



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

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

MATTER OF G-C-L- CORP.

DATE: SEPT. 19, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a trucking and transportation company, seeks to permanently employ the Beneficiary as its general manager under the first preference immigrant classification for multinational executives or managers. 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 Nebraska 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 or executive capacity; and (2) that it has the ability to pay the Beneficiary's proffered wage.

On appeal, the Petitioner asserts that the Beneficiary will be employed in a managerial capacity based on his management of an essential function and responsibility for supervising subordinate managers and professionals. The Petitioner further maintains that it has demonstrated its ability to pay the Beneficiary's proffered wage.¹

Upon *de novo* review, we will withdraw the Director's adverse finding regarding the Petitioner's ability to pay the Beneficiary's proffered wage.² However, as the Petitioner has not overcome the remaining ground 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

¹ The Petitioner's brief on appeal also discusses the Beneficiary's employment abroad in a managerial or executive capacity, but this issue was not addressed in the Director's decision as a basis for denial.

² The Director reviewed the Petitioner's tax returns and determined that the company's net income and net current assets were not sufficient to pay the Beneficiary's \$45,000 annual salary. However, the Petitioner submitted reliable evidence showing that it has been paying the Beneficiary \$42,000 annually, and it appears the Director did not consider this evidence. The Petitioner's 2016 net income, as reflected in its tax return, was sufficient to cover the difference between his current wage and the proffered wage. Accordingly, the Petitioner satisfied the ability to pay requirement at 8 C.F.R. § 204.5(g)(2).

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.

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).

II. DEFINITIONS

“Managerial capacity” means an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization; has authority over personnel actions or functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A).

“Executive capacity” is defined as an assignment within an organization in which the employee primarily: directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

The Petitioner must show that the Beneficiary will perform certain high-level responsibilities consistent with the statutory definitions of managerial or executive 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 or executive duties, as opposed to ordinary operational activities alongside the Petitioner’s other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

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

The sole issue in this matter is whether the Petitioner established that it will employ the Beneficiary in a managerial or executive capacity in the United States.

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, we review 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 nature of the Petitioner's business, its staffing levels, and its organizational structure.

A. Duties

The position description submitted at the time of filing, while lengthy, described the Beneficiary's duties as general manager in very broad and non-specific terms. The Petitioner listed generalized duties under 12 areas of responsibility that included "strategic plan," "rules & policies," "goals & objectives," "operations and procedures," "objectives & reports," "organization," "functions," and "cooperation," and stated that the Beneficiary would allocate 5 to 10% of his time to each area. The associated duties were described in vague terms and without context, and therefore did not provide insight into the nature of the Beneficiary's day-to-day tasks as the general manager of a trucking and transportation business. Rather, the duties described, such as "develop . . . the company's strategic plan," "set guidelines and business scope and direction," and "draft . . . company rules and policies," could describe any senior employee in any company. Reciting a 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). Here, the Petitioner did not provide the necessary detail or an adequate explanation of the Beneficiary's activities in the course of his daily routine.

In response to the Director's request for evidence (RFE), the Petitioner stated that the Beneficiary will allocate a total of 60 percent of his time to "general corporate planning," and "general administration." These areas of responsibility were also described in vague terms without explanation of the nature of the Beneficiary's typical daily tasks. For example, the Petitioner stated that he "directs the entire U.S. entity," "establishes corporate objectives and policies," "is the ultimate decision maker," makes judgments about how the business will operate, and has authority over "other discretionary matters." The Petitioner did not provide explanations or evidence of the policies and objectives the Beneficiary is expected to implement, or information regarding the types of discretionary decisions he is required to make in support of its claim that these general duties, which resemble the definition of "executive capacity," require more than half of his time. Conclusory assertions regarding the Beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the Petitioner's burden of proof. *Fedin Bros.*, 724 F. Supp. at 1108 (E.D.N.Y. 1989); *Avyr Assocs., Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The Petitioner indicated that the Beneficiary will spend an additional 35% of his time on "business development" and "marketing and sales of trucking and dispatching service." The Petitioner indicated that his "business development" responsibility will involve maintaining good relationships with direct shippers and brokers, but did not provide sufficient detail to establish that his business

development tasks will be performed at a managerial or executive level. Similarly, the Beneficiary's "marketing and sales" responsibilities include surveying clients, tracking competitors' prices assessing customer requirements, and evaluating potential services, duties that are not clearly managerial or executive in nature. The Petitioner states that he "supervises marketing policy," and supervises "marketing and logistics strategy"; however, as discussed further below, the Petitioner has not corroborated its employment of most of the employees who are claimed to staff its marketing and logistics departments. Finally, the Petitioner indicates that the Beneficiary would allocate his remaining time (5%) to the oversight of "investment" and GPS technology development activities carried out by subcontractors whose work for the petitioning company is not documented in the record.

