefore, this description does not clarify the inconsistencies between the two prior job descriptions. 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. *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).

Whether the broad duties attributed to the Beneficiary qualify as managerial or executive in nature depends in large part on whether the Petitioner established that he would have sufficient subordinate staff to supervise and perform the day-to-day company activities he is claimed to manage. As discussed further below, the Petitioner has not shown its ability to relieve the Beneficiary from significant involvement in the operational tasks required to operate its business.

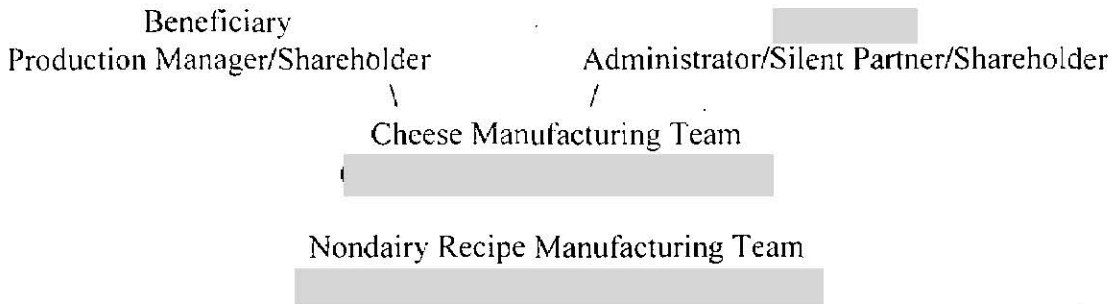
The fact that the Beneficiary will manage a business as its senior employee does not necessarily establish eligibility for classification as a multinational manager. By statute, eligibility for this classification requires that the duties of a position be “primarily” managerial in nature. Section 101(A)(44)(A) of the Act. Even though the Beneficiary may exercise discretion over the Petitioner’s

operations and possess authority with respect to discretionary decision-making, the position description alone is insufficient to establish his employment will be in a managerial capacity.

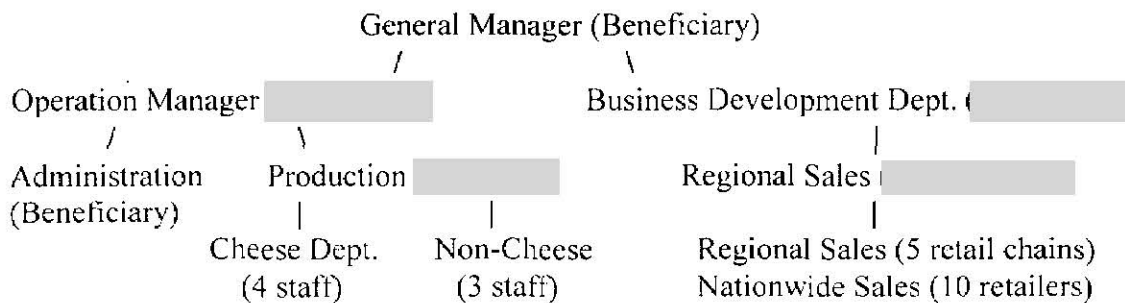
B. Staffing and Organizational Structure

The Petitioner manufactures and distributes Latin American specialty cheeses and other non-cheese food products, with approximately \$201,000 in gross sales in 2015. The Petitioner indicated on the Form I-140, filed in October 2016, that it had eight employees. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

The Petitioner's initial organizational chart depicted the following structure:



In response to the Director's request for evidence (RFE), the Petitioner provided the following chart identifying 11 subordinate employees by name:



In a supporting statement submitted with the RFE response, the Petitioner indicated that [redacted] and [redacted] are part-time employees and all other staff are contractors. The Petitioner stated that [redacted] works on an "as needed basis." The record contains a letter from [redacted] indicating that he has been a "silent partner" with a "diminished role" since deciding to pursue his veterinary career in 2015.

