



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

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

MATTER OF Y-A- LLC

DATE: AUG. 5, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of computer systems design services, seeks to permanently employ the Beneficiary as its chief executive officer 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, Nebraska Service Center, denied the petition. The Director concluded that the evidence of record did not establish that the Beneficiary has been employed abroad in a managerial capacity.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred by not considering a letter previously submitted with an earlier nonimmigrant petition. The Petitioner submits a copy of that letter and previously submitted materials.

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

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. FOREIGN EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary has been employed abroad in a managerial capacity. The Petitioner does not claim that the Beneficiary has been employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary has been employed in a managerial 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

(b)(6)

*Matter of Y-A- LLC*

statement from an authorized official of the petitioning United States employer which demonstrates 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.

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”:

- (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.

#### A. Evidence of Record

The Petitioner filed Form I-140 on January 20, 2015. The Petitioner identified the Beneficiary’s foreign employer as [REDACTED]

The Petitioner submitted a copy of an undated letter from [REDACTED] president of the foreign company, originally written in support of an earlier petition filed to extend the Beneficiary’s L-1A nonimmigrant status. [REDACTED] stated that the Beneficiary had been working as the foreign company’s “[a]ssistant general manager since 2005, over seeing [sic] the whole company. He manages the administrative services, human resources, operations, policies and procedures, accounting, etc. through the managers under his supervision.”<sup>1</sup>

---

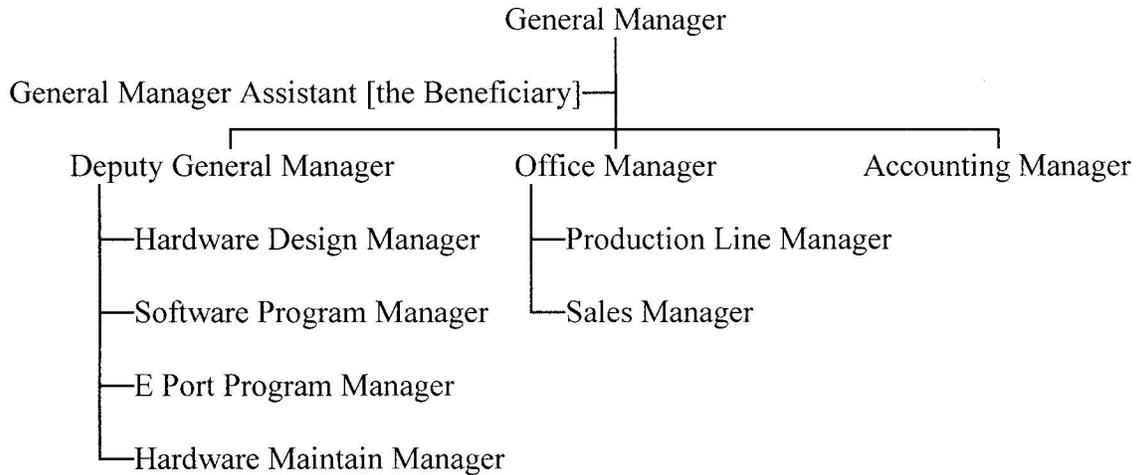
<sup>1</sup> U.S. Department of State records show that the Beneficiary applied for a B-2 visitor’s visa at the U.S. Consulate in [REDACTED] China, on April 4, 2012. On July 14, 2013, he applied for an L-1 intracompany transferee visa at the same consulate. On both occasions, the Beneficiary identified his then-current employer as [REDACTED] but he also stated that he previously worked as a software engineer or programmer for a different company, [REDACTED] from August or September 2005 to February 2012. On the April 2012 application, the Beneficiary claimed no management role with [REDACTED]

(b)(6)

*Matter of Y-A- LLC*

The Director issued a request for evidence (RFE), asking the Petitioner to submit detailed information regarding the Beneficiary's duties abroad and those of his subordinates.

In response, the Petitioner resubmitted a copy of [REDACTED] letter, a list of 98 employees of the foreign company, and an organizational chart for the foreign company. The chart did not show all 98 employees, but did show the company's management structure:



The Petitioner also submitted job descriptions for the Beneficiary and the managers named on the organizational chart, to be discussed below.

