



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

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

MATTER OF F-H-, INC.

DATE: JULY 19, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, described as a “food, beverages and dessert” business,¹ seeks to extend the Beneficiary’s temporary employment as its president/CEO under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the California Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

On appeal, the Petitioner submits additional evidence and asserts that the Director did not consider all of the facts presented, including the Beneficiary’s responsibility for expansion of the U.S. business. The Petitioner contends that the Beneficiary will primarily perform higher-level executive and managerial duties and supervise two subordinate managers or supervisors.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the Beneficiary’s application for admission into the United States. In addition, the Beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity. Section 101(a)(15)(L) of the Act.

¹ The Petitioner operated a frozen yogurt franchise at the time of filing and later signed a second franchise agreement for a pizza restaurant.

The term “managerial capacity” is defined as “an assignment within an organization in which the employee primarily”:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

Section 101(a)(44)(A) of the Act. Further, “[a] first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor’s supervisory duties unless the employees supervised are professional.” *Id.*

The statute defines an “executive capacity” 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.

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.

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

In the denial decision, the Director found that the Petitioner’s description of the Beneficiary’s duties did not provide sufficient detail regarding what he does on a day-to-day basis and therefore did not establish that his duties would be primarily managerial or executive in nature. The Director also reviewed the Petitioner’s staffing levels and organizational structure and determined that the Petitioner did not establish that the Beneficiary would be managing a subordinate staff of professional or supervisory employees.

On appeal, the Petitioner asserts that the Director did not explain why the submitted position descriptions were insufficient to establish employment in a managerial or executive capacity, and offers an expert opinion letter which “second[s] the notion that the duties of the Beneficiary are those of an executive.” The Petitioner claims, in the alternative, that the Beneficiary’s duties satisfy the definition of “managerial capacity,” and explains that, in considering the Petitioner’s reasonable needs, USCIS should note that the Petitioner operates a “self-service” frozen yogurt shop with limited staffing needs. Finally, the Petitioner offers evidence that it had recently entered into a second franchise agreement while the petition was pending.

When examining the managerial or executive capacity of the Beneficiary, we will look first to the Petitioner’s description of the job duties. The Petitioner’s description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, USCIS examines 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. Accordingly, our analysis will focus on both the Beneficiary’s duties and the Petitioner’s staffing levels and organizational structure.

A. Duties

Based on the definitions of managerial and executive capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the Petitioner’s other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The Petitioner provided a description of the Beneficiary’s duties in a supporting letter submitted at the time of filing. These duties are summarized below:

- 10% - Establish company goals, devise strategies, prepare operating procedures, and set policies to ensure that the company meets its sales and profit objectives.
- 10% - Oversee, plan and coordinate the Petitioner’s service and supply needs by directing staff to place orders with suppliers in the U.S. Norway and Europe and setting inventory handling and control responsibilities.
- 10% - Oversee, monitor, and coordinate the activities of other managers including the Sales Manager. Set policies and strategies related to employees’ schedules, their activities, job duties, and performance. Hire and train management staff.

- 10% - Be responsible for setting policies and strategies for marketing functions. Review sales records and use this information to predict future sales activity. Determine the company's distribution system and identify potential markets for the Petitioner's merchandise.
- 5% - Plan and direct the expansion of the company's operations in the United States, with total discretion over the selection of new sites and oversight of the opening of additional retail locations.

The Petitioner did not explain how the Beneficiary would spend the remaining 55% of his time or include any specific references to duties he performs in relation to the frozen yogurt shop, which serves as the Beneficiary's worksite and was the company's sole source of income at the time of filing. The Petitioner did not otherwise claim to be engaged in the import of any goods from Norway or other parts of Europe at the time of filing, nor did it employ a sales manager, as referenced in this job description. The Petitioner went on to describe the proposed roles of future employees, including a sales and marketing manager, a vice president of sales and marketing, a marketing manager, a sales representative and an operations manager, stating that these positions "would be filled during the first year of our company's operations." However, the Petitioner was not in its initial year of operations and it had previously filed a petition for the Beneficiary that was approved in October 2013, approximately 21 months prior to the filing of this extension petition. Therefore, this initial description of the Beneficiary's position did not appear to provide a complete or accurate account of his actual duties at the time of filing in July 2015.