The Petitioner's 2016 IRS Form 1065, U.S. Return of Partnership Income, shows that it paid no salaries or wages in 2016. The Petitioner reported \$28,375 in contract labor expenses and paid the following individuals on IRS Form 1099, Miscellaneous Income:

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Name	Title - Initial Chart	Title - RFE Chart	Amount Paid
	N/A	Non-cheese production	\$4184.00
	Cheese manufacturing	Cheese manufacturing	\$6874.00
	N/A	Cheese production	\$5127.54
	Cheese manufacturing	Production Dept. Specialist	\$1493.00
	N/A	N/A	\$543.00
	Cheese manufacturing	Non-cheese manufacturing	\$1482.75

Three individuals named on the initial organizational chart, did not receive any documented payments from the Petitioner in 2016. While the Petitioner established that it paid a total of six contractors in 2016, we cannot determine which, or how many, were actually working for the company when the petition was filed in October 2016. Based on the low payments, it is unclear whether any of the contractors worked all year.

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.”³ Section 101(a)(44)(A)(iv) of the Act.

The Petitioner’s initial organizational chart depicted the Beneficiary as a first-line supervisor of two teams of non-professional food production employees. While the Petitioner later inserted tiers of supervisory employees into its organizational chart, it has not shown that this multi-tiered structure or those employees/contractors were in place when the petition was filed. Therefore, the Petitioner did not show that the Beneficiary would supervise subordinate supervisors or managers.

On appeal, the Petitioner claims that the Beneficiary supervises two subordinate professionals – [redacted] and [redacted]. The Petitioner provides revised and expanded job descriptions for both individuals and evidence of their educational credentials with professional evaluations. However, the Petitioner has not established that either individual actually worked for the company and under the Beneficiary’s supervision at the time of filing. [redacted] a co-owner and silent partner, indicates that he devotes his time to his veterinary profession and the Petitioner has not provided evidence of any payments to [redacted] who it initially identified as a member of its food manufacturing team, not as “regional dispatcher” as claimed on appeal. The record does not support

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.”

the Petitioner's claim that the Beneficiary would supervise subordinate professional employees, or that he would act primarily as a personnel manager.

The Petitioner also has not articulated a specific function that the Beneficiary will manage. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that "(1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations." *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

The Petitioner generally indicates that the Beneficiary will manage its production, sales, and distribution activities. While these areas of responsibility are essential to the business, the record does not establish that he would *primarily manage* these areas, rather than performing non-qualifying duties associated with the company's day-to-day operations in these areas. While a function manager need not manage a subordinate staff, the Petitioner cannot meet its burden if it cannot show that someone other than the Beneficiary is available to carry out tasks required for the continued operation of its manufacturing and wholesale distribution business.

Section 101(a)(44)(C) of the Act requires that USCIS must take into account the reasonable needs of the organization in light of the overall purpose and stage of development of the organization if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity. 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.

At the time of filing, the Petitioner's staff included the Beneficiary, a silent partner, and an unknown number of contractors who were all more likely than not involved in the manufacture of the Petitioner's specialty cheese products. It is not clear how these contractors, who collectively earned an amount equivalent to two full-time minimum wage workers, would have been sufficient to perform all of the work necessary to produce the Petitioner's products. The Petitioner did not submit evidence that it had subordinate staff to perform many of the actual day-to-day, non-managerial operations of the company, such as ordering ingredients and supplies, selling the products to wholesale customers, arranging for the shipment and delivery of its products to its customers, marketing the products, supervising the day-to-day production, and performing routine administrative, clerical and bookkeeping duties. It does not appear that the reasonable needs of the

petitioning company might plausibly be met by the services of one full-time production manager (the Beneficiary) and a handful of part-time production contractors.

For the reasons discussed above, the Petitioner has not established that the Beneficiary would be sufficiently relieved from involvement in the day-to-day operations of the company, despite his senior position in the company hierarchy. Accordingly, the Petitioner has not met its burden to show that his duties would be primarily managerial in nature as of the date of filing.