The Director denied the petition concluding that the Petitioner did not establish that the Beneficiary had been employed in a managerial capacity abroad. In denying the petition, the Director found that the Petitioner's organizational chart did not show that the Beneficiary had any subordinates, and that the Beneficiary's job description was insufficient to establish that he performed primarily managerial duties.

On appeal, the Petitioner submits a copy of a letter previously submitted in support of a nonimmigrant petition filed on the Beneficiary's behalf. The Petitioner states that this letter contains

---

[REDACTED] Instead, he described his duties as "software design." He did claim to be a "general manager assistant" on the July 2013 application, but the information on each of these applications is inconsistent with [REDACTED] claim that the Beneficiary worked for the company as a manager since 2005.

Also, travel records indicate that the Beneficiary spent 332 out of 573 days in the United States between February 26, 2012, and September 20, 2013, when he began working for the Petitioner in the United States. Therefore, if the Beneficiary actually assumed his claimed managerial role with the foreign entity in 2012, and not in 2005 as asserted, it is not evident that the Beneficiary spent the required year working abroad for the foreign company prior to his entry into the United States on September 20, 2013, as required by 8 C.F.R. § 204.5(j)(3)(1)(B). While we are not making an adverse determination based on this information obtained from other government agencies, the Petitioner may need to address this information in any future petition filed by the Petitioner on the Beneficiary's behalf.

*Matter of Y-A- LLC*

more details about the Beneficiary's position abroad, and that the Director should have taken that letter into consideration. The Petitioner also submits copies of materials previously submitted in response to the RFE.

2. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that the Beneficiary was employed abroad in a managerial capacity

The Director's denial rested on two specific findings. First, "[t]here are no employees listed directly under the beneficiary" on the foreign entity's organizational chart. Second, the job description submitted in response to the request for evidence did not list any identifiably managerial duties.

The Petitioner states that "a simple misunderstanding/error of the organizational chart" created the impression that the Beneficiary had no subordinates. The Petitioner states that "the block for the beneficiary . . . should have been directly underneath the General Manager" instead of off to the side. The Petitioner asserts that the Beneficiary had authority over every employee of the foreign company except for the general manager.

The Petitioner's explanation is plausible, particularly in light of [REDACTED] assertion that the Beneficiary supervised "the managers." Still, the Petitioner must show not only that the Beneficiary had the required level of authority, but also that his duties were primarily managerial or executive, rather than operational tasks similar to those performed by lower-ranking employees.<sup>2</sup>

Here, the Beneficiary's job description comes into play. 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.<sup>3</sup>

The general manager assistant job description submitted in response to the RFE reads as follows:

- Updates job knowledge by participating in educational opportunities;
- Reading professional publications; maintaining personal networks; participating in professional organizations.
- Accomplishes organization goals by accepting ownership for accomplishing new and different requests;
- Exploring opportunities to add value to job accomplishments.

---

<sup>2</sup> See, e.g., *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World, Inc. v. INS*, 940 F.2d 1533.

<sup>3</sup> See 8 C.F.R. § 204.5(j)(5).

(b)(6)

*Matter of Y-A- LLC*

The Director correctly found that the above job description was inadequate. It does not describe any specific tasks or establish that the Beneficiary had any authority over other employees or any function of the company.

On appeal, the Petitioner does not explain or elaborate upon the job description quoted above. Instead, the Petitioner states that [REDACTED] letter included a detailed job description of the Beneficiary's foreign position, and that the Director erred by "only quot[ing] a small paragraph" from the letter. The Petitioner submits what it calls "a copy of the previously submitted letter." That letter, however, does not match the letter submitted with the petition or in response to the RFE. It was not in the record when the Director issued the decision, and therefore the Director could not have considered it at that time.