Overall, the job description submitted in response to the RFE did not provide additional insight into the nature of the Beneficiary's actual day-to-day duties. 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 to perform the day-to-day company activities he is claimed to manage or direct. 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 or executive. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial or executive 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 or executive capacity.

B. Staffing and Organizational Structure

The Petitioner states that it operates primarily as a trucking company and receives work orders through direct shippers or through brokers with which it has signed carrier agreements. The Petitioner states that upon receipt of a work order, it dispatches its own company drivers or assigns the work to sub-contracted owner-operators. The Petitioner also states that it engages in the sale of imported truck tires, provides services to Chinese investors who are interested in the U.S. trucking industry, and is developing GPS and other technology services for drivers and fleet companies. The Petitioner's trucking activities and carrier agreements are well-documented in the record, but it is unclear to what extent it was engaged in tire sales, investment-related activities, or GPS development work at the time of filing in April 2016.

The Petitioner claimed 17 employees on the Form I-140 and submitted an organizational chart which identifies 21 individuals by name. The chart identified nine individuals claimed to be payroll employees, eight staff paid as contractors on IRS Form 1099 (including five drivers); two "H1B candidates . . . working as intern graduates"; and two "sub-contractors." The Petitioner re-submitted the same organizational chart in response to a request for evidence (RFE), and again on appeal. The

chart shows the Beneficiary as general manager and indicates that he will directly supervise four department managers (identified as managers of the management, marketing, logistics, and investment departments).

We agree with the Director's determination that the record does not establish that the structure and staffing levels depicted in the organizational chart were in place at the time of filing. Looking first at the Petitioner's nine claimed payroll employees, the supporting evidence shows the following:

<u>Name</u>	<u>Title</u>	<u>2015 wages</u>	<u>2016 wages³</u>
Beneficiary	General Manager	\$42,000	\$42,000
	Vice GM, Logistics Mgr.	\$31,100	\$2800 (paid in January only)
	Secretary/HR & Client Rel.	\$25,500	\$0
	Manager	\$36,000	\$31,000
	Financial Manager	\$28,200	\$2500 (paid in January only)
	Dispatch & Coordinator	\$0	\$5000 (January/February only)
	Marketing Manager	\$0	\$1513 (paid in January only)
	Paralegal	\$13,848	\$3,528 (January/February only)
	Paralegal	\$0	\$14,112

Therefore, at the time of filing in April 2016, the Petitioner had three payroll employees, not nine as indicated on its organizational chart. The evidence shows that it maintained this staff of three employees throughout 2016 before reducing its payroll to two employees during the second quarter of 2017. The Petitioner has not provided evidence of non-payroll payments made to these employees (other than the "outside labor" already mentioned) and therefore has not established that it employed the vice general manager, logistics manager, "secretary/HR and client relations manager," financial manager, dispatcher, or marketing manager at the time of filing.


With respect to the contractor and subcontractor staff members identified on the organizational chart (excluding drivers and interns), the Petitioner documented the following payments:⁴

<u>Name</u>	<u>Title</u>	<u>2015 Form 1099</u>	<u>2016 Form 1099⁵</u>
	Investment Dept. Mgr.	\$11,111	Not issued
	Maintenance & Repair	\$12,450	Not issued
	Marketing Dept. Specialist	\$31,543	\$16,562

³ The Petitioner reported additional payments of \$2600 to [REDACTED] and \$4454 to [REDACTED] as "outside labor" on its 2016 tax return, but did not issue either employee a Form 1099.

⁴ We acknowledge that the Petitioner issued a total of 16 IRS Forms 1099 in 2016, and that it reported 32 payments to "outside labor" on its 2016 tax return. However, many of these payments were made to persons and entities whose roles have not been identified and we cannot determine that they were providing services to the Petitioner as of April 2016.

⁵ The Petitioner reported payments of \$24,334 to [REDACTED] and \$55,551 to [REDACTED] as "outside labor" on its 2016 tax return. It is unclear why these amounts did not match their Form 1099 payments.

	Truck Tires Sales Rep.	\$7950	\$46,407
	GPS & OBD Support	Not issued	Not issued

Therefore, as with the Petitioner's payroll employees, there are discrepancies between the number of contractors and subcontractors depicted in the organizational chart, and the Petitioner's evidence of payments made to these staff. The Petitioner must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Although the Director emphasized the discrepancies between the organizational chart and payroll/wage evidence in her decision, the Petitioner has not addressed the inconsistencies or the company's staffing on appeal and simply resubmits the same chart.

Absent some explanation for the discrepancies, we have determined that the Petitioner's documented staff as of the date of filing included the Beneficiary, the manager of the "management department," one paralegal, a marketing department specialist, a tire sales representative, and a number of truck drivers.

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. 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).