III. EMPLOYMENT ABROAD IN A MANAGERIAL CAPACITY

The remaining issue in this case is whether the Petitioner established that the Beneficiary was employed abroad in a managerial capacity. The Director determined that the Petitioner did not provide a sufficiently detailed description of the Beneficiary's duties or provide sufficient evidence to establish that the Beneficiary supervised subordinate professionals. We agree with the Director that the Petitioner did not meet its burden to show that the Beneficiary performed primarily managerial duties.

The Petitioner indicates that its foreign affiliate, where the Beneficiary served as "manager" or "administrator" is engaged in the same or similar activities as the petitioning entity. In a letter submitted at the time of filing (written in Spanish, with English translation), the foreign entity's minority shareholder, [REDACTED] stated that the Beneficiary performed the following duties:

- Purchasing of products, raw materials, supply parts and components for the running of the business. (30%)
- Development of new dairy products for wholesale. (15%)
- Warehousing, production and bacteria control for dairy products. (20%)
- Cyclical control of the inventory. (5%)
- Cost control. (5%)
- Supervision of SHA Program. . . . (5%)
- Development of Quality Plan ISO 9001-2000. (20%)

Based on these duties, it appears that the Beneficiary primarily performed non-managerial duties associated with purchasing, product development, product warehousing, inventory, and product quality. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial capacity. *See, e.g.,* sections 101(a)(44)(A) of the Act (requiring that one "primarily" perform the enumerated managerial duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Although the Director requested a more detailed description of the Beneficiary's duties, the Petitioner's response to the RFE included a statement that appears to describe the duties that the Beneficiary has performed remotely as the foreign entity's majority shareholder and "consulting manager" since his transfer to the United States in 2009. Therefore, the new information did not shed additional light on the nature of his duties while employed abroad.

The Petitioner has also not provided an organizational chart that corresponds to the Beneficiary's period of employment abroad with the foreign entity (January 2006 to April 2009). The organizational chart depicts the Beneficiary as the foreign entity's "majority shareholder"⁴ and "international liaison," and identifies his role with the Petitioner. Therefore, we cannot determine whether the foreign entity, between 2006 and 2009, had sufficient staff to relieve the Beneficiary from performing primarily non-managerial duties associated with the production, sale, and distribution of the company's products. Further, the Petitioner has not established that the Beneficiary supervised subordinate managers, supervisors, or professionals while employed abroad.

The additional evidence submitted on appeal does not overcome our concerns regarding the primarily non-managerial duties listed in [REDACTED] initial letter, nor does it address the staffing of the foreign company during the relevant period of time.

The Petitioner submits a new letter ostensibly signed by [REDACTED]. It contains a job description which bears no resemblance to the one submitted previously. Rather, it is very similar to the new U.S. job description provided on appeal. The description lists 23 generic tasks under the following headings: "manage the company" (30%); "supervises and controls the work of other professional employees"; (20%), "hire, fire or recommend those as well as other personnel actions" (5%); "exercises discretion over the company's day-to-day operations" (20%); "promote the company and represent the Company" (10%); and, "oversee the Company's strategic position and future strategies" (15%).

This letter, unlike the previous letter from [REDACTED] is written in English and not accompanied by a Spanish-language original or a translation certificate. In addition, the signatures on the two letters attributed to [REDACTED] are clearly different. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As noted, the sole remaining job description indicated that the Beneficiary performed primary non-managerial duties while employed abroad, and the record remains deficient with respect to establishing the staffing of the foreign entity during the relevant time period. Accordingly, the Petitioner has not overcome the Director's determination with respect to this basis for denial.

IV. CONCLUSION

The appeal must be dismissed as the Petitioner has not established that it the Beneficiary was employed abroad, or would be employed in the United States, in a managerial capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of Q-P-G- LLC*, ID# 1062615 (AAO Mar. 15, 2018)

⁴ The Petitioner provided evidence that the Beneficiary became the foreign entity's majority shareholder in 2013.