The letter submitted with the petition, and again in response to the RFE, referred on its first page to "Extension [of] L-1A Status." The letter submitted on appeal appears to be an earlier document, referring to a "Petition for L-1A Status." This letter was not in the record at the time the Director denied the decision.<sup>4</sup>

The newly submitted letter breaks the Beneficiary's former duties into five categories, with the approximate percentage of time devoted to each:

- Establishes and formulates departmental policies, procedures, long-term goals and objectives (10%)
- Directs and coordinates the formulation of financial programs to provide funding for new or continuing operations and projects, to maximize returns on investments, and to increase productivity (20%)
- Leads the management team in exploring and seeking new business opportunities and establishing business relationship with new vend[o]rs, suppliers and customers (30%)
- Evaluates performance and contribution of the managerial personnel for compliance with established policies and objectives of the company (30%)
- Reports to the president and the board of directors on a regular basis (10%)

A paragraph of additional information followed each of these elements. For example, after the fourth item listed above, [REDACTED] stated that the Beneficiary "was the primary leader in the recruitment of all the deputy general managers, and he also supervised the hiring process of the administrative manager and accounting manager, among others."

The job description encompasses elements of a managerial role, such as hiring authority and oversight over lower-level managers. The description, however, is entirely inconsistent with the four-part description submitted in response to the RFE (and again on appeal).

---

<sup>4</sup> In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). The record of the Beneficiary's nonimmigrant proceeding is not combined with the record of the immigrant proceeding.

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.

Like the Beneficiary's job description, those of his claimed subordinates raise questions. For example, the stated duties of the deputy general manager do not appear to have any relation to the operation of a computer hardware and software company. Instead, they appear to be dictionary definitions of the various uses of the word "deputy":

- Someone authorized to exercise the powers of a sheriff in emergencies
- A person whose immediate supervisor is a senior figure within an organization and who is empowered to act as a substitute for this superior
- A parliamentary representative in certain countries
- A member of the lower chamber of a legislative assembly
- An assistant with power to act when his superior is absent

The description for the e-port program manager appears to derive from promotional material for human resources software:

- Capture details essential to your organization and make
- Job descriptions more consistent.
- Create job descriptions within a formal, automated, HR
- Managed process where those most familiar with the job define the content.
- Manage all of your job descriptions from a central, shared online repository.
- Ensure all employees are aware of their job responsibilities and have signed-off on their updated job description.
- Link job descriptions to job requisitions, performance appraisals or competency assessment forms.
- Automatically reflect changes made to the job description in corresponding talent management forms.

The above anomalies raise serious doubts about the origin of the job descriptions, and those doubts are not confined to the descriptions quoted above.<sup>5</sup> The Petitioner has not explained how the quoted job descriptions relate to the operation of a computer hardware and software company, and there is no reason to assume that this is the case only for those three descriptions. For example, the Petitioner did not explain how the deputy general manager's stated duties of "a parliamentary representative in certain

---

<sup>5</sup> Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

(b)(6)

*Matter of Y-A- LLC*

countries” or acting as “a member of the lower chamber of a legislative assembly” relates to the position within its organization. The foreign job descriptions, therefore, have little to no probative value as evidence that the Beneficiary worked abroad in a managerial or executive capacity.

The foreign job descriptions submitted in response to the RFE are demonstrably unreliable. On appeal, the Petitioner submits another description for the Beneficiary (but not for his subordinates), but the Petitioner does not demonstrate that the newly submitted description is any more accurate than the version submitted earlier and does not explain why it prepared and submitted two completely different job descriptions for the same position. We will not accept the second version as representative of the Beneficiary’s actual duties simply because it looks more like a traditional job description.

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

### III. DOING BUSINESS

Beyond the Director’s decision, the Petitioner has not established that it has been doing business for at least one year prior to the date of filing the petition.<sup>6</sup> “Doing business” means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.<sup>7</sup>

The Petitioner is a limited liability company that formed on December 2, 2012, but existence alone does not qualify as doing business.

On April 11, 2014, the Petitioner purchased the assets of [REDACTED] and on May 1, 2014, the Petitioner signed a lease agreement for its retail location. These events took place less than a year before the petition’s January 20, 2015 filing date. The Petitioner has not shown that it operated any place of business before April 11, 2014.