On appeal, the Petitioner asserts that its main function is "supplying transportation service and dispatch service," and it claims that the Beneficiary primarily manages this essential function by directing "the entire U.S. entity." While we do not doubt the Beneficiary's senior position in the petitioning company, the Petitioner has not established that he would primarily manage the company's essential function by virtue of being the general manager of the company. Further, the Petitioner's assertion that he is a function manager is predicated on its claim that the company has "marketing and logistics managers, dispatchers," and other "sub-managers" who perform the function of marketing, selling and providing the company's services. As already discussed, the Petitioner has not established that it employed most of the workers depicted on its organizational chart when it filed this petition and has not documented the various staff who are claimed to relieve the Beneficiary from involvement in the day-to-day, non-managerial activities of the company. In addition, as addressed above, the Petitioner has not provided a detailed position description for the Beneficiary sufficient to establish that he would primarily perform managerial duties.

The Petitioner claims, in the alternative, that the Beneficiary qualifies as a multinational manager based on his supervision of “professional managers.” 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.”⁶ Section 101(a)(44)(A) 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).

On appeal, the Petitioner asserts that the Beneficiary supervises two “professional team leaders,” who work for the subcontractor [REDACTED] claimed to assist the Petitioner with the design of GPS applications to assist the Petitioner’s drivers and dispatchers. However, the Petitioner has not documented payments to [REDACTED] or its employees, submitted a copy of its agreement with [REDACTED] or otherwise submitted evidence to establish that the Beneficiary supervises these professionals as part of his day-to-day routine. In fact, the Petitioner stated that he would spend less than 5% of his time supervising the activities of this claimed subcontractor.

The Petitioner also consistently claims that the Beneficiary will supervise four department managers who are claimed to have educational credentials ranging from “university graduate” to an MBA. However, as discussed above, only one of these employees – the “general management department manager” – was being paid by Petitioner at the time of filing, and the Petitioner has not shown that either of this manager’s subordinates were still with the company as of April 2016. It is unclear what duties this employee would actually perform as the sole employee of her department, and the Petitioner has not established that she would be employed as a manager, supervisor, or professional. The Petitioner also provided evidence that the part-time paralegal in its “investment” department has an LLM degree, but did not provide a description of duties sufficient to establish that this individual would be employed in professional capacity. Further, this employee appears to have left the company in 2017 while the petition was pending. Again, while the Petitioner submitted an organizational chart that appears to show the Beneficiary’s supervision of subordinate managers or supervisors, the Petitioner did not submit sufficient evidence to corroborate the structure and staffing depicted in that chart.

We have also considered whether the Petitioner established that the Beneficiary would be employed in an executive capacity. The statutory definition of the term “executive capacity” focuses on a person’s elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization. Section

⁶ 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.”

101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to “direct the management” and “establish the goals and policies” of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and they must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they “direct” the enterprise as the owner or sole managerial employee. Here, although the Petitioner consistently indicates that the Beneficiary develops its goals and policies, makes discretionary decisions, and directs the entity as a whole, it has not supported its claim that he primarily performs these higher-level functions, and has not shown how he is relieved from 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 determining whether the Beneficiary is or would be employed in a managerial or executive capacity. *See* section 101(a)(44)(C) of the Act. However, it is appropriate to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when we note discrepancies in the record. *See Systronics*, 153 F. Supp. 2d at 15.

The Petitioner states that it provides trucking services through carrier agreements, acts as a dispatcher for truck owner-operators, markets and sells truck tires, develops GPS and on-board diagnostics (OBD) technology for drivers, and provides services to Chinese clients interested in investing in the U.S. trucking and transportation industry. Although it claims to have a staff of at least 16 employees and contractors (not including drivers), it has documented its employment of (or contract relationship with) only the Beneficiary, a “management department” manager, a paralegal, a marketing specialist, and a tire sales representative. It has not shown how it is able to operate three separate lines of business with this staff and has not shown that it requires the Beneficiary to primarily perform managerial or executive duties.

Further, even if we consider only the Petitioner’s primary business of providing truck transportation and dispatch services, the record does not demonstrate that it employed the logistic department manager, marketing department manager, dispatcher, or mechanic when it filed the petition. As the Petitioner repeatedly submits the same organizational chart even after being informed that the record does not corroborate the staffing or structure depicted in the chart, we are unable to determine how work is actually allocated among the Beneficiary and his four subordinate staff members. The Petitioner has established that it employs a sufficient number of drivers, but has not shown who performs most of the other operational, administrative, and other non-managerial tasks required for the company to do business.

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

Matter of G-C-L- Corp.

senior position in the company hierarchy. Accordingly, the Petitioner has not met its burden to show that his duties would be primarily managerial or executive in nature as of the date of filing.

IV. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of G-C-L- Corp.*, ID# 1520129 (AAO Sept. 19, 2018)