Later, in response to a request for evidence (RFE), the Petitioner described the Beneficiary's duties as follows:

- Direct the activities of the U.S. concern by establishing company goals, devise strategies, prepare operating procedures to keep in-line with [REDACTED] [REDACTED] - 10%
- Set financial goals, formulate policies and establish procedure for proper implementation of said policies - 10%
- Set and formulate the compilation of financial data to be used in financial forecasts [sic] to plan future funding requirements. Oversee preparation of the firm's annual budget. Oversee cash management activities, cash raising strategies and negotiate loan agreements, if necessary. - 10%
- Oversee Inventory control functions to be performed by staff supervised by shift managers, in accordance with [REDACTED] Evaluate post-sales records, analyze market conditions after taking into account budgetary considerations and consumer demand. Set policies related to qualify [sic] control standards and in accordance with [REDACTED] - 20%
- Set strategies and policies related to marketing activities. Identify potential markets and manners of distribution. For example, [the Petitioner's] [REDACTED] has recently embarked upon catering as a means of increasing sales. This

- required advance planning, purchase of required off-site equipment, training and pricing strategies. – 10%
- Set policies and establish procedures related to customers' satisfaction, guest recovery and guest-care troubleshooting. – 10-20%
- Set strategies to monitor and coordinate the activities of shift managers. Set standards for personal-related matters, such as setting policies related to employee functions, compensation, job duties and performance. – 10-15%
- Set expansion policies of the U.S. concern. Plan and direct search for locations and acquisitions. For example [the Petitioner] has been actively looking for the right opportunity to open a 2nd location. – 15%

The Petitioner's primary claim is that these duties establish that the Beneficiary will 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 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. 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.*

We agree with the Director's determination that this description provides insufficient detail regarding the nature of the Beneficiary's day-to-day tasks. While several of the responsibilities, as generally described, resemble portions of the definitions of managerial or executive capacity, the Petitioner itself acknowledges that many of the stated responsibilities occur only periodically. For example, the Petitioner offers an expert opinion letter from [redacted] Principal Consultant for [redacted] who observes that duties such as establishing goals are typically performed on a quarterly or annual basis, as is the Beneficiary's responsibility for preparing an annual budget. [redacted] also notes that duties such as identifying new markets, establishing new strategies, and searching for expansion locations would occur only periodically.

Further, we note that the Petitioner has not provided a copy of its franchise agreement with [redacted]. It is common for retail franchises to require the business owner or its principals to spend a certain number of hours per week on hands-on or first-line supervisory tasks in the store as a condition of the agreement. For example, on appeal, the Petitioner submits a copy of the franchise agreement it entered for a [redacted] which specifies that the franchise owner must devote a minimum of 10 hours per week to managing the pizza restaurant. The franchise agreement for the frozen yogurt store would have assisted in establishing the nature of the Beneficiary's role in its day-to-day operations.

While the Petitioner and [REDACTED] both opine that it is unrealistic for an executive to have a set of "day-to-day" responsibilities, the regulations require the Petitioner to provide sufficient detail for us to determine what the Beneficiary does within the context of the Petitioner's business. The Beneficiary has already been performing as the Petitioner's president for over a year and it is not unreasonable to expect further explanation of his typical duties beyond general statements such as "direct the activities of the U.S. concern." The Beneficiary's duties are so broadly described that they could refer to any senior position in almost any similar retail business. 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 Petitioner has not provided any detail or explanation of the Beneficiary's activities in the course of their daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

We may, in our discretion, use as advisory opinions statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we may give less weight to that evidence. *Matter of Caron Int'l*, 19 I&N Dec. 791 (Comm'r 1988).

The expert opinion here does not establish that the Director's decision was based on an incorrect application of law or USCIS policy. [REDACTED] cites to a number of industry and regulatory definitions of "executive"; however, the textbook or common understanding of business terms will not supersede applicable statutory definition at 101(a)(44)(B) of the Act. We acknowledge his opinion that the Director's decision "reflects a lack of understanding of the very nature of an executive position in a small private business organization." However, USCIS regulations do not require us to treat a small organization differently from a larger organization; regardless of the size of the organization, the Petitioner must establish that the Beneficiary's actual day-to-day duties will consist primarily of the high-level duties described in the statutory definition. In evaluating a Petitioner's claim, we consider the Beneficiary's duties, the nature of the business and its reasonable needs, and the number and types of employees available to perform the day-to-day operations of the company.

The fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive or managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. Although the Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, the provided position descriptions alone are insufficient to establish that his actual duties would be primarily managerial or executive in nature.

B. Staffing

The Petitioner operates a [REDACTED] franchise located in a shopping center that is open for business for 72 hours per week. The Petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that it has 11 employees.

The organizational chart submitted in response to the RFE listed 10 employees, including the Beneficiary. Those employees included the Beneficiary and his direct reports – a senior shift leader and a “Customer Services & Education Manager” who “implements policies and guidelines set by the President” and ensures employee safety and customer satisfaction. The chart shows that the senior shift leader supervises two shift leaders, who, in turn, oversee five team members. The Petitioner hired one of the team members in September 2015, so the record shows that the company actually had nine employees in July 2015 when the petition was filed.

The Petitioner submitted a detailed employee payroll summary for the third quarter of 2015. The Beneficiary and the customer services & education manager were the only full-time employees. The senior shift leader and two shift leaders worked an average of 30 to 35 hours per week. The four team members worked, respectively, an average of 3, 12, 21, and 34 hours per week.

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. 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.”² Section 101(a)(44)(A) of the Act. If a petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act.

The Petitioner asserts that the senior shift leader and the customer service and education manager are supervisory or managerial employees, but it has not provided a sufficiently detailed position description for either position to establish the nature of the duties they perform, nor has it shown that the customer service manager actually performs supervisory duties. Further, although the Petitioner shows three tiers of employees between the Beneficiary and the team members who perform the most routine duties, it has indicated that he personally performs duties such as establishing employee work schedules. The evidence must substantiate that the duties of a beneficiary and his or her subordinates correspond to their placement in an organization’s structural hierarchy. Artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position.

The evidence does not support a conclusion that the Beneficiary’s subordinates are supervisors or managers. Instead, the Beneficiary’s subordinates perform the actual day-to-day tasks of operating

² To determine whether the 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 United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation”). Section 101(a)(32) of the Act states that “[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.”

the frozen yogurt shop. The Petitioner has not established that the Beneficiary would be primarily performing the duties of a personnel manager.

Moreover, we note that on appeal, the Petitioner submitted a payroll report from February 2017, which shows only eight employees, including the Beneficiary. Three employees each worked fewer than 15 hours total during the two-week period, one employee worked approximately 14 hours per week, one worked approximately 18 hours per week, and one worked 27 hours per week, while the Beneficiary and the customer service manager worked on a full-time basis. This evidence shows an almost complete turnover in staff and it is unclear that the Petitioner continues to employ a senior shift leader or shift leaders. The Petitioner submitted this report to support its assertion that its store can operate with minimal staffing, particularly in the winter months, but it has not adequately supported its claim that this reduced staffing would be sufficient to relieve the Beneficiary from involvement in the day-to-day operations of the store. 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 correctly observes that we must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in denying a visa petition for classification as a multinational manager or executive. See section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company or a company that does not conduct business in a regular and continuous manner. *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 Petitioner's frozen yogurt shop employs a variable number of hourly employees who likely perform most of the retail duties, such as filling and cleaning machines, weighing purchases, handling customer transactions, and cleaning machines. However, even if we assume that the Petitioner has sufficient staff for these tasks, the record does not support a finding that it has a reasonable need for the Beneficiary to spend his time primarily establishing and implementing goals, policies and strategies on a day-to-day basis, or performing other executive-level duties particularly in a franchised business where many aspects of the operation are standardized and determined by the franchiser.

We acknowledge that the Petitioner, while the petition as pending, was approved to operate a [REDACTED] franchise in California, in addition to its frozen yogurt franchise. While this evidence indicates that the Beneficiary has been spending some portion of his time exploring additional franchise opportunities, we cannot consider the future business activities or hiring plans in adjudicating this petition, which was filed several months prior to securing the pizza franchise (which had yet to be opened 15 months later when the instant appeal was filed).

For all the reasons discussed above, we agree with the Director's determination that the evidence is insufficient to establish that the Beneficiary would be employed in a managerial or executive capacity under the extended petition.

Matter of F-H-, Inc.

III. CONCLUSION

The appeal must be dismissed as the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of F-H-, Inc.*, ID# 506066 (AAO July 19, 2017)