The one-year “doing business” requirement applies to the petitioner itself and not to any established business that a newly formed petitioner subsequently purchased. It is the prospective employer who must have been doing business for at least one year.<sup>8</sup> Therefore, the prior existence of the purchased company does not satisfy the doing business requirement.

The Petitioner submitted copies of invoices as evidence of its business activity, but all of these invoices date from October 2014 or later.

[REDACTED] undated letter indicated that the Petitioner “has taken concrete steps to prepare for full operations” and that the Beneficiary “hired his management staff relatively close to the acquisition

---

<sup>6</sup> See 8 C.F.R. § 204.5(j)(3)(i)(D).

<sup>7</sup> 8 C.F.R. § 204.5(j)(2).

<sup>8</sup> See 8 C.F.R. § 204.5(j)(3)(i)(D).

*Matter of Y-A- LLC*

date of [REDACTED] [sic], which was on April 11, 2014.” [REDACTED] identified staff that the Petitioner hired between March 4, 2014 and April 10, 2014, less than a year prior to the petition’s filing date of January 20, 2015.

For the above reasons, we find that the Petitioner has not established that it was doing business for at least one year prior to the petition’s filing date.

IV. ABILITY TO PAY

Also beyond the Director’s decision, the Petitioner did not establish its ability to pay the Beneficiary’s proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) reads as follows:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer’s ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Part 5 of Form I-140 includes instructions for the Petitioner to state its current number of U.S. employees, its gross annual income, and its net annual income. The Petitioner left those lines blank.

The Petitioner had not yet prepared its 2014 income tax return when it filed the petition in January 2015. The 2013 return indicated that the Petitioner paid the Beneficiary only \$15,000 that year.

A copy of a pay receipt issued on December 16, 2014, indicates that the Beneficiary received \$4,000 for work performed during a one-month pay period, and that his year-to-date pay was \$42,000. These figures are not consistent with a salary of \$60,000 per year, which is equivalent to \$5,000 per month.

The Petitioner has also submitted conflicting financial evidence. A Modified Business Tax Return filed with the State of Nevada reported that the Petitioner paid \$61,205 in gross wages during the second quarter (April through June) of 2014. The Petitioner’s profit and loss statement for the entire year of 2014, however, showed only \$29,725 in wages and salaries, considerably less than the \$42,000 year-to-date figure shown on the Beneficiary’s pay receipt dated December 16, 2014. The profit and loss statement indicated that the company’s total expenses for the year were \$52,274.15, which is less than the gross wages reported for three months of the same year. These figures are incompatible, and cannot

*Matter of Y-A- LLC*

both be correct. This discrepancy raises further doubts about the reliability and sufficiency of the Petitioner's evidence.<sup>9</sup>

The Petitioner did not submit the required types of evidence for the filing date or the year immediately preceding it, and the Petitioner's existing evidence is contradictory. The Beneficiary received substantially less than the proffered rate a month before the filing date. The Petitioner has not established its ability to pay the Beneficiary \$60,000 per year as of January 2015.

#### V. JOB OFFER

Another issue beyond the Director's decision concerns the requirement of a job offer from the petitioning employer. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the beneficiary is to be employed in the United States in a managerial or executive capacity. Such letter must clearly describe the duties to be performed by the beneficiary.<sup>10</sup>

The Petitioner in this case has not met the above requirement. The record contains a copy of an older letter from [REDACTED] on the foreign entity's letterhead, but the foreign company is not the prospective employer in the United States as the regulation requires. The Petitioner has submitted evidence of the company's existence, but it does not show the U.S. company's staffing and structure at the time of filing. [REDACTED] letter refers to an organizational chart at "Exhibit 21," but the Petitioner did not submit the chart with the immigrant petition. The chart appears, instead, to have been an exhibit submitted with a previous nonimmigrant petition. For these reasons, we find that the evidence of record does not satisfy the job offer requirement set forth in the regulations.

#### VI. 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 entirely 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 Y-A- LLC*, ID# 17862 (AAO Aug. 5, 2016)

---

<sup>9</sup> See *Ho*, 19 I&N Dec. 591.

<sup>10</sup> 8 C.F.R. § 204.5(j)(5).